

The Alabama

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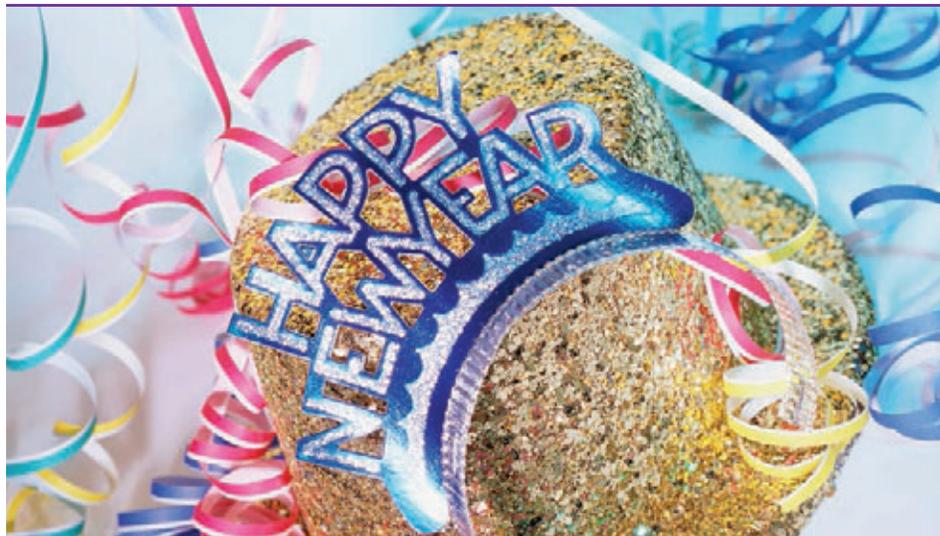
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Attitude, Action and Attention: Aspirational Resolutions for 2014

Happy New Year!

By now, you probably have already established your New Year's resolutions. If you are like me, many are recurrent themes: lose weight, spend more time in the gym and the general goal of breaking one bad habit. While those are important, I wanted to share some mere aspirational resolutions for this New Year. I do so humbly, respectfully and not with the illusion that I hold any unique insight. I only share in good faith and a spirit of fellowship.

The theme for these resolutions is driven by the Triple A's: Attitude, Action and Attention:

Attitude: I will strive to be happy and productive;

Action: I will take all necessary steps to make my goals a reality; and

Attention: I will focus on the resolutions as an action list and bring each to a successful conclusion.

With the Triple A's in mind, my resolutions for 2014 are:

- Find time to reflect
- Be more organized by embracing new technology
- Practice patience
- Seek a more balanced life
- Strive to become a better servant leader

Find Time to Reflect

Reflect upon your present blessings—of which every [person] has many—not on your past misfortunes of which all [persons] have some. —Charles Dickens

We all need time to reflect. Some call this quiet time, prayer time, exercise time or "me time." It should be time we set aside—no matter how brief—to think, calm ourselves and count our blessings. This time is important as we launch into the many challenges of the day. Through reflection, we are better able to approach the day more calmly so that all subsequent encounters will begin with a spirit of professionalism and civility.

Be More Organized by Embracing New Technology

Organizing is what you do before you do something, so that when you do it, it won't be all mixed up. —Winnie the Pooh (Christopher Robin)

Organization is particularly important for lawyers. There are a myriad of techniques and tools available. For some, it means a clean desk; for others, a structured calendar with appropriate reminders; for still others, it means setting aside a period of the day exclusively for addressing certain tasks such as returning calls, responding to emails and letters.

Like building the “six-million dollar man,” we have the technology to make our practices stronger and better organized. Unfortunately, the list of technological tools runs the gamut and can be overwhelming to digital dinosaurs like me.

My suggestion is to take a moment to assess your current organizational skills and then decide where you can improve. From there, seek guidance and do not be overwhelmed by the various options. Choose one tool and stick to it.

For me, my goal is to throw away my paper calendar and focus on my digital version. The tickler and meeting request

features, which synchronize with the online calendar, make this an invaluable tool for me.

For others, there are a number of practice management software programs that can be very useful. For example, Clio allows attorneys to manage their calendar, contacts, time and billing, and documents all through one interface. And, because it's a cloud-based system, you can access your information from anywhere you have an Internet connection. There are also speech recognition apps that will allow you to use your smart phone like a portable Dictaphone.

Just make the decision that you are going to incorporate one new piece of technology into your practice during this upcoming year, and then take the steps to make it happen.

For the record, one of the many benefits of bar membership is assistance from the Practice Management Assistance Program (PMAP). PMAP resources also include introduction to programs such as EasySoft, Rocket Matter and Ruby Receptionists. All tools are particularly beneficial to solo practitioners and small law firms.

It should also be noted that the PMAP serves as a clearing-house for the collection and dissemination of information about effective law practice management. The bar has an



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extensive free lending library, with a listing of titles and a brief description of each book on the bar's website. Books can be lent and returned by UPS or registered mail. Laura Calloway, director of the PMAP, is also available for confidential telephone calls or onsite office consultations. Since the start of the PMAP, she has worked with over 2,500 Alabama lawyers (sometimes on multiple occasions), and has also participated in CLE and ASB roadshows. She is an invaluable resource.

Practice Patience

A [person] should be quick to hear, slow to speak, and slow to anger. For the anger of man does not work for the righteousness of God. —James 1:19-20

If a person can make you angry they can defeat you because you are no longer thinking—but are acting off emotion. —AJ, from lessons learned

The root of professionalism is courtesy. We all know that a lack of patience disrupts the golden rule of doing unto others as you would have them do unto you. Anger and contentiousness will not advance your cause. It only prevents an expedited resolution because it creates unprofessional barriers that delay a resolution. I have always found it helpful to practice the 24-hour rule: Wait a day or so before you send an angry letter or email. Another version of this adage is the Grandma Rule: Don't do or say anything that would embarrass or bring shame to your grandmother.

Simply stated—practice advocacy without anger, send correspondence without antagonism and make all associations about professional harmony and not about confrontation.

Seek a More Balanced Life

Happiness is not a matter of intensity but of balance and order, and rhythm and harmony. —Thomas Melton

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Generally speaking, having a good work/life balance means that your actions and priorities are aligned in a way that is taking care of what is really important to you. —Steven R. Covey

The best starting place for making life changes is to begin with oneself. Begin by taking care of yourself. Make sure you get adequate sleep, rest, exercise and play. Sounds basic, but many of us fail miserably in this area. Another good starting place is to establish personal priorities. If you identify what is important, it will reduce conflict, help you organize your day and alleviate stress.

Strive to Become a Servant Leader

"Life's most important question is: What are you doing to help others?" —Dr. Martin Luther King, Jr.

To the profession I offer my assistance. I will strive to make our business a profession and our profession a calling in the spirit of public service. —ASB Lawyers' Creed

We should all use our time, skills, energies and finances to help others. If you are involved in activities helping others, continue; if you are not, find a way to serve. One important way to serve is through the mentorship model. There are many opportunities to mentor someone. There are formal programs such as Inns of Court, but it can be as simple as a chance encounter or an arranged meeting. Also, keep in mind that being a mentor is not based just on age differential, but experience, your purposeful attitude and a desire to help someone else. It is that desire to help someone else that makes it worthwhile.

As lawyers, we have many opportunities to serve each other and others. We provide service to the less fortunate through pro bono initiatives. The opportunity to serve awaits you: we can serve each other through CLE, ASB committees and sections. Additionally, there are a multitude of other opportunities in the community. If you need help finding some activities that fit, please call and we will try to help.

Conclusion

I hope and pray that each of you is approaching this year with much opportunism. No matter what you resolve for the upcoming year, I hope that you do so with a positive ATTITUDE, a solid ACTION plan and focused ATTENTION that will lead you to happiness and prosperity. | [AL](#)



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THE ALABAMA STATE BAR 135 Years of Service

As we move into this new year, it is worthwhile to look back to 1879, particularly to the months of January and February of that year. Of historical note, former Ohio Governor Rutherford B. Hayes was in the second year of his first and only term as president after a fiercely-disputed election. Frank W. Woolworth opened his first five-and-dime store. Congress passed the first Timberland Act and also authorized women lawyers to practice before the United States Supreme Court. On February 12, 1879, the first artificial ice rink in North America opened at Madison Square Gardens.

During the first two months of 1879, Alabama's legal profession was busy creating a professional organization. On January 15, delegates from the existing county bars assembled at a conference in Montgomery to organize the Alabama State Bar Association. This

organizational meeting was held in the hall of the House of Representatives and was the result of prior gathering¹ in Montgomery on December 13, 1878, where a call to form a state bar association was issued. The conference concluded on January 20, with the adoption of a constitution and by-laws. On February 12, Governor Rufus W. Cobb signed a charter that had been enacted by the state legislature incorporating the Alabama State Bar Association, thereby formalizing the new entity. The purpose of the newly-formed association as explained in Article I of the constitution was:

...to advance the science of jurisprudence, promote the administration of justice throughout this State, uphold the honor of the profession of the law, and establish cordial intercourse among the members of the Bar of Alabama.

Article II of the constitution provided that anyone who was a member of the legal profession in Alabama was eligible for membership in the association so long as the person was in good standing and appropriately nominated and elected for membership.

The conference also elected **W. L. Bragg** of Montgomery as the association's first president. The five vice presidents selected, as provided for in the constitution, were **L. P. Walker** of Huntsville, **James L. Pugh** of Eufaula, **Peter Hamilton** of Mobile, **E. W. Pettus** of Selma, and **H. M. Somerville** of Tuscaloosa. **Alex Troy** of Montgomery was the association's first secretary and treasurer. These officers served until the association held its first state convention on December 4, 1879 in Montgomery. By this time, the association had received 81 lawyers into its membership.

In the years to follow, the association continued to grow and work to improve the profession as a voluntary association.² Although the association's membership had climbed to about 440 by 1922, this only constituted roughly a third of the approximately 1,300 lawyers in Alabama at the time. At the association's 45th annual convention in 1922, one of the primary topics of discussion was the matter of requiring all lawyers in Alabama to be members of the association. It was observed that by requiring all lawyers to be members, the influence of the association would be enhanced and standards for character and legal education could be imposed.

A little more than a year later, on August 9, 1923, legislation supported by the association was enacted providing for the organization, regulation and governance of the Alabama State Bar (ASB).³ The state bar was no longer a voluntary association but, instead, had become a unified or mandatory bar with every lawyer in the state being a member. Alabama became the second state, after North Dakota, to become a unified bar.⁴ Under the new legislative charter, the ASB was an instrumentality of state government with the authority to license and regulate all lawyers in Alabama.

This act also created the board of commissioners as the ASB's governing body. The commission held its first meeting February 12, 1924⁵ at the Tutwiler Hotel in Birmingham. State bar **President C. E. Hamilton** of Greenville presided over the meeting. The main topic of business, 45 years to the day that the Alabama State Bar Association had been chartered, was the adoption of rules and regulations regarding qualifications for admission to the practice of law and appointment of the board of bar examiners. Rules governing

the conduct and disciplining of attorneys were also approved by the new commissioners at that meeting.

The ASB possesses a rich history and heritage which it has achieved over the 135 years since it was first created as a voluntary association. Some of the programs and activities which it supports today were just as relevant 135 years ago when a group of visionary lawyers met in Montgomery to establish a professional association for the first time. Ever since then, the legal profession has benefited from the labors of the lawyers who, over the course of many decades, have dedicated themselves to serving and improving our profession and our state. The vitality and longevity of the ASB is a testament to the motto: *Lawyers Render Service.* | AL

Endnotes

1. This group included **W. G. Little, Jr.**, Sumter; **David Clopton**, Montgomery; **Geo. P. Harrison, Jr.**, Lee; **J. L. Cunningham**, Etowah; **A. C. Hargrove**, Tuscaloosa; **L. A. Dobbs, DeKalb**; **Jno. D. Roquemore**, Barbour; **J. J. Robinson**, Chambers; **Jno. A. Padgett**, Crenshaw; **J. R. Satterfield**, Dallas; **W. E. Clarke**, Marengo; **J. W. Bush**, Perry; **D. S. Troy**, Montgomery; **Jno. T. Heflin**, Talladega; **C. F. Hamill**, Blount; **H. A. Woolf**, Marengo; **John A. Foster**, Barbour; **Malachi Riley**, Covington; **Gaylord B. Clark**, Mobile; **J. Little Smith**, Mobile; **A. L. Brooks**, Macon; **Thos. W. Williams**, Elmore; **F. W. Bowden**, Talladega; **A. H. McClung**, Walker; **Wm. G. Cochran**, Tuscaloosa; **G. D. Campbell**, Jackson; **H. A. Sharpe**, Morgan; **W. P. Jack**, Franklin; **J. T. Holtzclaw**, Montgomery; **W. S. Thornton**, Montgomery; **Jno. W. A. Sanford**, Montgomery; **Wade Keyes**, Montgomery; **W. A. Gunter**, Montgomery; **E. J. Fitzpatrick**, Montgomery; **H. C. Semple**, Montgomery; **T. M. Arrington**, Montgomery; **Geo. F. Moore**, Montgomery; and **T. H. Watts, Sr.**, Montgomery.
E.W. Pettus and **Wm. M. Brooks** of Selma and **W. L. Bragg** of Montgomery were requested by the group to prepare a plan of organization to be submitted at the organizational meeting.
2. The appointed committees provide an idea of the scope of the work which the association was undertaking at the time. In 1922, they included Jurisprudence and Law Reform; Judicial Administration and Remedial Procedure; Legislation; Publication; Local Bar Associations; Special Committee on Violation of Ethics and Law by Attorneys; Admissions to Membership; and Special Committee to Consider and Report to the State Convention, Democratic Party, Recommendations and Suggestions, and to Urge Enactment of Laws in Reference to the Election of the Judiciary, and Conferring upon the Alabama State Bar Association Such Power and Responsibilities as Are Deemed Advisable, in Reference to Admissions to the Bar, and Disbarment.
3. See sections 34-3-1 et seq., *Code of Alabama* (1975).
4. Today there are 38 states that have integrated state bars.
5. The organizational meeting was held in the office of **R.F. Ligon**, the clerk of the Alabama Supreme Court, at the capitol. The supreme court's chambers were in the capitol at that time.

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Alabama Lawyers' Hall of Fame

Local Bar Award of Achievement

Judicial Award of Merit

Notice of Client Security Fund Annual Assessment Fee

Notice of Election and Electronic Balloting

Alabama Lawyers' Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame which is located at the state judicial building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of the state of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then to provide a recommendation to the board of bar commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 40 lawyers have become members of the hall of fame. The five newest members were inducted on May 3, 2013.

A 12-member selection committee consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and make selections for induction.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement—leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found on the bar's website at <http://www.alabar.org/members/hallfame/index.cfm>.

Download an application form at http://www.alabar.org/members/hallfame/halloffame_ALH_2014.pdf and mail the completed form to:

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

The deadline for submission is March 1, 2014.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2014 Annual Meeting at the Hilton Sandestin Beach Golf Resort & Spa.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by May 30, 2014. Applications may be downloaded from www.alabar.org or obtained by contacting Christina Butler at (334) 269-1515 or christina.butler@alabar.org.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through March 14, 2014. 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



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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.

Notice of Client Security Fund Annual Assessment Fee

The Alabama State Bar is authorized to assess each lawyer \$25 who, on January 1 of each year:

- Holds a regular membership to practice law in the state of Alabama State Bar;
- Holds a special membership to the Alabama State Bar;
- Is registered as authorized house counsel; or
- Is admitted pro hac vice (\$25 per application)

This month (January 2014), bar members will receive a reminder notice by email with payment instructions. Bar members who do not have an email address will receive notice by regular mail. Payment instructions for the 2014 Client Security Fund Annual Assessment are available at www.alabar.org.

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*.

Any person admitted to practice in the state of Alabama who, upon attaining the age of 65 years and has elected to retire from the practice of law, may claim exemption from any assessment under these rules by notifying the Client Security

Fund Assistant of the Alabama State Bar at (334) 269-1515 or by emailing such notice to yvette.williams@alabar.org.

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:

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

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2014 and vacancies certified by the secretary no later than March 15, 2014. 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 at:

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

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 25, 2014).

As soon as practical after May 1, 2014, members will be notified by email 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 16, 2014).** Election rules and petitions are available at www.alabar.org.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2014. A petition form to qualify for these positions is available at www.alabar.org. | [AL](#)

LEGAL NOTICE

Dow Corning Claim Deadline Approaching

If you have clients who previously registered with the Dow Corning Breast Implant Settlement, they could be eligible to receive a \$5,000 payment for removal of the implant provided the claim is submitted by June 2, 2014.

Eligibility

In order to be eligible, the Dow Corning breast implant (whether silicone gel, saline, or double-lumen) must have been explanted after December 31, 1990 and before the June 2, 2014 deadline. If the explantation claim is allowed, \$5,000 will be paid to the claimant. Women who are re-implanted with silicone gel breast implants are disqualified from receiving this payment (except for certain women explanted in 1991).

Don't Wait

It can take several months for your clients to schedule an explantation procedure and obtaining copies of the required reports or bills can take weeks.

Get More Information

For more information on how to file a claim and the eligibility requirements visit www.DowCorningExplantationClaim.com or call 1-855-355-3799.

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*Chris and Julie Weller with their daughter, Florence
(not pictured is son Christopher)*

Photo by Elmore DeMott Photography, www.elmoredemott.com

Introducing the Clerk of the Supreme Court of Alabama: Julia Jordan Weller

By Joi T. Montiel

When the Alabama Supreme Court opened the 2013-2014 term,

it marked the first time in Alabama history that a female clerk of the supreme court presided over the ceremony.

On July 16, 2013, the Alabama Supreme Court appointed Julie Weller to the position of clerk of the Supreme Court of Alabama, replacing **Bob Esdale** after his three decades service. Weller commented, "Mr. Esdale left a strong legacy, serving both Democratic and Republican administrations well. In many respects, I hope to serve the public as he did, with enthusiasm and a gracious sense of professionalism which he maintained throughout his career."

Preparedness For the Job

Weller comes to the job with various experiences that will equip her to serve the court and the public. She served as an administrative law judge, a law clerk and an Assistant United States Attorney, in addition to her years in private practice.

Most immediately before her appointment as clerk of the court, Weller served as the chief administrative law judge in the state Attorney General's Office. She has served as an administrative law judge throughout her career, beginning in 1995 as a judge for the State Health Planning and Development Agency. She has also served as an ALJ for the State Personnel Board, where she ultimately became the chief ALJ.

Earlier in her career, Weller clerked for the **Honorable Joel F. Dubina** of the United States District Court, Middle District of Alabama, and the United States Eleventh Circuit Court of Appeals. While Judge Dubina's extraordinary reputation speaks for itself, Weller found him to be a great teacher "who possessed not only the superior intellect required of an Eleventh Circuit Judge, but also the wisdom to clearly see the practical realities from which circumstances arose and the unspoken impact a decision might have." From Judge Dubina, Weller said that she learned the "importance of strong writing, grace under pressure and to think from a judicial perspective."

Weller comes to the position of clerk with an understanding of practitioners' needs. Her legal career began as a law clerk and young associate at a small Birmingham firm, Norman, Fitzpatrick & Wood (now Wood, Kendrick & Turner), whose practice was well established in cases involving medical malpractice, insurance, products liability and other types of litigation. Weller said, "To have mentors such as **Robert D. Norman, Sr.; William C. Wood; Michael K. Wright; Tom Kendrick; and Robert D. Norman, Jr.**, who each provided strong guidance and an example as a litigator, without a doubt, shaped the course of my career. I am most grateful to each of them. I will never forget Mike Wright often saying 'He is no lawyer who cannot practice law from both side of the bench.' He underscored the importance of always viewing a case and each issue from both sides of the equation."

She was later recruited to work with **Edgar Elliott** at Rives & Peterson (now Christian & Small) in Birmingham. "Ed Elliott, who recently passed away, was both a strong litigator and a fine man. We handled multi-million dollar cases together, and he sponsored my application to the United States Supreme Court. Working with Ed Elliott taught me to fly more independently as a lawyer. Because of him, I developed the skill set to develop my own client base."

She moved away from Birmingham when her husband, Chris Weller, also a lawyer, joined Capell & Howard PC, where he is now a shareholder. While practicing in Montgomery, she represented insurance companies and plaintiffs, a

medical malpractice carrier, several corporations and others in a statewide practice. She has also litigated cases as an Assistant United States Attorney, serving two administrations, both Democrat and Republican, and eventually becoming First Assistant United States Attorney. She left in 2004 to adopt her daughter, Florence.

Personal

Weller earned her Juris Doctorate from Cumberland in 1988. She also holds a bachelor of fine arts degree from the University of Alabama. Julie met her husband while they were in law school, and they married in 1989. She confesses that she was "born, bred, raised and baptized in Montgomery." She comes from a family with a long history in Montgomery, "so much so that I had to look out-of-state to find a husband." Chris was born in Chattanooga and raised in Atlanta.

Julie and Chris have two children, Christopher, 21, and Florence, nine. Christopher is an architecture major at the University of Virginia. Florence attends the Montgomery Academy. Chris and Julie are members of St. Peter Catholic Church where they both serve as Sunday school teachers and lectors. Chris also serves on the Parish Council.

Weller's passion for children and families is evident through her service to the community. She serves as a board member of Mary Ellen's Hearth at the Nellie Burge Community Center. Mary Ellen's Hearth is a nearly one-of-a-kind facility providing a transitional home for homeless women with children, where they are given food and shelter, plus the skill sets to achieve self-sustaining independence within two years. In the past, she has also worked in Birmingham with Grace House Ministries, a home for abused and neglected children.

Weller also supports the arts by serving on the Montgomery Symphony Board of Directors. In the past she has worked with the Junior Leagues of Montgomery and Birmingham; Junior Women's Committee of 100 (benefiting the Emmett O'Neal Library) (Birmingham); Landmarks Board of Directors, the Children's Museum of Alabama, and Zonta International (Montgomery Chapter). | [AL](#)

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Mr. Wilkerson Retires

By A.C. Pettus and Julia Jordan Weller

December 31, 2013
marked the end of a legacy.

Alabama's first full-time clerk of Civil Appeals, John H. Wilkerson, Jr., leaves his final mark upon a court he served for over a third of a century. A man for all seasons, a consummate teacher, a gifted mentor, a husband, father, grandfather, surrogate parent to many, and a lover of law. John Wilkerson, Jr.'s signature style is exemplified in his effusive smile, his calmness under pressure, his even temperament and (according to one judge) his wild ties. Rebecca Oates, who worked alongside John for many years and follows as his successor, calls him her greatest mentor. Those who have worked for John have chosen to remain with him for decades. His contributions to the court and the bar can be found in the lives of many individuals and throughout the inner workings of the Alabama court system.

Early Years

Born and reared in Mobile, Alabama, John Henry Wilkerson attended public and private schools, graduating from University Military School ("UMS") in 1961. He subsequently obtained an AB degree from the University of Alabama in 1966, married his best friend, Jan Blackledge, raised three children, and is now spoiling three grandsons and two granddaughters. John began his career teaching school at UMS as chair of the English Department and coach before returning to Tuscaloosa to enroll in the University of Alabama's School of Law. In his senior year there, Camille Wright Cook suggested that John consider working with the current chief justice—Howell Heflin—a suggestion which altered the course and direction of John's life and career.

Following graduation in 1972, John clerked for then-Chief Justice Heflin. Following his clerkship, Chief Justice Heflin asked John to remain with the supreme court, where he served as the court's research analyst from 1972 to 1975, working with the various rules committees, such as the Supreme Court's Committee on Appellate Mediation, the *Alabama Rules of Civil Procedure*, the *Canons of Responsibility* and the *Canons of the Judicial Ethics*.

John smiles when discussing working alongside Alabama's greatest lawyers and judges. At that time, the Alabama Appellate Court System employed only one clerk to oversee the operations, docketing and filing for both the Alabama Supreme Court and the Alabama Court of Civil Appeals. Later, the court elected to appoint a clerk for the Court of Civil Appeals and in May 1975, John became the first full-time clerk of court for the Alabama Court of Civil Appeals.

Impact

Under John's progressive influence, he became involved with the National Conference of Appellate Court Clerks, where he first became aware of the transitions from typewriters to computers, from paper to paperless. Inspired by his new-found knowledge, he initiated the first steps toward moving the Alabama Civil Appeals Court toward automation.

Rebecca Oates says that "John electrified the court." In an interview, he laughed when reminiscing about his setting up his first demonstrations to the court to illustrate the exciting launch into this new era, coming to the court on the weekends to run wiring through the ceiling of the building to establish electronic connections between the clerk's office and judicial chambers. Under his direction, the Alabama Court of Civil Appeals was one of the first courts to transmit opinions electronically to Westlaw and Lexis. According to Judge Bill Thompson, John would probably qualify as an environmentalist based on the number of trees he has saved in his efforts moving the court toward becoming paperless. Even today, John's vision has grown and is being utilized by all three Alabama appellate courts.

Temperament

John's characteristic even temperament and understated personality thrives even "where emotions have run high among the litigants," according to Chief Judge Bill Thompson. Thompson also observed that "John handles irate phone calls so well that by the end of the conversation, you'd think he was talking to his long-lost friend. John would probably be a good hostage negotiator."

Not only has the court of civil appeals flourished under John's supervision and innovation, but he also left his indelible mark on appellate court systems throughout the country. From 1981-1984, John served as the vice president, president-elect and president of the National Conference of Appellate Court Clerks.

Teacher

In addition to his contributions to the court, he was asked what he felt is the greatest accomplishment of his career. His reply? "Teaching. There is something about that 'ah ha' moment that a teacher lives for, to watch the light bulb click in a student's eyes.... as a teacher, those moments bring the greatest joy." John was a professor at Jones School of Law for more than 20 years in nearly every major subject, including Alabama Civil Procedure, torts, appellate practice and legal writing. Many of his students have become leaders themselves, serving as judges, justices and professors. In class, students often heard John advise them, "...you need to decide whether you're going to talk in legalese or in American..." as well as, "...the law is a living thing, changing slowly and thoughtfully..." His teaching style was often evident when asked questions to which he could easily provide "the answer" but, instead, he modestly pushed back, saying, "I'm not real sure, but if you look at rule such-and-such, or code section so-and-so, you might find the answer." His gentle guidance promoted real learning.

Gifts

John's selfless gifts of time and energy can be found upon Montgomery's Kiwanis Club (one of the largest Kiwanis organizations in the world), where he served as both a member and the club's president, as well as president of the Alabama State Fair. He was also selected to serve on the board of directors for the YMCA. And, John's charitable nature extends to his faith, where he has served as a deacon at the First Baptist Church in downtown Montgomery.

John's love for the outdoors includes canoeing, hunting, fishing, playing golf, and taking every opportunity to shout a "Roll Tide" as proud fan of the University of Alabama's Crimson Tide.

Outside of the office and the classroom, John was chosen to become the vice president of the well-respected board for the Retirement Systems of Alabama. John loves to tell about the first time he and David Bronner discussed Bronner's vision to create the trails, and how John was one of the first to acknowledge and support this jewel in the crown of Alabama tourism. (Look closely at the markers adorning the Robert Trent Jones Golf Trails and you will often find his name.)

John's success has been acknowledged in many areas, including his receipt of the J. O. Sentell Award by the National Conference of Appellate Clerks, the 2010 Commissioners' Award and the 2012 Alabama Unified Judicial System Certificate of Service Award (awarded for 40 years of loyal and dedicated service to the Unified Judicial System).

John Henry Wilkerson, Jr. is truly beloved by untold numbers of people in all walks of life, throughout the state of Alabama and the country. John's career and dedication demonstrate he has certainly run the good race, leaving a positive, unmistakable mark upon the professionalism of the bar, upon the history of the court and upon the lives of people in whom he has so graciously invested his time. | AL



A New Type of Trial Court Order for a Digital Age: Are You and Your Client Prepared?

By Allison O. Skinner

On February 1, 2010, the amendments to the *Alabama Rules of Civil Procedure*

allowing the discovery of electronically stored information (ESI) went into effect. Almost four years later, where are Alabama courts in terms of “e-discovery”?

Neither the Alabama Supreme Court nor the Alabama Court of Civil Appeals has issued an opinion relating to e-discovery since the passage of the e-discovery amendments, so Alabama lawyers currently lack appellate court guidelines. Fortunately, however, a few Alabama trial court orders on e-discovery have been entered. These trial court orders are helpful. Until the law develops further, practitioners will rely on these trial court orders for direction to exercise e-discovery best practices, as well as persuasive authority in other jurisdictions across the country.

Judge Robert Vance of the 10th Judicial Circuit, Jefferson County, Alabama, Birmingham Division, has written the most comprehensive state trial court order regarding discovery of ESI in the matter of *Irondale Industrial Contractors, Inc. v. Carbo Ceramics, Inc.*, CV-2011-1434. The “Vance Order” was entered

October 31, 2011 and has subsequently been entered in several other cases. The Vance Order addresses the Rule 26(f) conference, commonly referred to as the “Meet and Confer.” The amended *Alabama Rule of Civil Procedure* 26(f) reads as follows:

(f)Discovery conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. *If discovery of electronically stored information will be sought, any party may request, or the court may on its own order, that the parties confer regarding any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information; issues relating to the form or forms in which the electronically stored information should be produced; and issues relating to claims of privilege or of protection of material as trial-preparation material, including, if the parties agree on a procedure to assert such claims after production of the material, whether to ask the court to include their agree-*

ment in an order. Following the discovery conference, the court may enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires. (*Emphasis added*).

The Vance Order is divided into two parts: The first part addresses 11 different provisions requiring action by the parties before the first Rule 26(f) conference. The second part addresses action required by the parties during the “Meet and Confer.” Fortunately, by virtue of the preparation required by the court’s instructions before the conference, client and counsel should be prepared to discharge their obligations required by the Vance Order during the actual discovery conference. This article focuses on dissecting the preparatory provisions in the Vance Order.

Alabama practitioners can expect other courts to issue orders like the Vance Order as discovery of ESI becomes more common. In lieu of waiting on the exchange of formal discovery, parties should consider taking an active role in records management, regardless of whether litigation is anticipated. See www.arma.org for more information. In other words, your client needs to have its “data house” not only to prepare for litigating in a digital age, but also to establish a prudent business practice. Regardless, when ESI is involved, best practices dictate an early, proactive approach to managing discovery.

Are you and your client prepared to litigate in a digital age? How prepared are you and your clients to address each of the provisions in the Vance Order outlined below?

Before the Meet & Confer:

“1. Review the client’s document retention plan, in order to assess its existence, scope, and quality of implementation;”

An organization is allowed to follow a legitimate document retention plan. However, a retention plan may not be

If the party and its counsel fail to preserve properly all relevant ESI, then the party may face sanctions.

executed to destroy relevant information in anticipation of litigation. *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) and *Micron Technology Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011). Once the duty to preserve is triggered, then the routine document retention plan must be suspended as to potentially relevant information. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). Attorneys should discuss with their clients the information governance of the organization, and when appropriate, provide advice to the client. These legal services should be provided in advance of any litigation. If the client does not have a formal retention policy, then the attorney needs to learn how the organization preserves its business records and who the custodians are for different types of information. Depending on the industry or the type of information, the organization may be under federal or state law to preserve certain types of information regardless of a formal retention policy. Attorneys should be wary of accepting, as 100 percent accurate, the word of a single contact in the organization regarding preservation efforts. Attorneys should conduct their own investigation to determine that the client is not wittingly or unwittingly withholding information. *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008). Further, high-level

employees and/or board of directors may not be following the organization’s retention policy and, as a result, may have in their possession, custody or control relevant, discoverable information, which should not be overlooked.

When is the duty to preserve ESI triggered? To date, Alabama does not have a case on point. In the seminal e-discovery case, the federal court held the following:

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.”

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

Determining when the duty to preserve is triggered for either the plaintiff or the defendant can often be tricky and require legal judgment. If the party and its counsel fail to preserve properly all relevant ESI, then the party may face sanctions. Accordingly, reasonable and proportional preservation is critical to effectively meeting discovery obligations.

“2. Identify the client’s ‘key players’ on IT issues and discuss issues such as the client’s network architecture and its process of creating and storing ESI;”

As part of the attorney’s obligation to ensure that ESI is being preserved, the attorney needs to identify the custodians who have potentially discoverable information, as well as the sources of this information. Some organizations may have a data map demonstrating how information “flows” through the organization. If a client does not have a data map, attorneys should advise the client in advance of the litigation to develop one. A data map is a legal service that is becoming more and more necessary and should not be overlooked. Additionally, vendor software tools are available to illustrate

who in the organization received certain types of information, such as an email. Identifying the appropriate key players is critical to meeting the party's duty to preserve.

“3. Ensure that the necessary hold notices have been issued and follow up to ensure client compliance; and”

Once the duty to preserve has been triggered, the attorney should issue a written litigation hold letter to his or her client. *Zubulake, supra*. However, Alabama does not have a case requiring a litigation hold or requiring that it be a written document, but best practices dictate the issuance of a written litigation hold.

Simply stated, the litigation hold letter should have the following element at a minimum: “1. Identify the litigation; 2. Specify the parties to the litigation, 3. Specifically identify the documents to be preserved, 4. Provide a contact point with the organization to answer questions; 5. Explain to the recipients the importance of compliance with the hold notice; and 6. Provide for the formal verification.” Shira A. Scheindlin, Daniel J. Capra and The Sedona Conference, *Electronic Discovery and Digital Evidence Cases and Materials*, 2nd Ed. WEST (2012), p. 191. In reality, the attorney should have already issued the initial litigation hold letter prior to the entry of an order similar to the Vance Order.

In the *Zubulake* opinion, *supra*, the trial court also held that the attorney's obligation does not end after the litigation hold letter is sent. Instead, the attorney is under an affirmative duty to monitor compliance. The Vance Order requires the same obligation by counsel. Attorneys may issue more than one litigation hold during the life of the litigation as more of the facts, claims and defenses become known. As an aside, some firms, as part of their risk management, require routine calendaring to follow up on compliance of the litigation holds that have been issued.

For those initiating a complaint, if counsel is concerned that the target defendant may claim ignorance of when the duty to preserve has been triggered, the initiator of the complaint may send a preservation letter to the other side. Attorneys should also consider the existence of any third parties that may possess relevant information and serve a

preservation letter on those third parties. If the circumstances warrant, a party may seek a preservation order from the court. However, the *Committee Comments* to Alabama Rule of Civil Procedure 26 caution attorneys from routinely seeking a preservation order:

“However, the suggestion that the parties should address preservation issues does not, as the FRCP Advisory Committee Note indicates, ‘imply that courts should routinely enter preservation orders. A preservation order entered over objection should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.’ FRCP Advisory Committee Note to Rule 26(f).”

“4. Determine the extent to which any relevant hard copy documents and ESI have been destroyed.”

This mandate may be challenging. How do you know what has been destroyed if it no longer exists? However, IT professionals may be able to provide information when data was downgraded or no longer available as a result of a change in the system architecture. If the other side suspects that relevant information is missing, then the opposing party can anticipate facing a motion to compel, and ultimately a motion for sanctions. The attorney can save credibility and mitigate the imposition of sanctions by readily advising opposing counsel and the court of potentially destroyed or missing relevant information.

“5. Select key players and any retained forensic experts who would attend the Meet and Confer, it being the Court's expectations that such individuals would attend the Meet and Confer to ensure that questions arising therein can be addressed by those who have IT expertise;”

“Key players” refers to witnesses in the organization who have knowledge about the claims and/or defenses in the cases. However, attorneys do not need to lose sight that key players may also include custodians of discoverable information who may not be the proverbial fact witnesses in a case. Restated, in the digital age, the Vance Order includes IT professionals as key players. The Vance Order recommends the parties have all the right “players” to hold an effective meet and

confer. IT expertise may include an in-house IT representative, a forensic expert/consultant and/or an e-discovery vendor representative. In other words, the court expects the attorneys to assemble the right team of participants at the “meet and confer” so that the ESI can be addressed appropriately at the outset of the case. This approach is consistent with the amendment to *Alabama Rule of Civil Procedure* 26(f).

“6. Determine the scope of the client's ESI, and the extent to which the ESI is ‘reasonably accessible;’”

Alabama Rule of Civil Procedure 26(b)(2)(A) reads:

(2) LIMITATIONS.(A) A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause for compelling the discovery, considering the limitations of subdivision (b)(2)(B) of this rule. The court may specify conditions for such discovery.

The producing party may object to providing ESI that is not reasonably accessible. At the time of rulemaking, accessibility was a significant concern and remains a viable objection to limiting discovery. However, the definition of accessibility is shifting as technology and best practices improve. If the producing party objects, it may move for a protective order. In opposition, the requesting party may move to compel and must show cause why the discovery should be had subject to the limitations in *Alabama Rule of Civil Procedure* 26(b)(2)(B).

The importance of this provision in the Vance Order is that the court wants the parties to identify the ESI that is not reasonably accessible sooner rather than later. Upon a motion, the court may order the parties test or sample the “not reasonably accessible” ESI, or may order focused

discovery, to include deposition of IT representatives, to evaluate whether the ESI should be produced subject to limitations. See, Alabama Rules of Civil Procedure 26(b)(2)(B) and 34(a) and *See Ex Parte Cooper Tire*, 987 So.2d 1090 (Ala. 2007).

In the federal system, the producing party may request costs to identify, collect, process and review the objectionable information be shifted to the requesting party. *Id.*, citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), *Rowe Entm't v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), and *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568 (N.D. Ill. 2004). In *Ex Parte Cooper Tire*, *supra*, the Alabama Supreme Court, prior to the adoption of the e-discovery amendments, followed the eight-factor test pronounced in the *Wiginton* case for limiting the scope of discovery. The Alabama Supreme Court did not apply the *Wiginton* factors to shift costs, but it did reference the *Fed. R. Civ. P.* 34 Advisory Committee Notes, 1970 Amendment, which reads “courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovery party pay costs.” *Id.* at 1105. The Alabama Committee Comments do not make the same reference to Rule 34; however, Alabama lawyers are not precluded from making a cost-shifting argument for production of ESI that is not reasonably accessible. Obviously, the requesting party responds that it should not pay any amount, or attempt to limit which costs are shifted and at what percentage. The court, however, cannot make any determination without the parties raising these issues as soon as practicable.

Regardless of whether ESI is accessible, best practices dictate that the ESI be preserved until the parties have reached an agreement or the court has entered an order on how to handle this set of information. As discussed in detail in another article, proportionality applies to both accessible and inaccessible ESI. See *Alabama Committee Comment* to Rule 26.

“7. Establish a collection protocol to ensure that ESI will be collected in a forensically defensible manner that would avoid any suspicion of spoliation, and—if the scope warrants—consider using a third-party vendor to assist in proper collection, with scrupulous compilation and maintenance of a chain of custody log;”

Courts want cases resolved on their merits and not a result of a discovery battle. The Vance Order commands that the parties handle ESI using best practices from the outset, which ultimately avoids the risk of spoliation. Attorneys who are not familiar with collection should retain an outside vendor for assistance. Hundreds of vendors are available. Several websites exist, including www.aspere.com, to help litigants evaluate which vendor is appropriate for which case. Attorneys should not allow their staff to hire a particular vendor without appropriate attorney oversight. The attorney should play an integral role in hiring a vendor that meets the needs of the case.

“8. Determine what resources would be needed for relevancy and privilege reviews, what the method of redaction will be, and what would constitute a duplicate and a near-duplicate;”

The court expects the parties to educate themselves on the differing technologies that are available to review ESI. What review platform does the attorney’s firm utilize, if any? The attorney should appreciate the functionality, limitations and costs of the review tool he is using. Further, attorneys need to appreciate that certain forms of production allow certain functionality for purposes of review while other forms do not. For example, ESI produced natively cannot be redacted. The Vance Order also instructs the parties to communicate about definitions so that all the parties have mutual expectations. A quick resource for commonly used e-discovery terminology can be found at The Sedona Conference Glossary (3rd ed.) at www.thesedonaconference.org.

“9. Compile a suggested list of keyword search terms for discussion at the Meet & Confer;”

Search methodologies are a key component for handling ESI efficiently. After all, *Alabama Rule of Civil Procedure* 34(a) was amended so that production could be tested and sampled. Search methodologies must be defensible. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008). One of the most common ways to identify potentially relevant information for purposes of discovery is the use of keyword searches. In *Victor Stanley, supra*, at 28-30, fn. 9, the court succinctly describes the various methods of searching:

Keyword searching may be accomplished in many ways. The simplest way is to use a series of individual keywords. Using more advanced search techniques, such as Boolean proximity operators, can enhance the effectiveness of keyword searches. Boolean proximity operators are derived from logical principles, named for mathematician George Boole, and focus on the relationships of a “set” of objects or ideas. Thus, combining a keyword with Boolean operators such as “OR,” “AND,” “NOT,” and using parentheses, proximity limitation instructions, phrase-searching instructions, or truncation and stemming instructions to require a logical order to the execution of the search can enhance the accuracy and reliability of the search. *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*; 8 Sedona Conf. J. (2007) at 200, 202, 217-18 (“Sedona Conference Best Practices”); *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J. L. & Tech. 10 (2007) at *37-41 (as cited at www.westlaw.com). In addition to keyword searches, other search and information-retrieval methodologies include: probabilistic search models, including “Bayesian classifiers” (which searches by creating a formula based on values assigned to particular words based on their interrelationships, proximity and frequency to establish a relevancy ranking that is applied to each document searched); “Fuzzy Search Models” (which attempt to refine a search beyond specific words, recognizing that words can have multiple forms. By identifying the “core” for a word the fuzzy search can retrieve documents containing all forms of the target word); “Clustering” searches (searches of documents by grouping them by similarity of content, for example, the presence of a series of same or similar words that are found in multiple documents); and “Concept and Categorization Tools” (search systems that rely on a thesaurus to capture documents which use alternative ways to express the same thought). See *Sedona Conference Best Practices, supra*, at 217-23.

Searching is more of an art than science. Perfection is not required. *See, Fisher v. Ciba Specialty Chemicals Corp.*, 2007 WL 987457 (S.D. Ala. 2007) (“The rules of discovery do not demand perfection, clairvoyance, or miracle workings in the production of documents.”).

Other search methodologies are gaining court acceptance such as “Computer-Assisted Review (CAR)” or “Technology-Assisted Review (TAR).” TAR is defined as:

a process for prioritizing or coding a collection of electronic documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document population. Some TAR methods use algorithms that determine how similar (or dissimilar) each of the remaining documents is to those coded as relevant (or non-relevant, respectively) by the subject matter experts(s), while other TAR methods derive systematic rules that emulate the expert(s) decision-making process. TAR systems generally incorporate statistical models and/or sampling techniques to guide the process and to measure overall system effectiveness.” *Grossman-Cormack Glossary of Technology-Assisted Review*, 2013 FED. CTS. L. REV. 7 (Jan. 2013).

See also, Da Silva Moore v. Publicis Groupe & MSL Group, No. 11 Civ. 1279 (ALC)(AJP) (S.D.N.Y. Feb. 24, 2012). Magistrate Judge William Cassidy in the U.S. District Court for the Southern District of Alabama, Southern Division, has recently enforced the parties’ agreement to use “computer-assisted search technology that permits efficient gathering of documents, de-duplication,” in *Northstar Marine, Inc. v. Michael Huffman*, CA 13-00037-WS-C (Aug. 27, 2013). An attorney may need to consider additional search methodologies in addition to keyword searching. See www.edrm.net for further discussion.

“10. Assess the preferred format that you want to receive production from the opposing side, taking into account factors such as the size of production, requests for metadata fields, hosting tools, use of outside vendors, and costs; and”

Alabama Rule of Civil Procedure 34(b) states that a “party need not produce the

Alabama lawyers should discuss expectations at the meet and confer or clearly state expectations in the written request for production.

same ESI in more than one form.” As previously stated, the parties need to evaluate what form certain categories of information need to be produced based on the parties’ own capabilities, limitations and costs, which vary depending on hosting tools. *Alabama Rule of Civil Procedure* 34(b) is not a mirror image of the federal counterpart. By its organizational differences, the rule is ambiguous regarding whether ESI should be produced in the “usual course of business” or “organized to correspond to the category of the request.” Alabama lawyers should discuss expectations at the meet and confer or clearly state expectations in the written request for production.

“11. Prepare suggested confidentiality and/or clawback agreements for consideration at the Meet and Confer.”

ESI has several characteristics that are different from paper. One is the sheer volume. Another difference is that ESI may contain metadata, commonly referred to as the “data about the data.” Reviewing a voluminous amount of data for privilege or work product creates risks of inadvertently disclosing privileged information even if counsel employs best tactics to prevent disclosure. As such, the parties

are encouraged to enter into non-waiver agreements to address the inadvertent production of privileged information.

Protecting privilege was such a challenge after the federal e-discovery amendments were passed that *Federal Rule of Evidence* 502(b) was amended to address inadvertent disclosure of privileged information. Alabama has not addressed its *Alabama Rule of Evidence* 502 counterpart. However, in *KBM Enterprises, Inc. v. Avocent Corporation*, CV-2007-900114-RSV (Dec. 21, 2009), Judge Vance followed the reasonable standard found in the *Federal Rule of Evidence* holding the plaintiff waived the privilege by failing to take reasonable steps to rectify the disclosure. Of note, the *Federal Rule of Evidence* 502(d) provides for a court order to preclude subject matter waiver in other federal and state proceedings. Alabama courts would not have this authority over federal courts.

The remainder of the Vance Order instructs the parties how to satisfy the “meet and confer” provisions.

At the Meet and Confer:

12. ESI in general—Counsel should attempt to agree on steps the parties will take to segregate and preserve ESI in order to avoid accusations of spoliation.

13. Email information—Counsel should attempt to agree on the scope of email discovery and email search protocol, i.e., search terms and other search methodologies.

14. Deleted information—Counsel should attempt to agree on whether responsive deleted information still exists, the extent to which restoration of deleted information is needed and who will bear the costs of restoration.

15. “Embedded data” and “metadata”—“Embedded data” typically refers to draft language, editorial comments and other deleted matter retained by computer programs, while “metadata” typically refers to information describing the history, tracking or management of an electronic file. The parties should discuss whether “embedded data” and “metadata” exist, whether it will be requested or should be produced, and how to handle determinations regarding privilege or protection of trial preparation materials.

16. Back-up and archival data—Counsel should attempt to agree on whether responsive back-up and archival data exist, the extent to which back-up and archival data are needed and who will bear the cost of obtaining such data.

17. Format and media—Counsel should attempt to agree on the format and media to be used in the production of ESI, and on Bates numbering and/or other identifying markings. Also, consideration should be given to an Internet-based repository where data from all parties can be hosted and reviewed.

18. Reasonably accessible information and costs—The court expects that most parties' discovery needs will be satisfied from reasonably accessible sources. Counsel should attempt to determine if any responsive ESI is not reasonably accessible, i.e., information that is only accessible by incurring undue burdens or costs. If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss: (1) the burdens and costs of accessing and retrieving the information, (2) the needs that may establish good cause for requiring production of all or part of the information, even if the information sought is not reasonably accessible, and (3) conditions on obtaining and producing this information such as scope, time, and allocation of cost.

19. Privileged or trial preparation materials—Counsel should attempt to reach an agreement regarding what will happen in the event privileged or trial preparation materials are inadvertently disclosed. If the disclosing party inadvertently produces privileged or trial preparation materials, it must notify the requesting party of such disclosure within a reasonable time thereafter. After the requesting party is notified, it must return, sequester or destroy all information and copies and may not use or disclose this information until the claim of privilege or protection as trial preparation materials is resolved. (A) The parties may agree to provide a "quick peek," whereby the responding party provides certain requested materials for initial examination without

The e-mediator can be utilized as part of the meet and confer process described in the Vance Order, or he or she can address specific issues, such as accessibility, that are raised by the Vance Order, as well as other issues that may arise.

waiving any privilege or protection. (B) The parties may also establish a "clawback agreement," whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party, so long as the responding party identifies the materials mistakenly produced. Other voluntary agreements should be considered as appropriate.

20. Sequence of production—Counsel should address the most efficient process of producing requested ESI. A rolling production should be considered if the volume of production is significant. Further, the parties should consider phasing discovery by producing ESI from sources/custodians that have the most relevant information first. If the attorney does his homework as prescribed in Provisions 1-11, then Provisions 12-20 to be addressed at the actual meet and confer should not pose any major obstacles.

Conclusion

As e-discovery becomes more commonplace, parties may expect to see orders like the Vance Order. Accordingly, clients and their outside counsel should discuss the handling of electronic information proactively. Such preparation can save time and money in the event of a lawsuit, whether your organization is initiating or responding to a complaint.

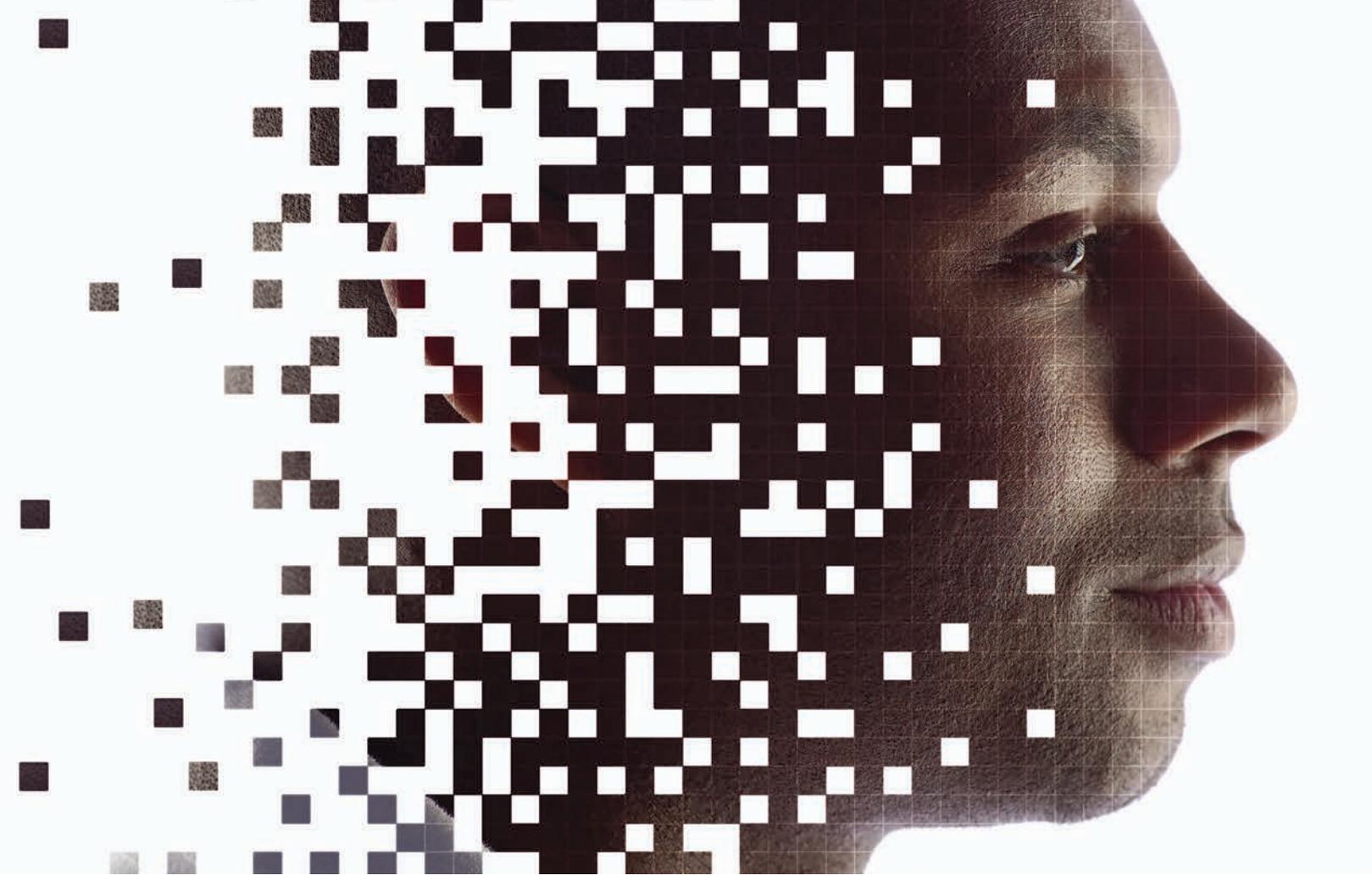
Despite preparation, discovery disputes will arise. When this occurs, before the parties face a court order compelling them how to respond, the parties have the opportunity to self-direct solutions by using the mediation process in what is called an "e-mediation." Allison O. Skinner, *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction to the Role of E-Neutrals*, 13 CARDOZO J. DISPUTE RESOL. 1 (2012). The e-mediator can be utilized as part of the meet and confer process described in the Vance Order, or he or she can address specific issues, such as accessibility, that are raised by the Vance Order, as well as other issues that may arise. If the parties need more of a "stick," the parties may request that the court appoint a special master to handle the e-discovery.

Bottom line, if your client received the Vance Order or a similar order, is your client prepared to meet the court's expectations? Are you, as counsel, prepared to address these provisions with your client? If the answer is "no" to either question, then the time has come to learn more about e-discovery. It is not going away. Many books, blogs, white papers, law review articles, websites, and CLE programs are available for free to help attorneys learn more about e-discovery. Here is a suggested list of resources to get started:*

- www.thesedonaconference.org (best practices)
- www.edrm.net (best practices)
- www.e-discoveryteam.com (blog)
- www.ediscoverylaw.com (database of e-discovery cases)
- www.esibytes.com (podcasts)

Many vendors offer free weekly or monthly newsletters. | [AL](#)

*references are not an endorsement of the organization



Ethics and Technology

By J.S. Christie, Jr.

In light of recent changes to the American Bar Association's *Model Rules of Professional Conduct*, what are a lawyer's ethical duties arising from new technology? And what should a lawyer know about technology?

Commission's Technology and Confidentiality Recommendations

Recently, the ABA Commission on Ethics 20/20 submitted to the ABA House of Delegates two resolutions and reports¹ on ethics and technology. Based on advances in technology, the commission made two types of recommendations as to confidentiality: (1) To amend the *Model Rules* to offer general guidance regarding the use of technology



and (2) to create a centralized user-friendly website with information about security standards when using technology. The website has not been created,² but the ABA House of Delegates approved the model rules amendments on August 6, 2012.

Actually, few lawyers today are governed by the technology-related changes to the model rules. State ethics rules govern lawyer conduct, not the ABA Model Rules. While almost all states except California have adopted a version of the ABA Model Rules, based on a chart on the ABA website, only Delaware and the U.S. Virgin Islands have adopted the 2012 and 2013 amendments to the model rules.³⁴ Yet, the Commission on Ethics 20/20 addressed technology issues that concern every lawyer practicing today. And lawyers who do not adequately address technology might find themselves embarrassed, if not worse.

The amendments to two model rules or comments highlight the ethics issues arising from technology that a lawyer should consider. Model Rule 1.6 was amended with a new paragraph and new amended comments. Model Rule 1.1 just has a phrase added to its comment [6].

As to Model Rule 1.6, Confidentiality of Information, it was amended to have a new paragraph (c):

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

In addition, Model Rule 1.6, Comment [16], was re-written to include factors to be considered in determining the reasonableness of a lawyer's efforts to prevent disclosure or access. As simple examples, a lawyer is supposed to make reasonable efforts to avoid his sending an email to the wrong person, his allowing someone to "hack" into a law firm's network or a lawyer's email account and his having staff post confidential client information on the Internet. As Comment [16] makes clear, not every disclosure is a violation, but reasonable safeguards are required.

Furthermore, Model Rule 1.6, Comment [17] has the following new language: "Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules." In other words, lawyers should also consider duties arising under HIPAA and other laws intended to protect data privacy.

As to Rule 1.1 (Competence), before its recent amendment, Comment [6] specified that, to remain competent, "a lawyer should keep abreast of changes in the law and its practice." Now, a phrase was added so Comment [6] reads "a lawyer should keep abreast of

And lawyers who do not adequately address technology might find themselves embarrassed, if not worse.

changes in the law and its practice, *including the benefits and risks associated with relevant technology* (emphasis added)." In other words, without the amendment, a lawyer already has a duty to keep up with technology⁴ and the model rule comment amendment emphasizes that duty for all lawyers.

Ethics and Technology: Practical Considerations For Lawyers

So, what are some of the technology issues in 2013 for lawyers? One step most lawyers probably have already considered might be the security of the lawyer's own computer systems, which is a topic beyond the scope of this article. Additional possible issues that every lawyer might consider are password fundamentals, mobile security and avoiding scams.

A. Lawyers and Password Fundamentals

Every lawyer should consider password fundamentals for client information that is confidential. Good passwords are a simple precaution to protect information relating to the representation of a client.

A lawyer's having strong passwords can create tension with the lawyer's efficiently using a computer. A password needs to be remembered, but easy passwords to remember can create risks. Hiding a password under the telephone may not be as bad as putting it on a sticky note on the computer screen, but an unauthorized person wanting to access a computer might look around for passwords written down. Moreover, using the same password for every purpose or not changing passwords periodically can increase risk.

In addition, some sites have password prompt questions such as, "What is your mother's maiden name?" If security matters, using a prompt that someone can research and discover might create a risk.

For any technology, what are bad passwords? The website SplashData released its list of the most popular Internet passwords for 2012. As the most common passwords, they are also the most vulnerable. Topping the list was "password," with "123456" as runner-up, followed by the slightly more inventive "12345678."³⁵ Any password that someone could guess is a bad (weak) password.



Good (strong) passwords include upper- and lower-case letters, numbers, symbols and spaces. For many purposes, an eight-digit password with some combination of several types of these characters should be strong enough.

An easy way to remember good passwords is to borrow from leetspeak (or L33tsp3ak). With L33tsp3ak, one replaces letters with other characters. For example, password can become P@55w0rD. The longer a password is, the harder it is to crack. Not only are passwords with characters that are not letters and numbers difficult to guess, but programs that try every possible password (brute force attacks) have great difficulty breaking long passwords using these types of characters.

Even stronger passwords combine l33tsp3ak with phrases (“passphrases”). More than 15 characters can currently make a passphrase too difficult to crack for almost any hacker. For example, M0unt@in M@n 4321 5treet is not impossible to remember, but would be much harder to hack than any eight-character password.

Applications called password managers are available. One service is called LastPass. It helps generate secure passwords and helps the user remember them. Using this type of tool, however, is difficult to manage for a law firm network and might create a risk of a hacker’s breaking into the service and then having all of a lawyer’s passwords.

B. Lawyers and Mobile Security

Mobile security might be the security risk many lawyers could consider more. Among the risks are losing computers that are mobile devices (laptops, tablets, smart phones) and WiFi interception. Among the risk-reducers might be passwords, remote wiping, encryption, two-factor identification, inactivity timeouts, required authorization before downloading applications, and automatic wiping if access is attempted incorrectly a certain number of times.

1. Mobile Device Security for Lawyers

An overwhelming trend in mobile devices is BYOD or Bring Your Own Device. Years ago, many law firms only allowed firm-approved and -owned mobile devices (usually Blackberries). With advances in smart phones and tablets, BYOD has become the accepted norm; iPhones and Android have been the predominant smart phone platform for several years now. Even new Blackberry models have similar security issues as iPhones and Androids. Nonetheless, a September 1, 2013 article in the *ABA Journal* called BYOD “a nightmare” from a security perspective and quoted a security firm executive as follows: “We strongly believe that lawyers should connect to law firm networks only with devices owned and issued by the law firms.”⁶

The initial concern is easy to understand. Imagine a tipsy lawyer’s leaving a smart phone at a bar. What client information is on the smart phone as email, email attachments or accessed documents? What access to the firm email system or other systems can a hacker find through the smart phone? How long before the law firm learns that its inebriated lawyer lost his smart phone?

For any mobile device that has information relating to the representation of a client, a lawyer should consider having a PIN or password. For smart phones with a swipe pattern as the password, a lawyer might consider changing the password periodically to avoid a wear pattern on the screen. A lawyer might also consider remote wiping and other risk-reducing steps.

For a mobile device used for work, a lawyer should consider what software (applications) are downloaded, since some might compromise the device. If a child plays with a work mobile device, a lawyer should consider the risks of the child’s deleting documents, sending documents to the wrong people or downloading malware.

For heightened mobile device security, a lawyer might consider two-factor identification to access a lawyer’s email or other systems. Two-factor identification can require a password and other information, a password and a telephone call to a specific number or a password and any other factor that can be used to identify the user. On the other hand, plowing through current two-factor identification can seem like a barrier to using technology.

Lawyers might consider Mobile Device Management (MDM) software, which can secure, monitor and support all connected

A mobile device that only has confidential client information in encrypted email attachments does not pose the same risks as a mobile device with thousands of emails with confidential client information in the text of the emails.

mobile devices.⁷ Through a remote MDM console, using commands sent over the air, an administrator can update any mobile device or group of mobile devices. MDM can separate email and associated content away from applications, can distribute applications, data and configurations and can even be used to securely deploy new applications from a law firm’s “app store.”

For simpler mobile device security, instead of (or in addition to) the above considerations, a lawyer might manage risk by not having or limiting the confidential information on the device. A mobile device that only has confidential client information in encrypted email attachments does not pose the same risks as a



mobile device with thousands of emails with confidential client information in the text of the emails.

2. WiFi Interception and Security for Lawyers

If a lawyer uses WiFi, especially in a café or hotel hotspot, someone could theoretically intercept what is sent, sometimes called “packet sniffing.” Packet sniffing captures packets of information sent through the air between the device and the hotspot. These packets can be passwords, emails or whatever is sent. Software to packet sniff (a packet analyzer) is readily available. An example is Wireshark.

Packets can be sent as “clear text” (unencrypted), which means anyone can read them as plain English, or packets can be sent on an encrypted connection, which means even though people can intercept them, all they can see is garbled characters. If a lawyer uses Microsoft Exchange and has encrypted connections, the lawyer should not have an email packet sniffing problem, because the emails are encrypted during transmission.

If a lawyer uses a general webmail service like normal Gmail, the lawyer might be sending clear text and have an avoidable risk. On the other hand, a lawyer can have a Gmail account that is secure. In the website address header (URL for uniform resource locator), look for an S after the HTTP. In other words, “HTTPS:” in the URL indicates that the site uses encryption.

Encryption is the process of encoding messages (or information) so hackers cannot read it, but authorized parties can. Encryption turns words into scrambled gibberish. Some email programs automatically encrypt information when sent. In addition, information can be encrypted when at rest, but such steps make using the information more difficult. Many encryption programs use factoring and prime numbers. A prime number can only be divided by one and itself. Factoring is identifying the prime numbers multiplied together that result in a number. Encryption today can make it very difficult for computers to decipher encrypted information without the key. Therefore, the key to accessing encrypted data is having the key and the key to safeguarding encrypted data is protecting the key.

A lawyer should consider what might need to be encrypted. Many free encryption tools are available. Encrypting all electronic information interferes with efficiently using the information. If information relating to the representation of a client is on a mobile device, on a thumb drive or attached to an email, whether it should be encrypted depends on a number of factors.

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When using WiFi, an alternative to using an encrypted email system might be to use a VPN connection to a firm network. A VPN connection provides a secure tunnel that funnels web activity, encrypted, through the secure connection. This connection is a secure way to work on WiFi. A lawyer’s email system can require a VPN connection to connect to email.

Mobile devices are easier to use if information is stored on the cloud. First, this cloud has nothing to do with weather. Years ago, when engineers diagrammed computer networks, they did not know how to represent the Internet, so they just drew a cloud. Today, the cloud means a computer somewhere accessible through the Internet. If a lawyer uses the cloud, the lawyer stores data on a computer owned by a third party and should consider whether data there is secure, encrypted and backed-up. Often, using a cloud service is more secure than what a lawyer might be able to have on the lawyer’s

own network and systems. Examples of file storage or sharing services include Dropbox (www.dropbox.com), Box by Box, Inc. (www.box.com) and Citrix’s ShareFile (www.sharefile.com).

Dropbox might be the most popular cloud file storage and sharing service,⁸ with more than 100 million users, including many lawyers. On the Dropbox homepage, it says that it uses 256-bit AES encryption (the strongest normal standard today) and two-step verification, so that “your stuff is always safe in Dropbox.” Nonetheless, putting aside user misuse, perfect security is not possible, with two recent articles raising security concerns as to Dropbox.⁹ For whatever reasons, Dropbox has been identified as the app that employers ban more than any other app.¹⁰

Perhaps in the future, the advances in quantum computing will make today’s encryption look easy to break. In the not-so-distant future, perhaps a new mode of security is likely to be needed. Until then, a lawyer should consider today’s reasonable safeguards to protect the lawyer’s mobile devices.

C. Lawyers and Avoiding Scams

Avoiding scams sounds almost too obvious to include as something lawyers should consider. Nonetheless, when people say their computer has been hacked, they probably mean they were deceived into allowing access to their computer or to their passwords.

A hacker can gain access through a computer user’s responding to phishing or spoofing emails, downloading games or apps with malware or downloading malware by opening infected email attachments, infected thumb drives or questionable websites. Some malware records keystrokes, which can reveal even the most

complicated passwords. Separating use of computers for work and personal can reduce the risks. Common sense can help, too.

D. What Risk-Reducing Steps Should a Lawyer Take?

Is a lawyer required to take any steps to reduce the risk of an unauthorized person's accessing confidential client information? Remember, an unauthorized person's accessing a lawyer's computer or email is a crime.¹¹ Nonetheless, just as lawyers would be expected to slow down a burglar by locking their offices when the lawyers and staff are gone, lawyers would also be expected to slow down a cyber-thief by taking reasonable steps to safeguard client confidential information.

As Comment [16] to new Model Rule 1.6(c) explains, a lawyer is not responsible for data breaches "if the lawyer has made reasonable efforts to prevent the access or disclosure." What are the reasonable steps a lawyer should take? Comment [16] indicates:

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Model Rule 1.6(c), Comment [16]. In other words, what a lawyer should do depends on many factors and requires judgment.

For discussion, assume that in the past the U.S. Post Office, Federal Express and UPS have all lost and misdirected lawyers' packages with confidential, client-related information. To avoid that bad result, a lawyer might pay a professional courier, a runner or a paralegal to hand deliver the package. But, most lawyers would agree that such effort is rarely, if ever, required. On the other hand, a lawyer would want to take certain steps to make sure the package was sealed properly, addressed correctly and did not have see-through wrapping.

The same cost benefit analysis applies to new technologies, too. As we all weigh the benefits and risks of new technologies, we should ask which of the technology safeguards discussed in this article are like making sure the package is sealed properly, and which safeguards are "overkill"—like hand-delivery by a paralegal?

Conclusion

The Commission on Ethics 20/20 intended the 2012 amendments to the model rules to help lawyers consider the risks arising from using technology, but also to encourage the use of technology to increase the quality of legal services and to provide

services more efficiently. Just as the commission intended lawyers to understand the ethical risks of using new technology, lawyers should also understand the reasonable steps that can reduce technology risks to protect information relating to the representation of a client. | AL

Endnotes

1. Summaries of the commission's resolutions and reports can be found at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.
2. Nonetheless, the ABA's Legal Technology Resource Center and Law Practice Management Section's eLawyering Task Force have developed excellent technology-related resources: http://www.americanbar.org/groups/departments_offices/egal_technology_resources.html; http://www.americanbar.org/groups/law_practice_management.html.
3. For a chart of "State-by-State Adoption of Selected Ethics 20-20 Commission Policies," see http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_of_selected_ethics_20_20_commission_policies_amended_with_all_e20_20_rules_8_13_13.auth_checkdam.pdf.
4. See, e.g., Florida Ethics Op. 10-2 (Sept. 24, 2010) ("If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality.").
5. <http://abcnews.go.com/blogs/technology/2012/10/top-25-worst-passwords-revealed/>
6. The online version of the *ABA Journal* article was found August 31, 2013 at http://www.abajournal.com/magazine/article/new_hacker_technology_threatens_lawyers_mobile_devices; see <http://www.techrepublic.com/blog/security/security-policies-must-address-legal-implications-of-byod/9280?tag=content;blog-list-river> (similar comments about BYOD).
7. For an example of an MDM demo, see <http://www.youtube.com/watch?v=oUYZZdSXQTQ>.
8. For an article by a lawyer discussing four alternatives to Dropbox, see <http://www.thecyberadvocate.com/2013/08/27/four-alternatives-to-dropbox/>.
9. <http://threatpost.com/researchers-reverse-engineer-dropbox-client>; <http://www.techrepublic.com/blog/security/dropsmack-using-dropbox-to-steal-files-and-deliver-malware/9332>
10. http://www.inc.com/francesca-fenzi/top-apps-banned-in-office.html?utm_source=feedly
11. The federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and the federal Stored Communications Act, 18 U.S.C. § 2701, make unauthorized access to computers (even smart phones) or to electronic communications felonies.



What Every Litigator Needs to Know about Using Web-Based Electronic Document Review Services

By A. Clay Rankin, III

The Problem

An essential part of the litigator's job is to manage information about the clients' and the opponents' documents. This includes separating the relevant from the irrelevant and the privileged from the unprivileged. Most of this work needs to be done quite early in each lawsuit, often within short time limits set by court rules and schedules. This set of tasks has come to be called "early case assessment" or "ECA."¹

In earlier times, most case-related documents were on paper. Lawyers and their staffs could feasibly review every page

(make a "linear review") to decide on the documents' relevancy and privilege status. This time is gone. The volume of electronic information is expected to double every two years.²

As a consequence, today's lawsuit may well involve hundreds of thousands of digital "pages" fueled by cheap powerful computers. The Internet has profoundly changed how lawyers and clients create, preserve and communicate information.³ Over 90 percent of all new information created today is digital, and 70 percent never gets put on paper. New information forms are emerging and are embraced by

clients, e.g., FaceBook.⁴ To complicate matters, some digital files may not be readable without special programs and processing,⁵ and they may well contain metadata such as the author and the date last modified. This metadata is not usually visible when the document is printed and reviewed on paper.

Despite these profound changes, the litigator's job remains the same—to conduct an accurate and timely review of all potentially relevant documents, including the digital ones, and often within a short time. However, the traditional linear review process is no longer a practical or economical option—in many cases involving large collections of electronic materials. The lawyers in these cases have no choice but to turn to computers for help. The prestigious Sedona Conference put it this way:

... [With] increasingly complex computer networks, and the exponential increase in the volume of information existing in the digital realm, the venerated process of “eyes only” review has become neither workable nor economically feasible. . . . The cost of manual review of such volumes is prohibitive, often exceeding the damages at stake⁶

According to a recent Rand Corporation study:

The increasing volume of digital records . . . makes computer categorized review techniques not only a cost-effective option to help conduct review but the only reasonable way to handle a large-scale production.⁷

Simple math verifies this conclusion. Assuming 6,000 documents per gigabyte and a lawyer review rate of 40 documents per hour,⁸ a one gigabyte manual review takes 150 hours and, at \$200 per hour, results in a \$30,000 legal fee. The Rand Corporation study observed:

... The major cost component in our cases was the review of documents for relevance, responsiveness, and privilege (typically about 73 percent) [of overall electronic document production costs.]⁹

Moreover, studies have shown that relevancy decisions made in linear review vary substantially among reviewers and over time. According to the Sedona Conference:

[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible—perhaps even perfect—and constitutes the gold standard by which all searches should be measured. Even assuming that the profession had the time and resources to continue to conduct manual review of massive sets of electronic data sets (which it does not), the relative efficacy of that approach versus utilizing newly-developed automated methods of review remains very much open to debate.¹⁰

The Courts Impose New Technology Requirements On Lawyers

In addition to the practical review problems that litigators are likely to face, the courts have entered the discussion with rules that increase client and lawyer responsibilities for dealing with electronic data. The 2006 amendments of the *Federal Rules of Civil Procedure* introduced the term “electronically stored information” (“ESI”), and now require that lawyers “meet and confer” with opposing counsel about “any issues about disclosure or discovery of electronically-stored information, including the form or forms in which it should be produced.”¹¹ Shortly thereafter, each party must make initial disclosures, which must include a copy or a description by category and location of all ESI in their possession that the party may use to support its claims or defenses. If the party claims damages it must make available all ESI on which its damages calculations rest.¹²

State courts, including Alabama,¹³ are adopting similar requirements, and courts are getting into detail about meeting these requirements in their scheduling orders.

In 2012, the American Bar Association changed the Model Rule for Competency to include the comment that, “To main-

tain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”¹⁴

Because time-honored paper review methods are no longer practical in many cases, and because court rules explicitly require lawyers to explore and understand their clients’ ESI, litigators no longer have a choice to remain uninformed about current computer technology and how best to use it in document review. To “keep abreast of technology,” litigators must know enough about available computer document-review tools, their capabilities and their cost to make smart technology choices.

Desktop Litigation Support Programs

The first generation of programs to help lawyers manage the review and presentation of case documents began to appear several decades ago.¹⁵ These programs typically ran on individual lawyer/paralegal computers or on the firm network. Firms with many lawyers and staff were required to buy a copy of the software for everyone who might need computer document-review help. Then they paid for annual license renewals, network servers, data backup and training for IT support. As a consequence, using desktop programs has often proved to be both expensive and wasteful.

Desktop programs were, and still are, good at solving some of the document-review problems, but other issues remained unsolved. Sharing information from these systems with clients and colleagues was a challenge. The learning curve for a new user tended to be steep. Getting and staying proficient with these programs often required more time and energy than many lawyers were willing to invest. The frequent result was that litigators used these systems only for megacases. Typically, more support personnel than lawyers actually used these programs on a regular basis.

SaaS to the Rescue

Beginning in the early 2000s and accelerating ever since, many developers for the legal profession¹⁶ have adopted the “software as a service” model and moved their litigation document-review programs onto the Internet.¹⁷ They provide a website with all the needed hardware, software, backup and maintenance. Lawyers and support staffs can access case-related ESI with a web browser, the “URL” web address of the site and a username and password. You can get to the website on any computer, tablet or smart phone.¹⁸ You do have to pay for it, but you rent these services when you need them and no longer. The charges are typically lower than desktop applications, and may be passed on to your client. SaaS providers can make upgrades and fix bugs on their websites instantly without the need for user-side computer changes.

NextPoint, an Exemplary SaaS Site

Most SaaS sites offer similar document-review tools like eliminating duplicates, sorting, searching and tagging. Some provide more features and do it more gracefully than others. Because it is not practical to attempt to describe all the variations among the numerous SaaS document services,¹⁹ we focus on NextPoint Discovery Cloud²⁰ as an example of what the better SaaS sites can do to facilitate your early case document review.

Document Upload

The NextPoint review process begins with setting up a new work area for your matter or choosing an existing one. Typically, you want to keep all documents for a single matter in a separate workspace.²¹ Then you load the ESI that needs reviewing to the selected workspace. Although it is possible to upload less than all of a party’s document collection, better

practice calls for uploading all documents received from the client or opposing party, and letting Nextpoint keep a record of documents deemed to be irrelevant or privileged. The upload process essentially copies to its website a collection of ESI from your computer or network.²²

Once Nextpoint receives your upload, it goes to work. It eliminates duplicates²³ or collects them in one place for review. It unpacks Outlook email PST²⁴ files, makes individual emails readable and saves each email separately. It also uploads the attachments as separate document records and keeps track of the relationship between email and attachments. It builds a word index of all text in all the documents to support rapid searching for key words.

Viewing the Document List

When Nextpoint’s intake is complete, it prepares a web page on which each document is represented by a collection of key information such as its date, author and title. From here you can sort the collection by date, author or other information in the view. You can create your own custom views to display various combinations of document information to suit your viewing requirements.

Viewing the Document Detail

Clicking on a document’s title opens a detail page showing you a lifelike image of the document along with text boxes and check boxes for recording your decisions about the document’s relevancy and privilege status, as well as user-defined issues or ad hoc tags like “Howard Depo.” Nextpoint tracks and saves a permanent record of the reviewer’s decisions about each document. Reviewers can customize the coding area of the page to include menus requiring the selection of one of several pre-canned choices and “hot fields,” which will always be visible. The detailed view also shows you links to related documents. The idea is that groups of related documents should often receive the same coding; so Nextpoint lets you code related documents in one operation.

Searching for Key Words

The ability make a full-text search for documents containing key words is the most important and universally provided document review tool. NextPoint supports quick and simple searches like “show me all the documents that contain the word ‘dynamite,’” and also more complex Boolean expressions like ‘dynamite’ within 3 words of ‘(holdup OR robbery)’ AND Date After March 15, 2013 AND author:Smith.” You search by typing key words or phrases into the search textbox on the Document List. You may also use an advanced search box that aids in constructing more complex searches. Clicking the Search button runs the search against the entire document collection and shows the selected documents in the Document List. The search engine is lightning fast, with only minimal delay in searching many thousands of documents and returning the results over the Internet.

After running a search and examining the details of some of the documents selected by NextPoint, you may decide to edit your search to target smaller or different search results. Your purpose is to use Nextpoint’s searching power to isolate a group of documents for further review or coding. It may be useful to tailor your searches to find collections of irrelevant as well as relevant documents. So if your review reveals recurring birthday greetings, meatloaf recipes or game scores, you can isolate them for further coding as a group.

Bulk Editing

This tool lets you code similar documents located by your searches with one operation instead of having to code them one by one. Bulk editing works well with large groups of documents deemed to be relevant, irrelevant or privileged. You can also tag or label entire groups of documents for treatment as a subgroup that is meaningful to the case, like “depo_smith” or “cross_jones.” This coding gives you immediate later access to the entire subgroup for later actions such as exporting or bates stamping.

Sharing Special Document Collections

NextPoint allows you to add as many users as you need without extra cost, and enables you can create and label document collections tailored for a particular purpose like preparing a witness, consulting with an expert, filing documents with the court or reporting to your client. You may add new users and give them nothing more than access to a special collection. So, for example, an expert can review, tag and comment on his subgroup of documents in support of case preparation. You can add more documents to his special collection as appropriate. Document-sharing using these tools is much faster (virtually instantaneous), much cheaper (no cost) and much more nimble than traditional alternatives like copying and mailing boxes of paper or burning and shipping CDs or DVDs.

Exporting Documents

At a number of points in a case you may need to export a set of documents from Nextpoint for use by another program, e.g. Trial Director or CaseMap, or for delivery to a third party, e.g. responding to a Rule 34 request. Nextpoint's export tool handles these requirements. You can collect the appropriate documents using the search, label and tag features or handpick a special set, and then export them to a downloadable file.

Audit Trail of Coding Changes

Nextpoint keeps a complete history of every change in the coding of every document, who made it and when it was made. This information provides useful data for quality control and for defending your coding decisions in discovery disputes. It may also help in spotting and eliminating inconsistencies among coding decisions by multiple reviewers.

Managing Document Reviews

Effective management of the review of large groups of documents by different people requires keeping a close eye on pending deadlines along with the progress of the review. NextPoint provides a review metrics page displaying pie charts and summary totals by reviewer and by issue.

Bates Stamping, Redaction and Exhibit Numbering

Nextpoint applies electronic Bates stamping to a set of documents while maintaining an audit trail on the details of the Bates process. The stamps can also be removed and redone if necessary. You can also apply and remove redactions, and can affix exhibit numbers as needed.

Automated Document Production—WIRE

Nextpoint WIRE is a free service that enables you to create a secure clone of the documents identified for production to opposing counsel or the court, with your coding work product removed. Receivers of the production get an invitation to log on to Nextpoint where they can search, copy and export the production set as they see fit. Nextpoint builds protection against disclosure of privileged information into the WIRE process. It also keeps a history of which documents are produced. WIRE is designed to save document-production cost while preserving the data integrity of document production. Needless to say, the decision to use WIRE in your case should be discussed and accepted by the receiving party, and should be a two-way street.

Privilege Protect™

This tool is intended to decrease the risk of inadvertently producing privileged documents. After you have finished your privilege review and tagged a set of documents as privileged, Nextpoint searches the “privileged” collection to discern common words or phrases that typically occur. It then automatically runs searches on “not privileged” documents to flag those that have attributes similar to the privileged set. These documents are flagged for further privilege review.

Security

One of the most frequent objections to SaaS websites has been concern over security. Although there may have been security issues in the past, most of the legal SaaS vendors have long since eliminated any reason for this concern. According to Nextpoint, “Your data is safe and secure.”²⁵

Affordability and Predictable Pricing

Clients understandably steer away from computer solutions in the absence of predictable cost- and time-saving benefits. Some SaaS legal services tend to be obscure about their pricing structure. Some charge for data storage by the month, plus additional one-time fees for uploading and downloading documents and even copying CDs. The safe practice is to avoid any vendor that is unable or unwilling to provide complete pricing information.

Nextpoint's formula is transparent and simple. The basic plan is \$25 per month per gigabyte stored and accessible by Discovery Cloud. All services are included. The “per gigabyte” formula raises the question of how many documents and pages are likely to be contained in a gigabyte. Expert estimates range from 15,000 to well over 100,000 pages depending on the types of computer files involved.²⁶ Conservative practice is to estimate monthly cost using 15,000 pages per gigabyte, the bottom of the scale.

Other Potential Choices

The most basic alternative to using Nextpoint is the linear review—printing, reviewing and storing the documents on paper. This approach is practically guaranteed to be more expensive and less efficient than Nextpoint. The price for printing one gigabyte of ESI will probably be at least \$1,200.²⁷ Nextpoint will house that same gigabyte for four years for the same price. Furthermore, it is likely that a paper document review will generate the need for many more copies for additional reviewers, witness folders, lawyer working copies and the like. The results of the paper review are apt to be buried in a box of folders that cannot be easily accessed by anyone, including the reviewer, much less other people who need the information. By contrast, documents stored on Nextpoint are accessible by any number of users who have immediate access to the documents and the results of other reviewers' decisions. There is no need to make multiple copies of a document except for deposition and trial exhibits. So, using Nextpoint instead of paper is a no-brainer for most document review tasks.

Review teams can also research available SaaS sites and select one of the many other vendors offering similar functionality. You should look for a favorable combination of functionality, ease of use and predictable cost. This choice depends on subjective factors to some degree; so there is no universal silver bullet. However, because vendor shopping takes substantial time and effort, prudence calls for trying several contenders, selecting one that has strong capabilities and predictable pricing and adopting it as your “go-to” vendor for most cases.

Sites with Advanced Functionality

When faced with large document collections, vendor selection should include looking at SaaS sites that offer advanced computer technology to locate and eliminate documents as irrelevant without the need for human review. The current buzz

words for these services are “computer-aided review (CAR),” “technology-aided review (TAR)” and “predictive coding.”²⁸ Here are two examples:

TAR: RenewData

RenewData²⁹ brings together case lawyers and its in-house experts for an early and intense discussion of case issues and related keywords that are likely to occur in the relevant documents. RenewData then uses this information to formulate and run hundreds or even thousands of separate searches to select likely relevant documents using “language analytics.”³⁰ The search results include a case vocabulary with a count of each word or phrase found in potentially relevant documents, as well as collections of documents for lawyer review. These collections are typically a small fraction of the total documents. RenewData guarantees a reduction in overall document size of at least 80 percent before manual review, and is able to provide statistical support certifying a 95 percent likelihood that they have found all the relevant materials.

RenewData charges \$15,000 for the initial interviews and document searches. Lawyer time for the initial step averages 50 hours.

Predictive Coding: OrcaTec

OrcaTec is a leading contender among SaaS sites offering TAR-based document review services.³¹ OrcaTec usually begins by using very sophisticated analytical tools to examine all documents sent to them, enabling litigators to gain an early understanding of the subject matter and vocabulary found in the documents. These tools can also provide quick and useful overviews of the documents, such as a timelines and maps of who communicated with whom about what subjects.³²

OrcaTec also provides predictive coding. A knowledgeable case lawyer, aided by the results of the analytical tools, reviews a relatively small random sample from the overall document collection and categorizes them as relevant and irrelevant. The computer system then analyzes these decisions using advanced computer mathematical algorithms to identify common attributes of documents deemed to be relevant or irrelevant. It applies these results to the entire document collection and decides on each document's relevancy without further human help. It is able to demonstrate that its results are highly accurate and consistent, and can do so

very quickly compared to linear review. Lawyers then manually review only the documents that the computer has determined are relevant. This process can reduce the total number of documents that the lawyers need to examine over 90 percent.

OrcaTec's pricing involves a per document charge of up to ten cents, so predictive coding analysis of 100 gigabytes (600,000 documents) should cost about \$6,000. Avoiding lawyer review of a large percentage of the documents by this approach is clearly a bargain.

Deciding to use a TAR site like RenewData or OrcaTec involves estimating the total lawyer hours likely to be saved by the TAR process compared to its cost. Small document collections do not require this kind of horsepower. On the other hand, larger collections point strongly toward evaluating TAR options.

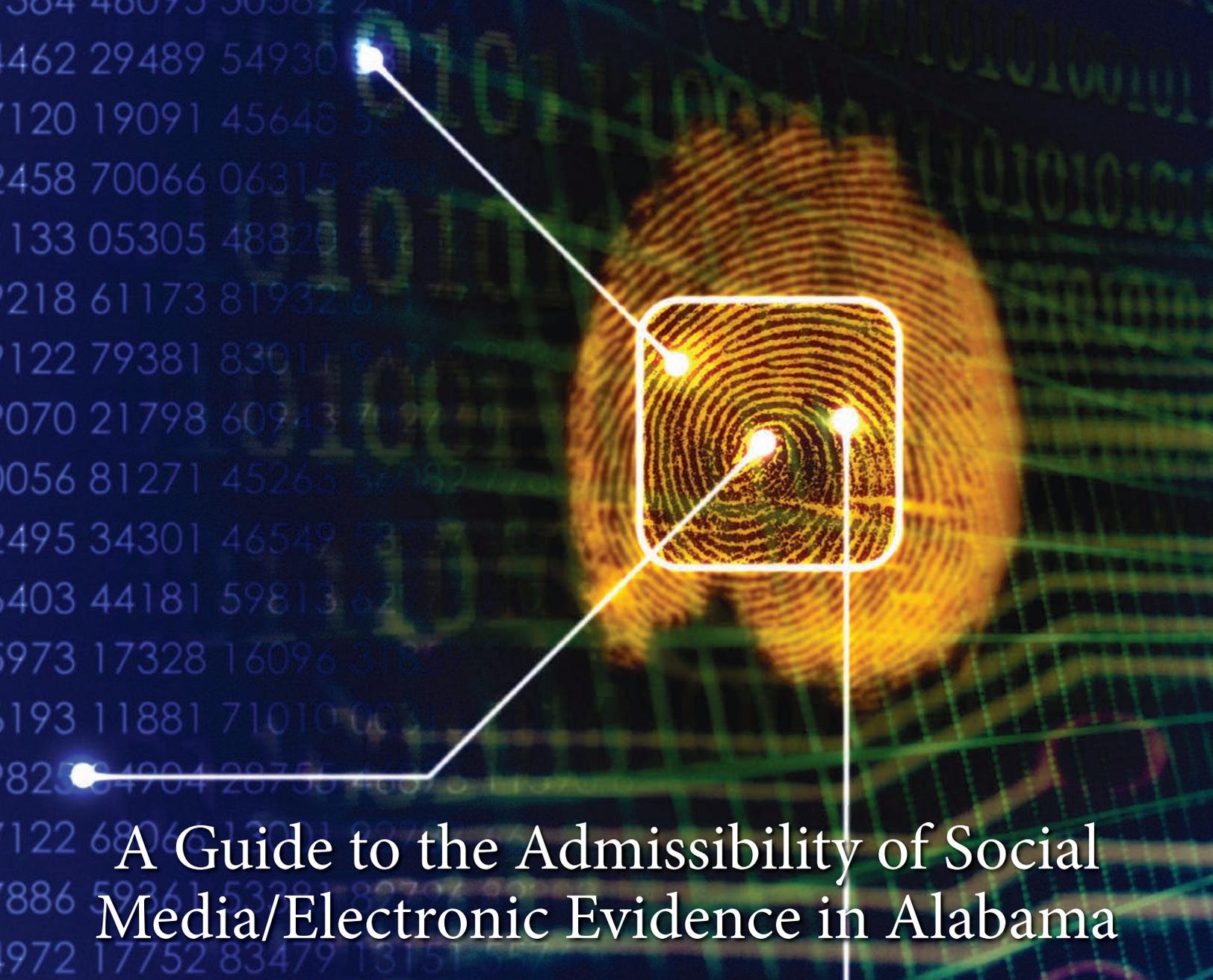
Conclusion

All litigators who must analyze significant quantities of electronic documents need a basic knowledge of alternative approaches that computer systems provide. Document review websites deserve the litigator's attention as tools to reduce costs and time frames of ESI reviews. | AL

Endnotes

1. See, e.g., DCIG Announces the Industry's First, Most Comprehensive DCIG 2012 Early Case Assessment Software Buyer's Guide, <http://www.d cig.com/2012/07/dcig-announces-the-industrys-first-most-compr.html>
2. http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html?pagewanted=all&_r=0
3. [O]ver the last 30 years, there has been a fast-paced and widespread shift from civilization's original physical information storage technologies to new, digital information storage technologies. This “digital realm” . . . [has] resulted in as fundamental a shift in the way information is shared as that which occurred in 1450 when Johannes Guttenberg invented the printing press.” The Sedona Conference, *The Sedona Conference Best Practices Commentary On the Use of Search and Information Retrieval Methods In E-Discovery*, 8 SEDONA CONF. J. 189, 197 (2007). (“The Sedona Search Commentary”). The Sedona Conference® (TSC) is a nonprofit, 501(c)(3) research and

- educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation and intellectual property rights.
4. Facebook was founded in 2004. <http://en.wikipedia.org/wiki/Facebook>. Twitter followed in 2006. <http://en.wikipedia.org/wiki/Twitter>. As Bill Clinton commented, "When I took office, only high energy physicists had ever heard of what is called the World Wide Web. Now even my cat has its own page." Gregory Gromov. "History of the Internet and World Wide Web"
 5. Examples include PST files containing email and attachments, and Excel spreadsheets where printing the file to paper or to an image file like TIFF hides the formulas beneath the numbers.
 6. The Sedona Search Commentary, *supra* n. 2 at 198.
 7. Nicholas M. Pace and Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, http://www.rand.org/pubs/mono_graphs/MG1208.html.
 8. [basis for 40 docs per hour and 6,000 pp/gb]
 9. *Id.* at xiv.
 10. *Supra* n. 8 at 199. See also, *Introduction to Predictive Coding*, Herbert L. Roitblat, Ph.D. CTO: ". . . traditional linear review, where at least one person reads every document, turns out to be only moderately accurate. For example, Roitblat, Kershaw & Oot (2010) had two teams of professional reviewers each review a sample of documents. If one team determined that a document was responsive, the odds that the other team would also find it responsive were about 50:50. . . . [H]uman reviewers are missing almost every other responsive document.
 11. *Federal Rules of Civil Procedure* 26(f)(3)(C).
 12. Rule 26(a)(1)(a).
 13. See J. Paul Zimmerman, "A Primer on the New Electronic Discovery Provisions in the *Alabama Rules of Civil Procedure*," 71 Ala. Law. 206(2010).
 14. Rule 1.1 *ABA Model Rules of Professional Conduct*. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
 15. Early pioneers included Concordance, Summation and CaseMap.
 16. The SaaS model is not just for lawyers and their documents. See iTunes, Dropbox, Evernote, Google Apps, BaseCamp, TeamworkPM, Rally, and Salesforce to name a few.
 17. SaaS is becoming a trustworthy alternative to the traditional model of software because it saves money, is much more flexible and requires fewer resources on the user end. <http://www.lexbe.com/hp/litilawhosted/Burney,%20SaaS%20Litigation%20Support.pdf>
 18. See generally, *Cloud Computing/Software as a Service for Lawyers*, Legal Technology Resources Committee of the American Bar Association, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyjs/saas.html.
 19. Nor could any researcher practically keep up with the volume of changes and improvements that occur daily.
 20. www.nextpoint.com. Founded in 2001, Nextpoint offers three services. Preservation Cloud is for collecting and cheaply storing documents, Trial Cloud is for trial preparation and presentation and Discovery Cloud focuses on early case document review. This article deals only with Discovery Cloud, which, for convenience, we will call "Nextpoint." This service has other admirers. "Discovery Cloud merits a nearly perfect TechnoScore of A+. It can compete toe-to-toe with just about any discovery review platform out there for any size case. Litigators of all stripes should get a close look." Burney, Brett, "Review of Discovery Cloud" (Litigation World August 5, 2013, www.technolawyer.com).
 21. Each workspace is separate from and invisible to all other workspaces, and can have its own set of users, customized details and billings.
 22. One commentator observes that, "if you can upload the photo to Facebook, you can upload a . . . file to Discovery Cloud." Burney, Brett, "Review of Discovery Cloud" (Litigation World August 5, 2013, www.technolawyer.com).
 23. Just eliminating duplicates is likely to reduce the total number of documents that need to be separately reviewed by as much as 30 to 50 percent.
 24. Dealing with PST files proved challenging to most law firms. Attempting to read them using Outlook is very often a waste of time.
 25. <http://www.discoverycloud.nextpoint.com/pricing/> states, "Nextpoint meets or exceeds many federally regulated security standards, including Sarbanes-Oxley and HIPAA compliance standards, as well as meeting the Statement on Auditing Standards No. 70: Service Organizations, Type II (SAS70 Type II)." But see http://www.computerworld.com/s/article/9241553/No_your_data_isn_t_secure_in_the_cloud.
 26. http://cdn.ca9.uscourts.gov/datas-tore/library/2013/03/28/Cotterman_gigabyte.pdf. It is impossible to be precise about Nextpoint's total monthly cost in advance of loading the document collection to Nextpoint's website. Precision is also affected because there is no way in advance to know how many duplicates Nextpoint will be able to locate and eliminate.
 27. Copying prices from litigation support vendors are averaging about \$.08 per page. At this price, a single copy of 15,000 pages will cost \$1,200. This charge does not include additional paper copying charges for working copies, client and witness copies, in-office labor, storage boxes and shelf space for the boxes.
 28. "Predictive coding uses computers and machine learning to reduce the number of documents in large document sets to those that are relevant to the matter. It is a highly effective method for culling data sets to save time, money and effort. Predictive coding learns to categorize documents (for example, as responsive or non-responsive) based on a relatively small sample of example documents. . . . [TAR includes] keyword searching, concept searching, clustering, email threading, more-like-this search, and near duplicates." Introduction to Predictive Coding, Herbert L. Roitblat, Ph.D. CTO, chief scientist, OrcaTec. Vendors include Categorix by Xerox, <http://www.xerox-xls.com/ediscovery/categorix.html>; Allegro, <http://iprotech.com/>; CasePoint by @Legal, <http://www.legaldiscoveryllc.com/ca-sepoint/>; Relativity by KCura, <http://kcura.com/>; Ringtail 8 by FTI Technology, <http://www.ftitechnology.com>.
 29. RenewData
 30. <http://www.renewdata.com/news-events/press-releases-detail.php?id=94>
 31. www.orcatec.com
 32. See Herbert L. Roitblat, Ph.D. CTO, *Exploratory Data Analysis with the OrcaTec Document Decisioning Suite*.



A Guide to the Admissibility of Social Media/Electronic Evidence in Alabama

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Introduction

The rise and rapid evolution of electronic communication and social media has forever changed the way we communicate, and it has left many courts and lawyers unsure of how to deal with the resulting deluge of evidence from these mediums. The stereotypical technophobe lawyer should have at least a rudimentary understanding of these mediums and how people use them to understand how potentially valuable or damaging they can be in court. Today's lawyer must also be aware of the common issues and hurdles that arise with regard to obtaining such evidence through discovery, but an important consideration is always whether that evidence is even admissible.

While Alabama appellate decisions addressing the foundations necessary for admitting electronic evidence are scarce, the *Alabama Rules of Evidence* and cases from other jurisdictions provide a blueprint for the Alabama lawyer.¹

Electronic Evidence in Society and the Courts

According to a late 2012 study done by the Pew Research Center, 67 percent of

Internet users also use at least one social networking site (<http://pewinternet.org/Reports/2013/Social-media-users/The-State-of-Social-Media-Users.aspx>). Judging from the numbers, Facebook and Twitter are the current giants of electronic social media. Facebook, founded in 2004, reported 1.1 billion monthly active users and 655 million daily active users as of March 2013 (Facebook, <http://newsroom.fb.com/>). Twitter, founded in 2006, reported over 200 million active users generating over 400 million tweets per day as of March 2013. (Twitter Blog, <https://blog.twitter.com/2013/celebrating-twitter7>).

With such widespread use of electronic communication, the legal implications of electronic evidence are staggering. News reports are filled with stories of criminals caught via information revealed in their social media posts and even in the posts of their friends. Family lawyers report that social media is increasingly being used as evidence in their cases. Defense lawyers are now using social media in personal injury cases to contradict allegations of disability. Large police departments are beginning to develop social media units, responsible for the online investigation of potential suspects. As long as people continue to use social media to communicate and to narrate their lives, it will continue to remain relevant in court. Thus, the practitioner must be aware of the common evidentiary hurdles.

Evidentiary Issues with Electronic Evidence

It should go without saying that, as with any piece of evidence, electronic/social media evidence must satisfy the relevancy requirement of Rule 401, pass the balancing test of Rule 403 and many other well-established rules of evidence. This article, however, focuses on the rules that will likely pose the most challenges: (1) authentication; (2) hearsay; and (3) the best evidence rule.

I. Authentication

A. Alabama Rules of Evidence and Civil Procedure

As with any tangible piece of evidence such as a document, recording, photograph or object, electronic/social media evidence must be authenticated. That is, the proponent of the evidence must lay a specific foundation to show the piece of evidence is what it is purported to be. *Ala. R. Evid.* 901(a). Traditionally, the authenticity bar is not a high one, and the evidence does not have to be conclusive or overwhelming. *Ala. R. Evid.* 901(a) advisory committee's note. The proponent is required to make a threshold showing "sufficient to support a finding that the matter in question is what its proponent claims." *Ala. R. Evid.* 901(a).

Despite the traditionally low bar to establish a piece of evidence as authentic, some courts have subjected electronically stored information to greater scrutiny than more traditional evidence. See e.g., Manual for Complex Litigation at § 11.447 (stating that computerized data "raise unique issues concerning accuracy and authenticity."); *In Re Vee Vinhnee*, 336 B.R. 437

(B.A.P. 9th Cir. 2005) ("The paperless electronic record involves a difference in the format of the record that presents more complicated variations on the authentication problem than for paper records."). As with any item of tangible evidence, there will be a concern as to whether the social media evidence being offered was actually posted, or whether it was manipulated or altered in some way. A second concern is whether the alleged declarant is actually the person who posted or authored the evidence at issue. The alleged declarant may be the victim of a hacker, or perhaps someone else has access to the computer.

Even though Alabama appellate decisions on the admissibility of electronic evidence are scarce, the *Alabama Rules of Evidence* and *Alabama Rules of Civil Procedure* provide ample authority for authenticating this evidence. The most prevalent sources of authority are *Ala. R. Evid.* 901 (done with a testifying witness); *Ala. R. Evid.* 902 (self-authenticating evidence); *Ala. R. Evid.* 201 (Judicial Notice); and *Ala. R. Civ. P.* 34 and 36 (Requests for Production and Requests for Admission).

■ Rule 901

The general rule of authentication is found in *Ala. R. Evid.* 901(a), which states that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Ala. R. Evid.* 901(b) goes on to list 10 examples of how evidence may be authenticated with a testifying witness. When authenticating electronic evidence with a live witness, the following methods are the most logical choices:

■ Rule 901(b)(1)–Testimony of a Witness with Knowledge

Rule 901(b)(1) states that a witness with knowledge may authenticate an item of evidence with "[t]estimony that a matter is what it is claimed to be." *Ala. R. Evid.* 901(b)(1). Traditionally, the testimony of a witness with firsthand knowledge has been "[t]he primary vehicle for establishing authentication or identification." Charles W. Gamble, *Gamble's Alabama Rules of Evidence*, § 901(b)(1) p. 434 (2d ed. 2002). For example, if someone personally observes another person sign a document, such testimony would be sufficient to authenticate that document. *Id.* Further, an individual who witnesses a murder could possibly authenticate the murder weapon.

While there appear to be no reported appellate decisions in Alabama that address a witness authenticating social media/electronic evidence under Rule 901(b)(1), federal courts outside Alabama construing the parallel federal rule routinely find that electronic evidence has been authenticated by a witness with knowledge. See e.g., *U.S. v. Bansal*, 663 F.3d 634, 667-68 (3rd Cir. 2011) (website screenshots properly authenticated under *Fed. R. Evid.* 901(b)(1) by witness with knowledge); *U.S. v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007) (chat-room conversation properly authenticated by witness with knowledge of the chat); *U.S. v. Kassimu*, 188 Fed. Appx. 264 (5th Cir. 2006) (holding that computer records of post office could be authenticated by a witness with personal knowledge).

The substance of Rule 901(b)(1) is the same under both the *Alabama* and *Federal Rules*, so these federal cases are persuasive

authority in Alabama state courts. *Ala. R. Evid.* 102, advisory committee's note. Thus, authentication through a witness with knowledge should remain the predominant vehicle to authenticate evidence, electronic or otherwise.

■ Rule 901(b)(4)–Distinctive Characteristics and the Like

901(b)(4) allows a court to consider “distinctive characteristics and the like” when deciding whether a piece of evidence, electronic or otherwise, is authenticated. *Ala. R. Evid.* 901(b)(4). Under this method, an item of evidence “may be authenticated or identified upon the basis of its possessing distinctive characteristics which, when combined with accompanying circumstances, furnish a basis for reasonably concluding that the evidence is what the offeror purports it to be.” *Gamble's*, § 901(b)(4), p. 442. See e.g., *Royal Ins. Co. of America v. Crowne Investments, Inc.*, 903 So. 2d 802, 808-10 (Ala. 2004) (distinctive characteristics of letter and report, such as being written on company letterhead and referring to key dates and events, held to indicate authenticity). In other words, the court will ultimately decide, based on the totality of the circumstances, whether a reasonable juror could conclude that the evidence is what it is claimed to be. If so, the evidence is authenticated.

While this rule is rarely cited in Alabama appellate decisions, outside Alabama it “is one of the most frequently used to authenticate email and other electronic records.” *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007). It has been used, for example, to authenticate emails, text messages, chat-room conversations and other types of electronic evidence. See e.g., *U.S. v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (email properly authenticated by circumstantial evidence, including the defendant's email address, content, use of defendant's nickname and testimony of a witness who spoke to the defendant about the subject of the email); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp.2d 1146, 1153-54 (C.D. Cal. 2002) (website posts ruled authentic due to circumstances); *Tienda v. State*, 358 S.W. 3d 633 (Tx. Ct. Crim. App. 2012) (content of postings on defendant's social media web page was sufficient circumstantial evidence to attribute the postings to the defendant in a prosecution for murder).

There is no reason to think that the “distinctive characteristics” method should not be used to authenticate similar types of evidence in Alabama courts. The types of “distinctive characteristics” offered depend on the facts and circumstances at issue. If an email is being offered against a defendant, for example, some of the “distinctive characteristics” might be testimony that the defendant frequently used the email address at issue, the defendant attended a later meeting that had been scheduled in the email or the email included topics of discussion unique to the knowledge of the defendant. As long as the proponent can offer enough circumstantial evidence that a reasonable juror could conclude the evidence is authentic (See *Ala. R. Evid.* 104(b)), the authentication hurdle is cleared.

■ Rule 902(5)–Self-Authentication of Official Publications

“Some written forms of demonstrative evidence are deemed to be self-authenticating.” *Gamble's*, 902, pp. 459-60. This means that the item of evidence may be authenticated without the sponsoring testimony of a witness. While most of the items discussed

above (i.e., chats, text messages and Facebook postings) will not have self-authenticating status, some forms of Internet-based evidence can have self-authenticating status.

The primary example is Rule 902(b)(5), which gives self-authenticating status to “[b]ooks, pamphlets, or other publications purporting to be issued by public authority.” *Ala. R. Evid.* 902(b)(5). While no Alabama appellate decision has addressed this issue, multiple courts construing the parallel federal rule and state rules have held that printouts from government websites can be self-authenticating. See e.g., *Firehouse Restaurant Group, Inc., v. Scurmont, LLC*, 2011 WL 3555704, at *4 (D.S.C. 2011) (“Records from government websites are generally considered admissible and self-authenticating.”); *Williams v. Long*, 585 F. Supp.2d 679, 689 (D.Md. 2008) (“The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under Rule 902(5) . . .”); *Hispanic Broad Corp. v. Educational Media Foundation*, No. CV027134CAS (AJWX), 2003 WL 22867633 at *5 n.5 (C.D. Cal. 2003) (“Other exhibits which consist of records from government websites, such as the FCC website, are self-authenticating.”). Presumably, unless there would be some reason to question the trustworthiness of official publications from a government website, self-authenticating status should be available in Alabama courts.²

■ Rule 201–Judicial Notice

As some types of electronic evidence become more accepted and part of society, authentication may possibly be accomplished through judicial notice. Rule 201 allows a court to judicially notice an adjudicative fact “not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Ala. R. Evid.* 201(b).

Even though some judges are still somewhat skeptical of electronic evidence, it has become common for courts in many jurisdictions to take judicial notice of information published on government websites. See e.g., *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 648 (7th Cir. 2011) (judicial notice taken of consumer price index on government website); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (judicial notice of National Mediation Board approval published on agency's website); *Reeves v. PharmJet, Inc.*, 846 F. Supp.2d 791, 794 n. 1 (N.D. Ohio 2012) (“The Court may also take judicial notice of matters of public record including records of the FDA available on its website.”).

Although Alabama appellate decisions on this issue are scarce, there is some evidence that Alabama courts are beginning to follow this trend with regard to reliable government websites. See *Petty v. Allen*, 77 So. 3d 1182, 1184 n. 3 (Ala. Civ. App. 2011) (judicial notice of regulations found on Department of Corrections website); *Johnson v. Hall*, 10 So. 3d 1031, 1035 (Ala. Civ. App. 2008) (recognizing that a Kentucky appellate court in *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. Ct. App. 2004) observed that a court can take judicial notice of “public records and governmental documents available from reliable sources on the Internet.”). Until the Alabama case law becomes more fully developed, proponents of reliable government websites have numerous federal cases to rely upon in seeking admission of this evidence.

■ *Alabama Rules of Civil Procedure*

Finally, a piece of electronic evidence may be authenticated through the *Alabama Rules of Civil Procedure*. It has long been the rule in Alabama, for example, that a party is relieved from having to authenticate evidence that is produced by an adverse party and the party that produced the evidence is a party to it or claims a benefit thereunder. See e.g., *Jordan v. Calloway*, 7 So. 3d 310, 314 (Ala. 2008); *Ala. Power Co. v. Tatum*, 306 So. 2d 251, 258 (Ala. 1975). Furthermore, a party may take advantage of *Ala. R. Civ. P.* 36 (Requests for Admission) and request the adverse party to admit that a piece of evidence is genuine.

B. Examples of Authenticating Specific Types of Electronic Evidence

We will now focus on specific types of electronic evidence common in litigation and address the means courts have used to authenticate these types of evidence.

■ Email

Email evidence is obviously very common, and authenticating an email is not difficult. Here are the most common ways:

- Rule 901(b)(1)—a witness included on the email chain can typically authenticate an email by testifying that he has personal knowledge of the email discussion and that the printout is a true and accurate copy of the email. See e.g., *Navedo v. Nalco Chemical, Inc.*, 848 F.Supp.2d 171, 178-79 (D.P.R. 2012).
- Rule 901(b)(4)—an email may be authenticated purely by circumstances, including the email address, email suffix, whether it was a reply email and by information contained in the email exchange. *U.S. v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000); *U.S. v. Safavian*, 435 F. Supp.2d 36 (D.D.C. 2006).
- Rule 902(7) (trade inscriptions)—inscriptions, signs, tags or labels purporting to have been fixed in the course of business and indicating ownership, control or origin may be deemed self-authenticating. See *ACCO Brands, Inc. v. PC Guardian Anti-Theft Products, Inc.*, 592 F.Supp. 2d 1208, 1219 (N.D. Ca. 2008).

■ Website Postings

Typically, it is not overly difficult to authenticate information posted on a website. A witness who actually viewed the website may testify that a printout of the website fairly and accurately depicts what was on the site when the witness viewed it. The information on the website is presumptively attributable to the owner of the website. Generally, there are three foundational questions that must be answered either explicitly or implicitly to authenticate a posting from a website:

1. What was on the website?
2. Does the exhibit or testimony accurately reflect what was on the website?
3. If so, is it attributable to the owner of the site?

Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 555 (D. Md. 2007) (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 Prac. Litigator (Mar.2002), reprinted in Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual*, Part 4 at 20 (9th ed. 2006)).

In deciding whether to admit a website posting, the court may consider the following factors:

1. The length of time the data was posted on the website;
2. Whether others report having seen it;
3. Whether it remains on the website for the court to verify;
4. Whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations);
5. Whether the owner of the site has elsewhere published the same data;
6. Whether others have published the same data, in whole or in part; and
7. Whether the data has been republished by others who identify the source of the data as the website in question.

Id. After considering those factors and possibly others, the court will decide whether a sufficient foundation has been established for a reasonable juror to conclude that the evidence is what it is purported to be.

■ Chat-Room Discussions

Chat-room discussions can pose additional authentication problems that are not present with a traditional website. Chat-room participants often use pseudonyms and screen names, and unlike website postings already discussed, chat-room postings are made by third parties—not the owner of the website. Thus, in addition to authenticating the chat itself, the proponent of chat-room evidence will often be required to link the chat to the individual the proponent claims was a party to the chat. The first step, authenticating the chat itself, is typically done as follows:

Rule 901(b)(1)—a witness with personal knowledge of a chat-room conversation may testify that a printout fairly and accurately depicts the chat. *Adams v. Wyoming*, 117 P.3d 1210 (Wy. 2005).

In the second step, linking the chat to an individual who denies having participated, courts will often look to the following factors:

Evidence that the individual used the screen name in question when participating in chat-room conversations (either generally or at the site in question).

Evidence that, when a meeting with the person using the screen name was arranged, the individual in question appeared.

Evidence that the person using the screen name identified him or herself as the individual (in chat-room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.

Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).

Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

Gregory P. Joseph, *Internet and Email Evidence*, 13 Prac. Litigator (Mar.2002), reprinted in Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual*, Part 4 at 20 (9th ed. 2006)). See also *U.S. v. Tank*, 200 F.3d 627, 630-31 (9th Cir. 2000) (authenticating chat room conversation based on the following: (1) a co-conspirator testified the printout accurately depicted the chat; (2) the defendant admitted he used a screen name used in the chat; (3) co-conspirators testified the defendant used the screen name used in the chat; and (4) co-conspirators testified that they arranged for a meeting with a person who used the screen name and that the defendant appeared for the meeting).

■ Text Messages

Text messaging is an increasingly common form of communication. Typically, a text message can be authenticated by a witness with knowledge or distinctive characteristics and the like. *State v. Jaros*, 2011 WL 4529312 (Ohio, App. 2011) (text messages properly authenticated by witness who identified messages sent to her cell phone from defendant's email address, as she was familiar with the email account from having received messages from him in the past). See also *Gulley v. State*, 2012 Ark. 368, 11-15, where text messages were authenticated based on the content of the messages, the fact that the messages were sent from a telephone number assigned to the defendant and witness testimony that confirmed defendant's involvement in the activities described in the messages.

II. Hearsay

Authentication is just one step in the analysis. Out-of-court statements, written and oral, must go through the hearsay analysis. Thus, before any information from cyberspace may be admitted, it must satisfy the hearsay rules. Hearsay is defined as a statement made outside the trial offered to prove the truth of the matter asserted. *Ala. R. Evid.* 801. To fully perform the hearsay analysis, it is necessary to know the purpose for which the evidence is offered. While hearsay is evaluated on a case-by-case basis, some hearsay exemptions and exceptions are more prevalent than others in the context of electronic evidence.³ Satisfying hearsay, of course, is just one evidentiary hurdle and does not guarantee admissibility.

A. Admissions

An admission of a party opponent is considered non-hearsay, and is a common way to satisfy a hearsay objection. *Ala. R. Evid.* 801(d)(2). A chat-room posting, Twitter, Facebook or MySpace posting, email, text message, or website information posted by the owner of the site or account can all constitute admissions, provided these items are used against the party who made the posting. See e.g., *U.S. v. Burt*, 495 F.3d 733, 738-39 (7th Cir. 2007) (holding that portions of chat from the defendant were party admissions and portions from the other participant were not offered for the truth of the matter asserted.); *U.S. v. Hart*, 2009 WL 2552347, at *4 (W.D. Ky. 2009) (“the suspect's portion of the chats contained in the chat logs are admissible as non-hearsay admissions of a party opponent under Rule 801(d)(2).”); *U.S. v. Levy*, 594 F. Supp.2d 427, 439 (S.D.N.Y. 2009) (“Levy's hearsay objection was not well-founded, for his statements in the transcript were not hearsay, but were statements offered by the

Government against Levy as admissions of a party opponent.”); *Doctors Med. Ctr. Of Modesto v. Global Excel Mgmt., Inc.*, 2009 WL 2500546, at *9 (E.D. Cal. 2009) (“the statements from the website are party admissions, which are not hearsay and are admissible under *Fed. R. Evid.* 801(d)(2).”).

If the person denies having made the post, that is typically more of an authentication issue than a hearsay issue. In that scenario, as discussed above, the proponent of the evidence will typically be required to make some minimal threshold showing to link the post to the individual.

B. Business Records

Ala. R. Evid. 803(6) provides a hearsay exception for records of regularly conducted activity, i.e., the business records exception. Relevant, properly authenticated website information may qualify under the business records exception, but only if the traditional business records elements are established. The website evidence offered must be: (1) a memorandum, report, record or compilation of data; (2) of acts, events, conditions, opinions, or diagnoses; (3) made at or near the time [of the event, condition, opinion or diagnosis]; (4) by, or from information transmitted by, a person with knowledge; (5) kept in the regular course of business; (6) all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The rationale underlying the business records exception is that business records have the “earmark of reliability” or the “probability of trustworthiness” because they reflect the day-to-day operations of the enterprise and are relied upon in the conduct of business. *Palmer v. Hoffman*, 63 S. Ct. 477 (1943). As long as the reliability threshold is met and the foundation addressed in the above paragraph is established, properly authenticated, relevant website information created and kept in the ordinary course of business can satisfy the business records hearsay exception. See e.g., *U.S. v. Cameron*, 762 F.Supp.2d 152, 187-89 (D. Maine 2011) (reports generated by the National Center for Missing and Exploited Children were admissible as business records, including attached contraband images); *Lorraine*, 241 F.R.D. at 552.⁴

C. Public Records

Many government records are considered public records and fall under the public records exception to the hearsay rule. Federal courts have frequently given the same self-authenticating status to certain government websites. *Kew v. Bank of America, N.A.*, 2012 WL 1414978, at *3 n. 4 (S.D. Tex. 2012) (“The print-out from the Harris County Appraisal District's website is a public record under 803(8).”); *Bartlett v. Mutual Pharm. Co., Inc.*, 760 F. Supp.2d 220, 235 n. 10 (D.N.H. 2011) (“This court admitted the [Food and Drug Administration] analysis into evidence as a full exhibit, since it was a self-authenticated public record available on the FDA's website.”). There is no reason to think Alabama courts should not follow suit in the proper circumstances. See *Ala. R. Evid.* 803(8).

D. Then-Existing State of Mind or Condition

Rule 803(3) provides an exception to the hearsay rule for “[t]hen existing mental, emotional or physical condition.” If a condition

provided under this rule is material as to a particular witness or party, certain social media posts, chat-room messages and emails can fall under this exception to the hearsay rule. For example, if a Facebook post says, “my leg hurts,” or “I feel sad today,” such postings could overcome a hearsay objection via Rule 803(3).

E. Present Sense Impression and Excited Utterance

Rule 803(1), the present sense impression exception to the hearsay rule, makes it a hearsay exception for statements that describe an event while perceiving it or immediately thereafter. *Ala. R. Evid.* 803(1). One commentator has observed that Twitter (like Facebook) “is, in essence, a vast electronic present sense impression (e-PSI) generator, constantly churning out admissible out-of-court statements.” Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impression*, 160 U. Pa. L. Rev. 331, 335 (2012). Indeed, through the use of smart phones, Twitter, Facebook and text messaging, users are constantly telling the world about events as they unfold (i.e., “at LSU-Bama game, and just saw the Honeybadger cheap shot Dre Kirkpatrick;” “I’m watching a great fight at the bar”). Those posts, tweets or texts that describe an event while perceiving it or immediately thereafter can qualify as hearsay exceptions under Rule 803(1). See e.g., *State v. Damper*, 225 P.3d 1148, 1152 (Ariz. App. 2010) (“On this record, we cannot conclude the superior court abused its discretion in ruling the text message constituted a present sense impression.”).

Similarly, posts, tweets or texts made under the stress and excitement of a startling event that relate to that startling event can qualify as excited utterances under Rule 803(2). *Funches v. State*, 2012 WL 436635, at *1 (Nev. 2012) (observing that the state argued “persuasively” that text messages were admissible under the excited utterance exception).

III. Best Evidence Rule

The best evidence rule (“BER”) states that “[w]hen a party is attempting to prove the terms of a writing, the law generally requires such proof to be in the form of the original.” *Gamble’s*, § 1002(a), p. 472. There are, however, many avenues to admit secondary evidence. The BER should rarely be a problem when trying to admit electronic/social media evidence.

In Alabama, the BER applies to writings only, in contrast to the *Federal Rules of Evidence*, where it applies to writings, recordings and photographs. *Ala. R. Evid.* 1001(1), which defines “writings,” includes within that definition “other form of data compilation.” *Ala. R. Evid.* 1001(1). “Use of the words ‘data compilation’ makes it clear that the best evidence rule is expanded by Rule 1001 to include computerized records.” *Ala. R. Evid.* 1001(1) advisory committee’s note. Under Rule 1001(2), “[t]he status of original is likewise conferred upon any computer printout.” *Ala. R. Evid.* 1001(2) advisory committee’s note. Further, *Ala. R. Evid.* 1004 allows secondary evidence to be used when the original is lost or destroyed (unless it was lost or destroyed in bad faith), it is not obtainable, it is in possession of the opponent or if it involves a collateral matter.

Given the above rules, a best evidence rule objection with electronic evidence is often not very difficult to overcome. See e.g., *U.S. v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012) (holding that trial court did not abuse its discretion in allowing, over a

best evidence rule objection, printouts of a chat conversation; recognizing that *Fed. R. Evid.* 1001(3) defines “original” “to include a printout of computer data shown to accurately reflect that data.”); *U.S. v. Lanzon*, 639 F.3d 1293, 1301-02 (11th Cir. 2011) (holding that trial court did not abuse its discretion in allowing, over a best evidence rule objection, instant message transcripts, absent a showing that the originals were destroyed in bad faith); *Norton v. State*, 502 So. 2d 393, 394 (Ala. Crim. App. 1987) (computer printouts of electronically stored public information deemed admissible over best evidence rule objection).⁵

Conclusion

While this article has focused on authentication, hearsay and the best evidence rule, counsel should be aware that those are not the only evidentiary rules that apply to electronic/social media evidence. Obviously, any evidence offered must be relevant (Rule 401), the probative value must not be substantially outweighed by the danger of unfair prejudice (Rule 403), it must not violate the general exclusionary rule of character (Rule 404) and it must satisfy all other evidentiary requirements.

Notwithstanding all the changes in the world of technology, those basic requirements of the evidentiary rules remain the same. And, while some courts have been skeptical of certain types of electronic evidence, such evidence may still be offered, authenticated and analyzed under the existing *Alabama* and *Federal Rules of Evidence*. While this article is not intended to exhaust every issue that could possibly be raised, hopefully it will give the practitioner some useful tips when electronic evidence is an issue at summary judgment and trial. | AL

Endnotes

1. Because the *Alabama Rules of Evidence* are modeled after the *Federal Rules of Evidence*, cases interpreting the *Federal Rules of Evidence* are persuasive authority for interpreting the *Alabama Rules of Evidence*. *Ala. R. Evid.* 102, advisory committee’s notes. The same argument can be made for the cases interpreting the rules of evidence from other states that are modeled after the federal rules.
2. By way of example, the parallel federal rule has been found to be satisfied where: (1) the printout of the record included the website address; (2) the printout included the date on which it was printed; (3) the court verified that website; and (4) the website was maintained by a government agency. *E.I. Du Pont de Nemours & Co.*, 2004 WL 2347559 (E.D. La. 2004).
3. Social media and other websites typically contain a significant number of photographs that could potentially be offered at trial. Because photographs are rarely considered “assertions,” they are usually not excluded via a hearsay objection. *U.S. v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980) (“a photograph is not an assertion, oral, written, or nonverbal, as required by 801(a).”).
4. Counsel should also be aware that there are several new amendments to the *Alabama Rules of Evidence* that are effective in proceedings that begin on or after October 1, 2013. Rules 902(11) and 902(12), which are newly added and virtually identical to their federal counterparts, provide for the self-authentication of business records. Again, this is only for those proceedings that begin on or after October 1, 2013.
5. It should be noted that in Alabama state courts the best evidence rule does not apply to photographs obtained from websites or social networking sites. *Gamble’s*, § 1001, p. 470 (stating that the best evidence rule “has no application to non-written evidence such as tape recordings, photographs, and chattels.”).



The iPad: Litigation and Trial in a New Digital World

By James R. Moncus, III

Embracing Change and Technology

Over the last few years, lawyers have been increasingly interested in incorporating new technology into their practices. The advent of the tablet computer itself seemed to spawn an awakening among lawyers looking to be more efficient and tech-savvy. Yet, the technological revolution among lawyers probably started even earlier. We can trace back the mobile revolution among lawyers at least to the prevalence of the Blackberry, which seemed ubiquitous among our profession

almost a decade ago. Of course, this once-popular device is but an interesting footnote today. The smartphone, incorporating access to email, nearly everywhere, was truly transformational in facilitating a mobile practice among busy attorneys. Many of us cannot imagine practicing law without instant access to email at depositions and in the courthouse. In a relatively short period of time, Alabama courthouses have shifted from paper to electronic filings, thus reducing cost and creating efficiencies. Today, we know that nearly 90 percent of lawyers in the United States report using smartphones in their daily practice according to the latest American Bar Association (ABA) Technology Survey.¹ The modern

law office has come a long way; nevertheless, there is still unrealized potential for most lawyers and law firms.

In 2014, smartphone usage is more likely to be perceived as boilerplate than cutting-edge. The predominant interest among lawyers over the last few years has been the tablet, and more specifically, the iPad. In 2011, the ABA Technology survey found 15 percent of attorneys in the United States using tablet computers for law related work and the overwhelming majority of those were iPad users. By the summer of 2013, this percentage had skyrocketed to 33 percent, again over 90 percent of that group consisting of iPad users.² To borrow a phrase from Malcolm Gladwell,³ it would seem that iPad use among lawyers has reached a *tipping point*. As this piece is being written, Apple has sold well over 100 million iPads and there are hundreds of legal specific apps available. Yet, lawyers are only a tiny fraction of those groups taking advantage of this new technology platform. The tablet computer has been readily adopted by various industries and businesses, as well as finding a home in education and among students and teachers.

Interestingly, at roughly the same time the Annual Technology Survey results were being released in 2012, the ABA published an amendment to the *Model Rules of Professional Conduct*, Rule 1.1, pertaining to lawyer “competence.” The comment entitled “Maintaining Competence” now reads, as follows (*changes emphasized*):

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁴

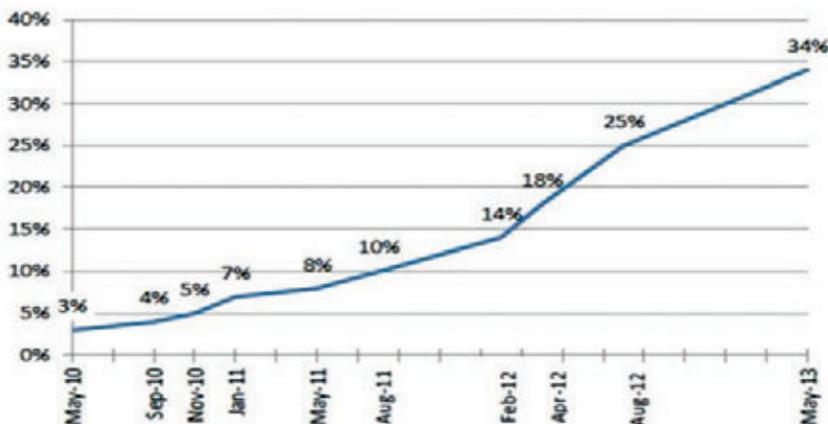
Lawyers today are embracing technology more than ever before. If mere curiosity were not enough to spark interest in modern technology among our profession, our ethical rules now affirmatively require us to keep abreast of advancements in technology in order to serve our clients better. As the yellow legal pad gives way to ultra-thin laptops, smartphones and iPads, there is no better time

to be practicing law for those who care about delivering the very best product for our clients.

For example, it is easier than ever to jettison your yellow legal pad in favor of a digital note-taking system. Or, you may choose to keep your paper notes but exchange your heavy black document binders for a slim iPad containing the very same data. In your next trial or hearing, you may contemplate the pros and cons of blowing up large foam exhibit boards versus presenting directly from your tablet computer. With an iPad and an iPhone you can even stand before a jury with only your iPhone or iPod in your hand, utilizing it as a remote control for your presentation. In your next deposition, you may consider leaving the bankers’ boxes behind in favor of a digital

Tablet ownership over time (2010-2013)

% of American adults ages 18+ who own a tablet computer, over time.



Source: Pew Research Center’s Internet & American Life Project tracking surveys, May 2010 – May 2013. May 2013 data is from the Pew Research Center’s Internet & American Life Project’s April 17-May 19, 2013 Tracking Survey of 2,252 adults ages 18 and older. Interviews were conducted in English and Spanish and on landline and cell phones. The margin of error on the sample is +/- 2.3 percentage points.

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approach. Whatever your decision, it is now possible to do more, with less. Though many tablet computers may make these scenarios a reality (at last count there were at least a dozen major brands in the marketplace), this article focuses primarily on Apple's iPad as the most ubiquitous tablet among attorneys.

The Advantages Of Technology At Trial

The trial of lawsuits has changed dramatically in the last few decades. First, traditional oratory has given way to more effective presentations benefiting from the jury research that has been conducted over the last several years. Recent psychological and cognitive studies have shed valuable light on what it really takes to make persuasive arguments. We now understand that it takes significantly more than great speech-making to succeed as lawyers in the courtroom. Not coincidentally, we rely on demonstrative evidence now more than ever, but how are we leveraging new technology to ensure the quality of our demonstrative evidence?

At the same time, the medium of trial presentations has gradually shifted from an analog approach to a digital one. Laptop computers in the courtroom are now commonplace, if not expected, in the trial of most lawsuits. Experienced trial lawyers now rarely rely primarily on a blackboard or flip-charts as a platform for the presentation of evidence. Today's trial lawyer has inherited a vast body of research supporting the persuasive power of demonstrative evidence while, at the same time, having access to a wide variety of cutting-edge tools for creating impressive digital presentations that only a few years ago were reserved for professionals. And, while demonstrative evidence has always been a part of our trial process, the

Remember this when incorporating the iPad into your trial—it should not serve as your primary method of communication, but it should supplement your well-crafted story.

quality of demonstrative evidence available today is unmatched. At no time in history have trial lawyers been better equipped to make persuasive arguments. In short, advancements in technology now allow us to service our clients in ways that were impossible just a few years ago. We can now pull off image editing and video production on a small budget that was possible only in Hollywood a couple of decades ago.

Technology now makes it possible, indeed easier, to incorporate the kind of persuasive visuals we find so compelling when engrossed in an episode of *48 Hours* or *60 Minutes*. With an iPad, we all have the power of persuasion in the palm of our hands.

The Inherent Risks of Technology in The Courtroom

Any discourse on presentation technology focusing on the iPad would be remiss without a cautionary note about the potential pitfalls of using technology. Indeed, as the ABA puts it, there are

inherent risks involved in the incorporation of any new technology. We must be keenly aware of the risks in order to fully appreciate the benefits. Perhaps the risk we tend to focus on most is the risk of our trial technology simply not working at all; *i.e.*, the dreaded unexplained technological glitch. Indeed, that can and will occur, which is the reason we have a contingency plan in place as well as hardware and software backups readily available.

In my mind, however, the risk more worthy of discussion is that of a poor or ineffective use of an otherwise good technology. We can all buy the latest iPad and load it with the latest and best apps, but if we fail to make smart use of the apps in our presentation, it will fall flat. Our audience will not be persuaded and we would have been better off giving a simple opening statement without the aid of any technology whatsoever.

In some ways, the iPad actually makes it easier to badly try our cases. This occurs especially when we fail to carefully plan how to meet our trial story goals. The technology itself is just a means to that end; an iPad is not a Band-Aid to help fix an otherwise inept trial plan or otherwise poorly thought-out trial graphics. I'm reminded of a case my partner tried last year (not in Alabama), with opposing counsel reportedly so excited to use his iPad in trial that his focus was on its benefit to himself, while unfortunately ignoring how it was being perceived by the jury. In situations such as this, the technology becomes an obstruction to credibility and persuasion. We've now let an impersonal thing (*i.e.*, poor use of technology) come between our message and the audience. It is destructive and counterproductive. It also can lead to mistrust of your message. It is my view that, when used correctly, your technology (*i.e.*, iPad) should be almost invisible. The less visible your technology and hardware, the more the jury can properly focus on your message.

The Theory of Digital Trial Skills

When dialing in your iPad to your trial plan, I suggest you bear in mind all the lessons you've learned from cognitive science and juror research. I would submit that the most important lesson for trying lawsuits is found here, "not in Southern 2d," as one of the founding members of my law firm is fond of saying. More specifically, focus on using your iPad to help you perfect the art of storytelling. In this way, the technology disappears and we form a stronger connection to our audience.

We are all born with the capacity to tell and to understand stories. Stories have the capacity to resonate within our souls, to command our attention and to motivate action. Stories are deeply imbedded within our human DNA, but storytelling need not (and, I argue, should not) be all about oral communication. We can now leverage the iPad to tell more compelling stories than allowed by oral communication alone. At its core, storytelling allows us to make sense of the world. We all view life predominantly as a series of stories about ourselves, and others, whether we realize it internally or not. We find meaning in these stories and are constantly searching for new stories to add to our life experience. The narrative form is powerful because we are pre-programmed to receive information by stories. Indeed, "[t]he universe is made of stories, not of atoms."⁵

So, what does this all have to do with the iPad? The iPad allows us all to hold powerful digital stories in the palm of our hand. This is important, because visual stories trump oral stories. In addition, we are much more capable of remembering good stories than lists of facts, even if the same information is contained in each. The oral tradition of storytelling has been passed down from generations and dates back to the dawn of man. Nevertheless, our modern digital world allows us to

capture the best of what makes storytelling persuasive and package it in a new digital format. Our jurors are already accustomed to learning in the digital format, so why not reach out to them in the way they are most familiar?

In addition, the best oral stories take on renewed life when combined with well-designed digital media. Remember the old adage: "A picture is worth a thousand words." Though perhaps a worn-out expression, the chief idea is that visual images can quickly convey what it would take many pages of words to otherwise explain. For this reason, images are a powerful tool in the trial lawyer's arsenal. After all, humans were painting magnificent creations on cave walls long before we wrote down anything down in the form of words. Art—or the need for self-expression—like story-telling, resides deep in our psyche as human beings. While it is true that we think about and understand the world through stories, we also make sense of the world through images. Images provide a deeper, richer meaning to oral stories.

We are all inherently visual communicators. Consider kindergarten: crayons, finger paints and clay propelled our expression, not word processors or spreadsheets.⁶

The skilled trial lawyer must take advantage of both mediums to create visual stories. Visual stories are the most effective way to teach new information and also for the jury to learn and retain new information. Importantly, teaching and understanding come well before persuasion. Studies have shown that visual presentations are significantly more effective than oral-only presentations. The popular UM/3M study dating back 25 years concluded that "presentations using visual aids were found to be 43 percent more persuasive than unaided presentations."⁷ In addition, the audience's retention of information increased dramatically with visual aids coupled with oral presentations. Information retention, of course, is a precursor to persuasion. If the audience

cannot connect with your trial story, or remember your themes, you cannot be persuasive. Thus, to make the most out of any case, your presentation should be both oral and visual. Remember this when incorporating the iPad into your trial—it should not serve as your primary method of communication, but it should supplement your well-crafted story.

The Mechanics Of a Trial Presentation App

There are a handful of iPad applications that can be used as a platform for trial presentations or mediation presentations, some of which are specifically designed for the task, and others which can be adapted for trial or other presentation use.

TrialPad (\$90) was the first serious trial presentation app for the iPad, and perhaps still the best. It organizes your documents by case files, thus allowing multiple cases to be loaded at the same time. Since its debut, I've been in continued contact with the developer of this app, and he's always making improvements and adding valuable new features. While perhaps not quite on par with the laptop computer equivalent software, it's getting pretty close. Of course, there are also several advantages of using an iPad, rather than a cumbersome laptop computer.

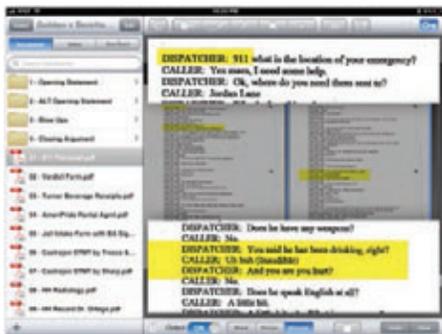


*It should be noted
that all trial
documents should
be carefully named
in a sequence that
allows both
searchability and
easy name
recognition.*

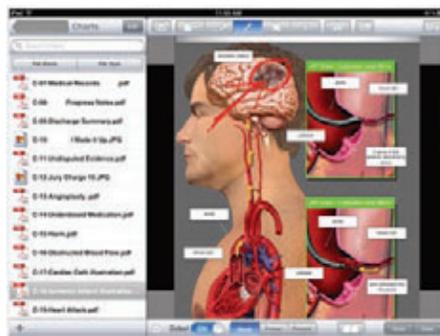
New cases are added from DropBox, an indispensable app for any iPad owner. For that reason, the vast majority of the document organization process is usually conducted outside the app—most likely on a personal computer with DropBox.

Once inside the application, you may (and should) create as many subfolders as necessary, but no more, (see sidebar on left) to organize your case documents. I find it helpful to organize subfolders for each phase of your trial story. You may have subfolders for the opening statement, each witness's direct examination, each witness's cross-examination and the closing argument. You may also wish to create subfolders for medical demonstrative aids, particular motions in limine or other discrete issues likely to arise during trial. When all is set up in the courtroom, you might as well take advantage of the technology and use it to argue important motions before the court with ease.

In this example, two pages of a document are displayed side-by-side with multiple call-outs and highlighting. While this process is not difficult, it is wise to pre-mark and save versions of key annotations for easy call-out during an opening statement or even while examining a witness. Of course, this may not always be possible during the course of a trial where the unpredictable sometimes seems a given; nonetheless, it is advisable to pick your key documents and pre-mark them in anticipation of your proof or rebuttal to your opponents proof.



The sidebar on the left shows documents and folders, while the document screen on the right previews precisely what is to be shown to the jury through your projector or monitor(s). Importantly, the input controls and switches are hidden from the jury so that the output contains only the relevant document displayed.



Showing a document to the jury merely involves the touch of a finger (Document C-18 in the example above). Zooming in on any portion of the document is simply accomplished with the traditional pinch of fingers on the iPad screen. It should be noted that all trial documents should be carefully named in a sequence that allows both searchability and easy name recognition. Whatever naming convention you

choose to use, you'll also want to be careful not to use long names as they will be cut off in the sidebar and hinder quick identification.

There are a handful of other great trial presentation apps available at varying costs. I encourage anyone headed to trial to download a couple of them and get a feel for what works best for you. I still like to load the apps I'm *not* planning to use as a backup, in case my primary app experiences a problem during trial.

Conclusion

There is a plethora of other trial-related tools and apps that may be employed in the modern trial. Three years after the debut of the iPad, we already have well-developed deposition related apps, note-taking apps, legal research apps and jury selection apps, just to name a few. There truly is an app for almost anything. Or, if there's not, there soon will be, as the app development business keeps rapidly expanding. With a little time and planning, an iPad can make a difference in your next trial, whether you choose to use it as your primary presentation tool or as a supplement to a more robust computer-based set-up. | AL

Endnotes

1. ABA Legal Technology Survey, *A Report from the Legal Technology Resource Center, 2012*.
2. ABA Legal Technology Survey, *A Report from the Legal Technology Resource Center, 2013*.
3. *The Tipping Point: How Little Things Can Make a Big Difference* (ISBN 0-316-31696-2) is a book by Malcolm Gladwell, first published by Little Brown in 2000.
4. August 2012 Amendments, *ABA Model Rules of Professional Conduct*, Rule 1.1, Note 8.
5. Muriel Rukeyser, *The Speed of Darkness* (1968).
6. Nancy Duarte, *Slide:ology* (2008).
7. *Persuasion and the Role of Visual Presentation Support: The UM/3M Study*, Vogel, Dickson, Lehman (1986).

Proposed Alabama Rules of Procedure for Expedited Civil Actions

The Alabama Supreme Court is considering adoption of the following proposed Alabama Rules of Procedure for Expedited Civil Actions and invites public comment. Comments should be submitted no later than February 7, 2013 and addressed to:

Julia Jordan Weller
Clerk, Alabama Supreme Court
300 Dexter Avenue
Montgomery, AL 36104

Rules

Rule A. Scope of Rules

These rules shall be known and cited as the “Alabama Rules of Procedure for Expedited Civil Actions.” These rules apply to civil cases in circuit court where the plaintiff(s) elects assignment of the case to an expedited track, pursuant to the Alabama Rules of Procedure for Expedited Civil Actions, and limits any damage recovery to a total of \$50,000, inclusive of interest, costs, and attorney fees whether provided by contract or statute. These rules shall not apply to workers’ compensation cases or to cases wherein no money damages are claimed. The rules are intended to secure the just and efficient determination of every case. The deadlines in the Expedited Scheduling and Discovery Order (Form 1) shall apply in every case unless amended by the circuit court for good cause shown. Under the Expedited Scheduling and Discovery Order, each defendant shall have until 45 days after filing an answer to request permission from the court to opt out of the expedited track. The court shall grant such permission upon good cause shown. Parties may jointly agree to opt into or out of the expedited process at any time. If a party chooses to opt out of the expedited track, the recovery of plaintiff(s) shall not be limited to \$50,000 as outlined above.

Rule B. Beginning the Case

A plaintiff seeking the application of these Rules of Procedure for Expedited Civil Actions shall conspicuously state on the face of the complaint a declaration whereby the plaintiff(s) elects assignment of the case to an expedited track pursuant to the Alabama Rules of Procedure for Expedited Civil Actions and limits the recovery of any damages claimed to an aggregate limit of \$50,000.

Rule C. Amendments and Additional Parties

Under the Expedited Scheduling and Discovery Order, plaintiff(s) shall file any amendments to the complaint or add any additional parties at least 90 days before the close

of discovery. If an additional party or claim is added by plaintiff(s), plaintiff(s) may opt the case out of the expedited track. If any defendant files a cross-claim, counter-claim or third-party claim in which the amount in controversy exceeds \$50,000, then that defendant or the party against whom the claim is alleged may opt the case or claims in excess of \$50,000 out of the expedited track.

Rule D. Discovery

Under the Expedited Scheduling and Discovery Order, all discovery shall be commenced so as to be completed within 120 days following the filing of the defendant’s answer to the complaint. If there are multiple defendants, the 120 days shall begin to run upon the filing of the last answer due after all defendants have been served. If service is not perfected upon one or more defendants, the plaintiff may dismiss any unserved defendant(s) and certify that all defendants have been served and have answered, in which case the 120 days begin to run upon such certification.

A party shall not propound more than 50 written discovery requests (inclusive of all interrogatories, requests for production, and requests for admissions) to any other party without leave of court. Upon motion, and for good cause shown, the court may increase the number of written discovery requests that a party may serve upon another party. For purposes of this limitation, (1) any subpart or separable question (whether or not separately numbered, lettered, or paragraphed) shall be considered a separate discovery request, and (2) the word “party” includes all parties represented by the same lawyer or firm. There is no limitation to the number of subpoenas that a party may issue to non-parties for the production or inspection of designated books, documents, electronically-stored information, or tangible things under Rule 45 of the Alabama Rules of Civil Procedure.

Each party shall be allowed to take one fact witness deposition, in addition to the depositions of the parties to the litigation. For purposes of this limitation, the word “party” includes all parties represented by the same lawyer or firm. Upon motion, and for good cause shown, the court may increase the number of fact witness depositions that a party may take. This limitation shall not apply to expert witnesses, including retained experts and treating physicians.

Rule E. Experts

Under the Expedited Scheduling and Discovery Order, plaintiff(s) shall provide expert information pursuant to Alabama Rule of Civil Procedure 26 at least 60 days before the conclusion of discovery. Defendant(s) shall provide Rule 26 expert information at least 30 days before the conclusion of discovery. Expert testimony, including testimony by treating physicians, shall be admissible at trial through

live testimony, deposition, affidavit, report, or letter; however, if a party plans to offer expert opinions through an affidavit, report, or letter, the party shall provide a copy of the expert writing that party plans to offer along with a curriculum vitae of the expert on or before the respective expert disclosure deadline. Under this rule, a party may prove the reasonableness and necessity of claimed medical expenses at trial through admission of an expert affidavit, report, or letter, provided that a copy of the expert writing is produced in accordance with the expert disclosure deadlines outlined above. If requested, experts shall be made available for deposition, although any reasonable expert fees and expenses for the time spent in preparing for the deposition and in attending the actual deposition shall be borne by the party requesting the deposition.

Rule F. Dispositive Motions

Under the Expedited Scheduling and Discovery Order, all dispositive motions shall be filed no later than 14 days after the close of discovery.

Rule G. Trial

When practical, the trial should be scheduled within 90 days following the completion of discovery. The court shall place a reasonable limit on voir dire. Each party may have up to three hours to present evidence, opening statement, and closing argument, which may be expanded by the court for good cause shown. For purposes of this limitation, the word “party” includes all parties represented by the same lawyer or firm. The amount of time allotted for each party includes the time that the party spends on cross-examination.

Notwithstanding the *Alabama Rules of Evidence*, documents and other exhibits, such as photographs, shall be deemed authentic without predicate unless the opposing party objects to authenticity in writing to the court no later than 14 days before the trial setting and the court determines there is a genuine question about authenticity.

If the case is a jury trial, the parties have the right to a jury panel of 12 competent jurors with the requirement of a unanimous verdict. The parties, however, are encouraged to stipulate to a jury of less than 12 in accordance with Rule 48 of the *Alabama Rules of Civil Procedure*.

Unless otherwise agreed by all parties, no plaintiff shall recover a judgment in excess of \$50,000, including interest, costs and attorney fees. The jury may neither be instructed nor informed of the \$50,000 limitation.

Rule H. Applicability of ARCP and ARE

The *Alabama Rules of Civil Procedure* and the *Alabama Rules of Evidence* shall apply to all matters not specifically addressed in these rules.

Committee Comments

Rule A.

A civil action that alleges purely equitable, non-money damage claims is not within the scope of these rules. In a multi-count complaint that contains some equitable counts and some legal, money-damage counts, these rules may apply if the amount of money damages sought is \$50,000 or less. If all parties who have appeared agree to opt in or opt out of the application of these rules to the action, a joint stipulation to that effect may be filed with the clerk and the court may not reject or disallow such stipulation. If all parties do not agree, then a motion must be filed and the movant has the burden of showing good cause for a change in track assignment.

Rule B.

To trigger the application of these rules, the *ad damnum* clause of the complaint must limit the damages claimed by plaintiff(s) to an amount of \$50,000 or less. The complaint must also elect assignment of the case to an expedited track, pursuant to the *Alabama Rules of Procedure for Expedited Civil Actions*. It is suggested that plaintiff(s) express some conspicuous statement in the caption or style of the complaint, such as, “Complaint for \$50,000 or Less pursuant to the *Alabama Rules of Procedure for Expedited Civil Actions*,” or “NOTE: Plaintiff limits the demand for and recovery of damages to \$50,000 or less and seeks application of the *Alabama Rules of Procedure for Expedited Civil Actions*.” For a complaint to comply with this rule, the staff of the circuit clerk’s office should be able to easily and non-ambiguously determine from the face of the complaint that the plaintiff intends to limit the demand to \$50,000 or less and seeks application of the *Alabama Rules of Procedure for Expedited Civil Actions*. Subject to some amended pleading or some action by the parties to “opt in,” a complaint that contains an open-ended *ad damnum* clause and merely claims something like “an amount to be determined by the trier of fact” is not initially assignable to an expedited track within the coverage of these rules.

Rule C.

In a multi-count and/or multi-party action, the complexity or the amount in controversy may render application of these rules inappropriate. Where new claims and/or parties are added (for example, a permissive counterclaim seeking more than \$50,000), the court may utilize the procedures of severance or separate trial in order to keep the original action within these rules and on an expedited track.

Proposed Alabama Rules of Procedure for Expedited Civil Actions

Rule D.

The discretion granted the trial court under this rule is intended to be similar to *Alabama Rule of Civil Procedure* 33, which provides that, “for good cause shown, the court may increase the number of interrogatories that a party may serve”

Rule E.

This rule is an exception to the *Alabama Rules of Evidence* in that a party may elect to present expert opinion evidence via an expert’s written report or affidavit, in lieu of deposition or live testimony. If otherwise admissible (e.g., deemed by the court to be relevant and admissible under Rule 702), this form of expert evidence is admissible, notwithstanding the hearsay objections that would otherwise apply.

Rule F.

The two principal types of dispositive motions contemplated herein are motions for summary judgment and Rule 12(b)(6) motions to dismiss.

Rule G.

The mechanism or method for keeping time is left to the trial court’s discretion. The parties are encouraged to stipulate to as many factual and evidentiary matters as possible, as well as streamline the trial process by limiting the number of live witnesses. One intent of this rule is to relax the ordinary principles of authenticity so that a party can offer into evidence such items as photographs, medical records, computer print-outs, and other documents without deposing or calling as a trial witness the custodian or maker of the record, unless the opposing party can prove to the court that there is some genuine issue about the authenticity of the document or item of evidence. The parties are also encouraged to stipulate to a jury of less than 12 jurors, in light of the potential cost savings and conservation of court resources.

A party may argue to the jury for a verdict amount in excess of \$50,000, and these rules do not prohibit a jury from returning a verdict in excess of \$50,000. However, unless all parties have agreed that the plaintiff is not bound by the \$50,000 limitation, the court may not enter a judgment for the plaintiff in excess of \$50,000. So, for example, if a jury returns a verdict in plaintiff’s favor for \$70,000, the court would enter judgment for \$50,000.

“Plaintiff(s)” does not include defendants who file counter-claims, cross-claims or third-party claims for damages in excess of \$50,000 as addressed in Rule C.

Rule H.

If a point of procedure or evidentiary law is addressed by these rules, then these rules apply. If these rules are silent

on the point in question, then the general *Alabama Rules of Civil Procedure* and *Alabama Rules of Evidence* and other applicable rules, statutes, or case law shall control.

In the Circuit Court of _____ County, Alabama
[NAME],)
)
Plaintiff(s),)
)
v.) CIVIL ACTION NO.
) CV _____
[NAME],)
)
Defendant(s).)

Expedited Scheduling And Discovery Order

This case has been assigned to the expedited trial track, at the election of plaintiff(s), and, thus, any recovery by plaintiff(s) shall be limited to \$50,000, inclusive of interest, costs, and attorney fees as long as this case remains on the expedited track. The following deadlines and discovery requirements shall apply in this case unless good cause is shown by a party for amendment thereto:

1. All discovery shall be commenced so as to be completed within 120 days following the filing of defendant’s answer to the complaint. If there are multiple defendants, the 120 days shall begin to run upon the filing of the answer of the last-served defendant.
2. Each defendant shall have until 45 days after filing an answer to request permission from the court to opt out of the expedited trial track.
3. A party may propound no more than 50 written discovery requests (inclusive of all interrogatories, requests for production, and requests for admissions) to any other party without leave of court. For purposes of this limitation, (1) any subpart or separable question (whether or not separately numbered, lettered, or paragraphed) shall be considered a separate discovery request, and (2) the word “party” includes all parties represented by the same lawyer or firm. There is no limitation to the number of subpoenas that a party may issue to non-parties for the production or inspection of designated books, documents, electronically stored information, or tangible things under Rule 45 of the *Alabama Rules of Civil Procedure*.

Proposed Alabama Rules of Procedure for Expedited Civil Actions

4. Each party shall be allowed to take one fact witness deposition, in addition to the depositions of the parties to this litigation. For purposes of this limitation, the word “party” includes all parties represented by the same lawyer or firm. This limitation shall not apply to expert witnesses, including retained experts and treating physicians.
5. Plaintiff(s) shall file any amendments to the complaint or add any additional parties at least 90 days before the close of discovery.
6. Plaintiff(s) shall provide Rule 26 expert information at least 60 days before the conclusion of discovery. Defendant(s) shall provide Rule 26 expert information at least 30 days before the conclusion of discovery. Expert testimony, including testimony by treating physicians, may be admissible at trial through live testimony, deposition, affidavit, report, or letter; however, if a party plans to offer expert opinions through an affidavit, report, or letter, the party shall provide a copy of the expert writing and any curriculum vitae that party plans to offer on or before their respective expert disclosure deadline. A party may offer evidence regarding the reasonableness and necessity of claimed expenses for medical care, treatment, and services at trial through admission of an expert affidavit, report, or letter, provided that a copy of the expert writing is produced in accordance with these expert deadlines. If requested, experts shall be made available for deposition, although any reasonable expert fees and expenses for the time spent in preparing for the deposition and in attending the actual deposition shall be borne by the party requesting the deposition.
7. All dispositive motions shall be filed no later than 14 days after the close of discovery. Other motions, including motions in limine, shall be filed no later than seven calendar days before the trial setting.
8. No later than 30 days before the trial setting, the parties shall exchange (a) a list of all witnesses (including names and addresses) they intend to call at trial, (b) the names and addresses of those witnesses whose testimony the party expects to present by deposition, (c) the names and addresses of any expert witnesses whose testimony or opinions the party plans to present through an affidavit, report, or letter, and (d) a list of all exhibits they intend to offer into evidence at trial. At trial, the parties may use excerpts from depositions, including video depositions, regardless of where the deponent lives or whether the deponent is available to testify. Objections to any exhibits, witnesses or deposition

testimony shall be filed and served no later than 14 days before the trial setting.

9. The parties will make available for inspection and copying, at a designated location within Alabama no later than 30 days before the trial setting, all photographs, bills, statements, or other exhibits they intend to introduce into evidence, whether in possession of counsel, client, or witness, and they will be deemed authentic without predicate unless the opposing party objects in writing to the court no later than 14 days before the trial setting and the court determines there is a genuine question about authenticity. Objections, including objections to authenticity, should be made only if there is a genuine issue.
10. This case is scheduled for trial on _____, 20____, at _____ a.m./p.m. The court will place a reasonable limit on voir dire and allow each party up to three hours to present evidence, opening statement, and closing argument, which may be expanded by the court for good cause shown. For purposes of this limitation, the word “party” includes all parties represented by the same lawyer or firm. The amount of time allotted for each party includes the time that the party spends on cross-examination. The parties are encouraged to stipulate to as many factual and evidentiary matters as possible, as well as encouraged to streamline the trial process by limiting the number of live witnesses.
11. If this case is a jury trial, any verdict shall be a unanimous verdict, and the parties have the right to a jury panel of 12 competent jurors, in accordance with Rule 47 of the *Alabama Rules of Civil Procedure*. The parties, however, are encouraged to stipulate to a jury of less than 12 jurors, and the court suggests that the parties stipulate to a jury of six regular jurors selected from a list containing the names of at least 12 competent jurors. The court may also direct that alternate jurors be called and impaneled, and, if such alternate jurors are called, the parties shall be entitled to strike from a list containing the names of three competent jurors for each alternate juror required, in addition to at least 12 competent jurors required for a panel of six regular jurors, unless the parties agree otherwise.

DONE AND ORDERED, this _____ day of _____, 20_____.

Circuit Court Judge



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

ALABAMA STATE BAR

FALL 2013 Admittees

STATISTICS OF INTEREST

Number sitting for exam	487
Number passing exam (includes 12 MPRE-deficient examinees).....	359
Number certified to Supreme Court of Alabama.....	347
Certification rate*	71.3 percent

CERTIFICATION PERCENTAGES

University of Alabama School of Law.....	96.7 percent
Birmingham School of Law	40.3 percent
Cumberland School of Law	84.3 percent
Jones School of Law.....	96.9 percent
Miles College of Law	9.4 percent

**Includes only those successfully passing bar exam and MPRE*
For full exam statistics for the July 2012 exam, go to
<http://www.alabar.org/admissions/files/stats0712detail.pdf>.

ALABAMA STATE BAR
FALL 2013
Admittees

Albright, Autumn Leanne
Alexander, Tia Nicole
Allgood, Megan Kay
Alverson, III, William Bruce
Andreen, Christina Margaret
Andrews, Holly RaeAnn
Bader, Madeline Krontiras
Bains, Erin Abigail
Ballentine, Bridget Michelle
Barnes, Mary Alison
Barrineau, Charles Reid
Bates, Kathryn Brooke
Bauder, April Edwards
Baumhauer, IV, John Daly
Beaton, IV, Ernest Linwood
Beaver, Mary Sharon
Bell, Paul Stanley
Benefield, Caroline Hughes
Bennett, Charlotte Pool
Bergman, Jacob Edward
Berns, Jahan Nkwanga
Bevis, Jared Lance
Blackburn, Robert Lovelace
Blair, Elizabeth Lyn
Blankenship, Jennifer Lynn
Bledsoe, Robert William
Bolden, Brina Ilona
Bolton, John Edward
Bone, Samuel Dani
Bonham, Jennifer Lynn
Bowen, Shana Brooke
Bowers, Anna Kathleen
Boyd, Jessica Kelley
Bradstreet, Ronald Chase
Britt, Katherine Emily
Britt, Katie Boyd
Brooks, Judson Ryan
Broome, Zachary Tyler
Brown, Andrea Hope
Bruns, Griffin Daniel
Bryan, Sarah Elizabeth
Bunt, David William
Burchell, Adam Brandon
Burgess, Brittany Nicole

Burns, Christine Nicole
Burnum, Elisa Jean
Cabell, Kennedy Louise
Caldwell, Joel Thomas
Campbell, Elizabeth Rawdon
Caradonna, Aaron Christopher
Cardin, Rebecca Shannon
Carroll, Emily Margaret
Carter, Kasey Mitchell
Cash, Michael Joseph
Caudell, Alexander Banks
Causby, William Wesley
Chang, Carl Ming
Charles, Ryan Thomas
Childs, Sharonda Donje
Chupp, Christina Anne
Chynoweth, Brad Alan
Clark, Dru Lauren
Clark, Katherine Elizabeth
Clark, Sarah Henson
Cobb, Jeremy Dale
Coffman, III, Wilson Burton
Colbert, Timothy Corey
Coleman, David Matthew
Collins, Emily Blake
Cotten, Thomas Graham
Craddock, Calida Joy McCampbell
Crittenton, Adrian Rashad
Crow, Emily Allison
Crowe, III, Bennie Earl
Culwell, Jonathan Ray
Cureton, Justin Blake
Daley, Catherine Anne
Darnell, Christina McClendon
Davis, Jordan Blankenship
Davis, Kacey Dunn
Davis, William Taylor
Dean, Shane Michael
Dearth, Megan Hudson
Deason, David Edwin
Dees, II, Alford Jerome
DeFoor, Steven Kyle
DeLap, Lauren Elizabeth
DeMarco, Brian Fredrick

Dennis, Charles Lloyd
Dixon, III, Sam Perry
Doblar, Patricia Ann
Dodson, Michael Ryan
Doman, Patrick Lyle
Donald, Moshae Elise
Donovan, Christopher James
Dunavant, Lauren Daly
Dunn, Elizabeth Ann
Dupree, LaTonya Johnson
Earley, Blake French
Ebersbach, Kurt David
Ebrahimi, Nazanine Victoria
Eckinger, Helen Lynne
Edinger, Matthew Scott
Edwards, Keli Ri-Charde
Elliott, III, George Bondurant
Elmes, Thomas Edward
Elrod, William Roper
Emmons, Carl Joseph
Engelhardt, Todd David
Estes, Chase Elliot
Evans, Elizabeth Prather
Evans, IV, Jesse Price
Evans, Kimberly Anne
Fargason, Justin Tyler
Ferguson, James Robert
Fichtner, John David
Findley, Kenneth Baker
Fontana, Kimberley Christine
Fosson, Jane Ann
Frederick, Scott Steven
Gay, Tiphani Strickland
Gewin, Walter Rody
Gillis, Mariam
Gisi, Jennifer Stubbs
Givan, Shardaue Juanice
Givens, Chase Hamilton
Givens, Jessica Kramer
Gleason, Thomas Edward
Godsey, Jamerson Cory
Godwin, John Warren
Graffeo, Blair Henderson
Graugnard, Angela Giglio

Gray, III, John Merrill
Gray, Paul David
Gray, Scott Alan
Guin, John Caldwell
Gullatte, Samuel Mark
Hagood, John Harrison
Hahn, Harold Patrick
Hall, John Bryant
Hall, Kevin Michael
Hall-Wright, Lakitia Monique
Hampton, Jr., Leon
Hanrahan, Shane Padget
Hardy, Ryan Geoffrey
Harris, II, Gregory Lamar
Harris, Hugh Blackwell
Hartley, Sr., Davis Brian
Hatcher, Jessica Anne
Hawthorne, Charles Earl
Hayes, Allen Michael
Hayes, Tracey Katrina
Heidger, Ashley Victoria
Hein, Vernon Paul
Hellums, Emilee Tanner
Hewitt, Graham Wright
Hicks, Kerra Killingsworth
Hill, Heather Robertson
Hoffman, Warren David
Holtsford, III, Alex Lafayette
Horne, Charles Jefferson Berkel
Hosford, Holly Sarah
Hoskins, Erin Marie
Hughey, Lindsey Ray Johnson
Hurt, Lindsay Schafer
Ingalls, Johnna Kay
Ireland, Lesley Coleman
Issis, Odeh John
Jackson, Sidney Monroe
James, Amanda Lauren
Janich, Brett Alexander
Jefferson, Christopher Dee
Jepkembai, Grace
Johnson, Leon Kevin
Johnson, Tenee' Rochelle
Jolly, Samantha Kathleen

Jones, Bryant Wheeler
Jones, Justin Louis
Jones, Robert Bryan
Jones, Robert Andrew
Kahn, Stephen Andrew
Keel, David Anand
Kelley, Jessica Dylan
Kelley, Stephen Matthew
Kines, Julie Melissa
King, Christopher Norwood
Kober, Kaitlin Stollbrink
Kolen, Jr., John Michael
Krombach, Michael Patrick
Lahr, Hanna Blair Perry
Lassiter, Korinne Starr
Last, Stephen Harold
Lawrence, Kayla Sharda
Lee, Michael Bryan
Leverton, John Daniel
Levinson, Allison Linick
Livingston, Avery Corinne
Logan, Jamie Mae
Long, Christopher Michael
Lord, III, Leven Drew
Love, William Thompson
Lovett, Alan Dale
Lowe, Jessie Edward
Lumpkin, Evelyn Hope
MacLachlan, Catherine Ann
Mangold, Mallory Jordan
Mannor, Michael Louis
Marron, Michele Polk
Martin, Claire Foster
Martin, Joseph Ryne
Martin, Rachel Stewart
Martin, Sarah Wood
Mason, Alexander Boyd
Mason, Jr., Victor Chad
Massey, Matthew Carleton
McCauley, Tyler Burton
McCollum, Maegan Ashley
McCorquodale, III, Ernest Chester
McDonald, Yawanna Nabors
McKean, Rory Mahlon
McKenzie, Scott Lawrence
McNaylor, Mitchell Dirk
Meador, Hillary Claire Herron
Mendez, Louis Frank
Merrell, III, Edward Armfield
Merritt, Lowell Dustin
Messer, Christopher Ray
Mest, Laura Beck
Metzger, Kenneth Albert
Mickle, Collin Ross
Milam, Joshua Clinton
Miller, Carlyn Emily
Miller, Douglas Grayson
Miller, Rachel Loreth
Milling, Jessica Alisha
Mitchell, Matthew David
Mollica, Jr., Tony Paul
Montalvo, Gabriel
Montgomery, Wyatt Perry
Mooney, Leigh Garner
Moore, Effie
Morrison, Brian Douglas
Mulligan, Patrick Joseph
Mullins, Robert Bruce
Munagala, Pavan Reddy
Murphy, Laura Ward
Muse, Seth Ian
Myers, William Ryan
Nadeau, Lindsay Ann
Nair, Anjali Jayanand
Naramore, John Wesley
Navarro, Kyle Steven
Nedospasova, Victoria Viktorovna
Nelson, Elizabeth Christian
Nelson, Patrick Lahan
Nichols, Evan Hunter
Nichols-Gault, Allison Lynne
Nkengla, Pascal Mbuh
Noel, Bryce Robert
Norgard, Ashley Lowe
Norton, Edward Joshua
Odesnik, Darren Errol
Oswalt, William Whitney
Outlaw, Sarah Blakely
Owens, Claire Catherine
Padgett, Alyssa Barrett
Pantazis, Patrick Lee
Papaioannou, Mary Kathryn
Parker, Adam Eugene
Parker, Matthew John
Parker, Thomas Brannon
Parmer, Lance Willis
Parris, Amber Fay Murphy
Parrish, Trevor Watson
Patterson, Maria Justine
Pattillo, Katherine Elizabeth
Pelton, Meredith Lindsey
Perkinson, Carla Kathleen
Pescia, Leslie LeeAnn
Peterson, Breana Renea
Peterson, Jamiel Jontae
Phillips, Crystal LeAnne
Phillips, Lacey Gaston
Phillips, Sherry Denise
Phillips, Steven Andrew
Pilgrim, Jessica Yvonne
Pinkard, Mandy Lynn
Pipes, Gregory Berlin
Pope, Preston Taylor
Porter, Ashley Elyse
Prince, Jeremy Wayne
Pritchard, IV, William Shelton
Putman, Amanda Jeannine
Rainbolt, Tiffany Parrish
Rand, Paul Hartmann
Rankin, Devon Kehres
Rasbury, Meredyth Whitney
Rayburn, Nicholas McCullough
Reynolds, Jennifer Machele
Rich, James Daniel
Riopka, Ashlee Dee
Robertson, John Curry
Robinson, Christina Lee
Rogers, Brantley Trayce
Rogers, Margaret Loving
Ross, Ashley Marie
Ross, Tessa Elizabeth
Rucks, Amanda Louise
Rudakas, Jason Edward
Rutledge, II, Joseph Henry
Saucer, Garrett Jackson
Scarborough, Jarot Hunt
Schiff, Julie Michelle
Schwebke, Emily Claire
Scott, Atoyia Antoinette
Seitz, Jay Andrew
Setterstrom, Jeffrey Patrick
Shah, Vishal Hemchandra
Shamburger, Susan Emily
Sharper, Isadore Martinez
Shashy, John Charlton
Shaver, Andrew James
Shugart, Jr., Jonathan Larmore
Siegelman, Joseph Jay
Simpler, III, Miland Fredrick
Simpson, Lenae Spain
Siniard, Thomas Barton
Smith, Joshua Mark
Spann, Catherine Simon
Speake, Catherine Jordan
Speegle, Clinton Timothy
Speir, Kelly Renee
Steele, William Bradley
Stephens, Samuel Carlton
Stevenson, William Edward
Stewart, Gregory Dain
Stokes, Freddie Demetrius
Sumlin, III, Burl Quinn
Surasky, Charles W.
Sutherlin, Christine Elizabeth
Tanner, James Curtis
Tarbox, James H.
Taylor, Cassie Elizabeth
Tedford, Brittany Dawn
Teel, Al Foster
Thompkins, Kathryn Elyse
Thompson, Cline Davis
Thornton, Lauren Elizabeth
Torbert, Whitney Hannah
Uemura, William Kennedy
Ufomadu, Evelyn Chidinma
Ventress, Daniel Thomas
Vinson, Christopher Eric
Vinson, Davis Paul
Waddell, Nicholas Cole
Waddell, Spencer Pace
Wade, Walter Andrew
Walker, Caroline Dye
Walker, Robert Sewell
Waller, IV, William Chambers
Walls, Roderick Livingston
Walterscheid, Wesley Shawn
Ward, Reilly Katheryne
Ware, Dargan Maner
Warren, Sr., Cornelious Dewayne
Warriner, Amanda Dawn
Watters, Elizabeth Lacy
Webb, Joseph William
Welsh, Cecily Marie
West, Jacob Samuel
West, John Kirby
West, William Carey
Westry, Briana Cashaye
Whatley, John Reynolds
Wheale, Patrick John
Wheeler, Mary Claire
White, Robert Vardaman
White, Samuel Morgan
Wiggins, Olivia Chilton
Williams, Earlisha Shante'
Williams, Robert Kyle
Williams, Stephen Chase
Willingham, Zane Lee
Willis, Lashanda Jamila
Woodard, Olivia Rachele
Woods, Samuel Green
Worshek, DeWanna Sims
Yarbrough, Nancy Bereckis
Yeager, Michael Scott
York, Jamee Irene

LAWYERS IN THE FAMILY



1. Chase Givens (2013), **Jessica Kramer Givens** (2013), **John Givens** (2011), **Keith Givens** (1981), **Joe Lane** (1991), and **Larry Givens** (1993)
Brother-in-law/sister-in-law co-adoptees, brother/husband, father/father-in-law, uncle, and cousin



2. William B. Alverson, III (2013) and **William B. Alverson, Jr.** (1986)
Admittee and father



3. Ashley Porter (2013) and **Dave Porter** (2007)
Admittee and father



4. Mariam Gillis (2013), **H. Lewis Gillis** (1977), **Judge Anita Kelly** (1991) and **Kristen J. Gillis** (2012)
Admittee, uncle, cousin and cousin

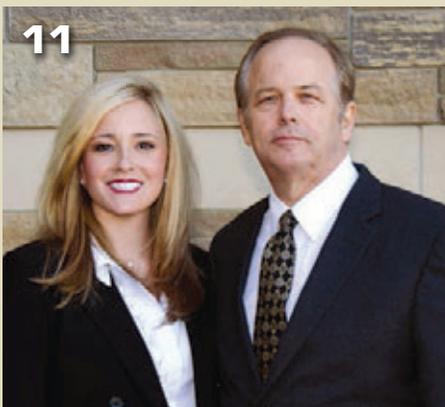


5. Kimberly Anne Evans (2013) and **Jennifer Leigh Evans** (2012)
Admittee and sister



6. Julie Schiff (2013) and **Gary Schiff** (1983)
Admittee and father

LAWYERS IN THE FAMILY



7. Kathleen Bowers (2013), Sally Bowers (1983) and Clark Bowers (2010)
Admittee, mother and brother

8. Preston Taylor Pope (2013), Patrick Bruce Pope (1977) and Deborah Gattis Pope (1981)
Admittee, father and mother

9. Wyatt Perry Montgomery (2013) and Judge Charles Robert Montgomery (1982)
Admittee and father

10. Garrett Jackson Saucer (2013) and Susan G. James (1987)
Admittee and mother

11. Hannah Torbert (2013) and Whit Torbert (1980)
Admittee and father

12. Mary Claire Wheeler (2013) and Othni Lathram (2000)
Admittee and cousin

13. Jesse Price Evans, IV (2013); Jesse Price Evans, III (1979); Martin W. Evans (2012); and Dawn Stithe Evans (1998)
Admittee, father, brother and step-mother

LAWYERS IN THE FAMILY



14. Alex L. Holtsford, III (2013),
Alex L. Holtsford, Jr. (1985) and
Ronald L. Holtsford (1999)
Admittee, father and uncle

15. Miland Simpler (2013),
Fred Simpler (1982) and
Sarah Simpler Glover (2011)
Admittee, father and sister

16. John R. Whatley (2013) and
Dean James Bushnell (1981)
Admittee and uncle

17. Sam Bone (2013) and
Dani Bone (1996)
Admittee and father

18. Roderick Livingston Walls (2013)
and Roderick Walls (1992)
Admittee and father

19. Alford Jerome Dees, II (2013) and
Alford Jerome Dees (1995)
Admittee and father

20. Charles E. Hawthorne (2013);
Raymond J. Hawthorne, Sr. (1981);
Frank H. Hawthorne, Jr. (1979);
Raymond J. Hawthorne, Jr. (2010);
Alison D. Hawthorne (2010); and
Frank H. Hawthorne, III (2012)
*Admittee, father, uncle, brother,
sister-in-law, and cousin*



LAWYERS IN THE FAMILY



21. John Edward Bolton (2013) and W. Donald Bolton, Jr. (1978)
Admittee and father

22. Kathryn Brooke Bates (2013), Tasha Brock Bates (1983), Walter W. Bates (1981) and Reed R. Bates (1994)
Admittee, mother, father and uncle

23. Blair H. Graffeo (2013) and Judge Michael G. Graffeo (1979)
Admittee and father

24. Cline Thompson (2013) and Glenn Thompson (1978)
Admittee and father

25. Calida Joy McCampbell Craddock (2013) and Judge John H. England, Jr. (1974)
Admittee and uncle

26. Gregory Lamar Harris, II (2013) and Gregory L. Harris (1987)
Admittee and father

27. Jessica Pilgrim (2013), Jerry Pilgrim (1972), Carl Pilgrim (1973) and Bob Kracke (1965)
Admittee, father, uncle and uncle

LAWYERS IN THE FAMILY



28. John Merrill Gray, III (2013), Ginger Carroll (2007) and David Carroll (1980)
Admittee, fiancée and future father-in-law

29. Robert Walker (2013), George Walker (1977) and Marion Walker (1976)
Admittee, father and aunt

30. William Whitney Oswalt (2013), Cheryl Howell Oswalt (2006), R. Wyatt Howell (1987), Ronald Strawbridge, Jr. (2000), and Audrey Oswalt Strawbridge (2000)
Admittee, wife, father-in-law, brother-in-law, and sister

31. Thomas Barton Siniard (2013) and Thomas H. Siniard (1980)
Admittee and father

32. Daniel T. Ventress (2013) and William T. Ventress, Jr. (1981)
Admittee and father

33. Elizabeth Campbell (2013) and James M. Campbell (1966)
Admittee and father

34. Ernest C. McCorquodale, III (2013) and William F. McCorquodale, II (2012)
Admittee and brother



LAWYERS IN THE FAMILY



35. Barney Lovelace (1983), Joe Blackburn (1974), **Bob Blackburn** (2013), Judge Sharon Blackburn (1977), and Robert Norman (2011)
Uncle, father, admittee, mother, and cousin

36. **Jack K. West** (2013) and Kim West (1983)
Admittee and mother

37. **Will Coffman** (2013) and J. Robert Miller (1957)
Admittee and grandfather

38. **Joseph Henry Rutledge, II** (2013) and William Eugene Rutledge (1963)
Admittee and father

39. **John Guin** (2013), Hon. J. Foy Guin, Jr. (1947) and David Guin (1985)
Admittee, grandfather and father

40. **Catherine Simon Spann** (2013) and David A. Simon (1982)
Admittee and father



Wilson F. Green

By Wilson F. Green

Wilson F. Green is a partner in Fleenor & Green LLP in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.

By Marc A. Starrett

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



Marc A. Starrett

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Uninsured Motorist; Ripeness

***Ex parte Safeway Ins. Co.*, No. 1120439 (Ala. Oct. 4, 2013)**

Insured suffered injuries in accident with phantom vehicle. Insured sued insurer for UM benefits arising from accident, alleging bad faith and breach of contract claims. Insurer moved to dismiss the case for lack of subject-matter jurisdiction, arguing that a claim for uninsured-motorist benefits is not ripe for adjudication until liability and damages have been established. Trial court denied the motion, and insurer petitioned for mandamus only as to the bad-faith claim. The supreme court denied the writ, reasoning that although *Pontius v. State Farm Mutual Automobile Insurance Co.*, 915 So. 2d 557 (Ala. 2005), stands for the proposition that no bad faith claim arises for failure to pay UM until the fault of the tortfeasor is established, that is an issue of the merits of the claim, not the subject-matter jurisdiction of the trial court to adjudicate the claim. The majority concluded that if the insured "cannot establish the fault of the phantom driver, then he cannot prove bad faith and, accordingly, Safeway may prevail on a Rule 12(b)(6) motion to dismiss." Justices Stuart, Shaw and Bolin dissented, arguing that under *Pontius*, the bad-faith claim should be dismissed without prejudice as unripe.

Family Law; Post-Minority Educational Expenses

***Ex parte Christopher*, No. 1120387 (Ala. Oct. 4, 2013)**

In a plurality opinion, the court overruled *Ex parte Bayliss*, 550 So. 2d 986 (Ala. 1989), in which the court had interpreted § 30-3-1, *Ala. Code* 1975, as authorizing a trial court in a divorce proceeding to require a noncustodial parent to pay college expenses for children past the age of majority. The court held that the statute does not authorize the requiring of such payments. The court specifically applied its holding only prospectively.

Class Actions; Substitution of Representative

***Alabama Mut. Ins. Co. v. City of Vernon*, No. 1110738 (Ala. Oct. 11, 2013)**

After class was certified, AMIC appealed. While case was on appeal, Vernon settled Vernon's individual claim. AMIC then sought remand with instructions that the trial court dismiss the action, because the representative's claims had been released and dismissed. The supreme court held that under *Corbitt v. Mangum*, 523 So. 2d 348, 351 (Ala. 1988), once the class is certified, the class acquires a separate legal status from the representative, and, thus, remand was appropriate for trial court to consider substitution of representatives.

Rule 54(B)

***Pavilion Development LLC v. JBJ Partnership*, No. 1110791 (Ala. Oct. 11, 2013)**

The court dismissed a Rule 54(b) appeal in a redemption action with a long and tortured procedural history, holding that the remaining claims were intertwined with the claims subject of the appeal because redemption issues cannot be adjudicated in a piecemeal fashion.

Election Law; First Amendment

***State Superintendent of Education et al. v. Alabama Education Association*, No. 1110413 (Ala. Oct. 25, 2013)**

The AEA and other parties filed an action in federal district court, challenging the constitutionality of legislation designed to curtail payroll-deduction contributions to the AEA. After preliminary injunctions and appeals, the Eleventh Circuit certified the following questions to the Alabama Supreme Court concerning the construction of the law in issue: "1. Is the 'or otherwise' language in the [Act] limited to the use of state mechanisms to support political organizations, or does it cover all contributions by state employees to political organizations, regardless of the source?" and "2. Does the term 'political activity' refer only to electioneering activities?" (The Eleventh Circuit's opinion stated that aiming at activities beyond pure "electioneering" would likely be unconstitutional.) The supreme court answered the certified questions as follows: 1. The "or otherwise" language in the Act is limited to the use of state mechanisms to make payments to organizations that use at least some portion of those payments for political activity; and 2. The term "political activity" is not limited to electioneering activities, i.e., activities undertaken in support of candidates for elected offices.

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State-Agent Immunity

***Ex parte Coleman*, No. 1120873 (Ala. Oct. 25, 2013)**

Police officer's car entered intersection while responding to emergency call, making sporadic "yelp" of siren, then exited intersection. Plaintiff's vehicle struck fire vehicle traveling behind police car. Plaintiff sued police officer and others. Police officer claimed peace-officer and state-agent immunity. Circuit court denied summary judgment on the basis that officer was not "making use of an audible signal," as that term is defined in *Ala. Code* § 32-5A-7, because officer did not make continuous use of the siren of the police vehicle he was driving. The supreme court granted mandamus relief to officer, reasoning that the statute does not require "continuous" use of the siren.

New Trial; Discretion of Trial Court

***Mottershaw v. Ledbetter*, No. 1101959 (Ala. Nov. 8, 2013)**

Held: trial court acted within its discretion in ordering a new trial of medical malpractice action, where trial court had granted motion *in limine* to exclude certain evidence, but where certain testimony was elicited and exhibits improperly unredacted so as to expose jury to the subject of the ruling *in limine*.

Fraud; Suppression; Commercial Transactions; Punitive Damages

***CNH America LLC v. Ligon Capital LLC*, No. 1111204 (Ala. Nov. 8, 2013)**

This is a complex commercial fraud case generally concerning a claim for fraudulent suppression, on which the jury returned a verdict for plaintiff of \$3.8 million compensatory and \$7.6 million punitive damages. The supreme court affirmed the judgment for plaintiff.

The Claim: The gravamen of Ligon's and HTI's fraudulent-suppression claims was that CNH decided in approximately September 2007 to replace HTI as a supplier of cylinders, and then fraudulently suppressed that fact from Ligon and HTI for approximately eight months, inducing them to take actions and expend funds in an impossible attempt to foster an ongoing relationship between HTI and CNH.

Duty to Disclose: To determine whether a duty to disclose arose, the court used the test from *Freightliner LLC v. Whatley Contract Carriers LLC*, 932 So. 2d 883, 892 (Ala. 2005), under which in a commercial transaction involving arm's-length negotiations, the parties have no general obligation to disclose any specific information to the other, but each has an affirmative duty to respond truthfully and accurately to direct questions from the other. Thus, whether CNH had a duty to disclose to Ligon and HTI, before May 2008, that it had decided to terminate its relationship with HTI depended on (1) whether Ligon and HTI ever asked CNH direct questions regarding the status of HTI's ongoing relationship with CNH and (2) whether CNH truthfully and accurately answered any such questions. The court held there was sufficient evidence for the jury to determine that Ligon articulated with 'reasonable clarity' its question, and that the answer provided was cleverly worded half-truths. Even under *Freightliner*, "once a party elects to speak, he or she assumes a duty not to suppress or conceal those facts that materially qualify the facts already stated." The evidence supported the conclusion that the decision had already been made to replace HTI, and, thus, statements to the effect that CNH was "committed" to HTI were not fully and fairly disclosing.

Failure to Preserve a JML Issue: The court also held that CNH failed to properly raise entitlement to JML as to the claims of Ligon (as opposed to and distinguished from its subsidiary HTI) because the JML at the close of all evidence lumped the claims into one, and did not specifically articulate a separate request as to the claim of Ligon.

Reliance: In holding there was sufficient evidence of reliance, the court dropped an important footnote about the effect of disclaimers on reliance issues, so commonly an issue in fraud cases:

"CNH emphasizes that its forecasts always included a disclaimer indicating that they were not binding. However, we must view the evidence in the light most favorable to Ligon and HTI and entertain such reasonable inferences as the jury would have been free to draw. . . . The jury certainly could have concluded that Ligon and HTI reasonably understood the forecasts to be good-faith estimates of future orders, subject to change based on CNH's customer requirements—not false projections CNH had no intention of using HTI to fill. Although the disclaimer on the forecasts might

defeat a breach-of-contract claim, Ligon and HTI are not arguing breach of contract here."

Punitive Damages: The court rejected each of the punitive damage challenges of CNH. First, CNH first argues that no punitive damages are warranted because, it argues, Alabama has no interest in punishing CNH, an Illinois corporation, for harm caused to HTI, an Ohio company. The court rejected that challenge on the basis that Ligon (an Alabama-based company) was purportedly harmed as well, and CNH failed to preserve for appeal issues relating to liability running to Ligon. The court also upheld the 2:1 punitive damage verdict in light of the evidence, which supported a finding that defendant acted consciously.

Wrongful Death; Breach of Warranty

Alabama Powersport Auction LLC v. Wiese, No. 1120007 (Ala. Nov. 8, 2013)

Wiese bought go-cart through APA (an auctioneer dealing in power equipment) which FF had manufactured and consigned. Several years later, Wiese's minor son had accident, leading to his eventual death. Wiese sued APA for wrongful death based upon an implied warranty theory under UCC 2-314 and 2-315. APA moved for summary judgment, arguing (1) that under *Geohagan v. General Motors Corp.*, 279 So. 2d 436 (Ala. 1973), a wrongful death claim cannot be based in implied warranty, and (2) APA was an auctioneer and not a merchant or seller under UCC Article 2. Wiese countered that *Geohagan* was overruled by *Sledge v. IC Corporation*, 47 So. 3d 243 (Ala. 2010). The circuit court denied the motion but certified the issue under Rule 5. The supreme court reversed in relevant part, holding (1) that *Sledge* does not overrule *Geohagan* and a breach-of-warranty claim cannot be maintained under Alabama's wrongful-death statute, but (2) an auctioneer dealing in a specific kind of goods (in this case, power equipment) can be a seller-merchant under UCC Article 2 for purposes of the separate warranty claim (as distinguished from a wrongful death tort claim), even where the auctioneer is operating for a consigner. However, the auctioneer operating for a consigner is the merchant only if the auctioneer fails to disclose the identity of the principal, under *Abercrombie v. Nashville Auto Auction, Inc.*, 541 So. 2d 516 (Ala. 1989).

State Immunity; School Boards

Ex parte Bessemer City Board of Education, No. 1121111 (Ala. Nov. 15, 2013)

Held: school boards are agents of the state, entitled to Section 14 absolute immunity, and individual school was not a separate legal entity from the board, and therefore receives same immunity.

From the Alabama Court Of Civil Appeals

Materialmen's Liens

Gunther v. Carpet Systems of Huntsville, Inc., No. 2120511 (Ala. Civ. App. Oct. 4, 2013)

Under *Ala. Code* § 35-11-210, a materialman may perfect a "full price" lien only where the materialman (1) has an express contract with the property's owner or the owner's agent to supply the materials or labor, or (2) has given notice to the owner in writing of the cost of the materials or labor to be supplied before beginning work or delivering materials and the owner must not have responded in writing that the owner will not be liable for payment. At issue in this case was whether CSH had satisfied option (2). The CCA held there were disputed facts as to option (2) and reversed.

Finality of Judgments; Remaining Attorneys' Fees Claims

Wolfe v. JPMorgan Chase Bank NA, No. 2120438 (Ala. Civ. App. Oct. 11, 2013)

Held: the time for taking appeal ran from the final adjudication of the substantive claim, and not a post-judgment attorneys' fees order, because a merits decision as to all claims is a final decision even when there remains for adjudication a request for attorneys' fees attributable to the case.

Forum Non Conveniens

Ex parte Alfa Mutual Insurance Company, No. 2120997 (Ala. Civ. App. Oct. 25, 2013)

Following a recent line of supreme court precedent, the CCA compelled a transfer of a personal injury case under the "interests of justice" prong of section 6-3-21.1 and the nexus test.



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From the Eleventh Circuit Court of Appeals

FMLA; Retaliation

***Dawkins v. Fulton County*, No. 12-11951 (11th Cir. Oct. 1, 2013)**

Even though plaintiff was indisputably not taking FMLA leave, she contended that defendants were equitably estopped under federal common law from disputing her FMLA eligibility because her manager approved her FMLA leave. The Eleventh Circuit affirmed summary judgment to defendants, reasoning that plaintiff failed to establish a prima facie case of federal common law equitable estoppel, without deciding whether federal common law equitable estoppel applies to the FMLA.

Bankruptcy

***In Re Kulakowski*, No. 12-15294 (11th Cir. Nov. 15, 2013)**

Wife filed Chapter 7, seeking to discharge about \$136,000 in consumer, non-priority debt. The bankruptcy court dismissed the case under the abuse provisions in 11 U.S.C. §§ 707(b)(1) and 707(b)(3)(B), concluding that husband's income and expenses should be considered in determining wife's ability to pay. The district court affirmed, and the Eleventh Circuit affirmed.

RECENT CRIMINAL DECISIONS

From the Alabama Appellate Courts

Juvenile Sentencing

***State v. Henderson*, nos. 1120140 and 1120202, 2013 WL 4873077 (Ala. Sept. 13, 2013)**

The prohibition against sentences of death or mandatory life-without-parole to juveniles pronounced by *Roper v. Simmons*, 543 U.S. 551 (2005) and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) did not require dismissal of the juvenile defendants' capital murder indictments.

Appointment of Counsel

***Roberts v. State*, CR-11-1855, 2013 WL 5506664 (Ala. Crim. App. Oct. 4, 2013)**

The trial court erred in appointing the defendant's trial counsel to represent him in his Rule 32 proceedings, due to the inherent conflict arising where counsel alleges claims of her own ineffectiveness at trial. The court of criminal appeals noted, however, that it did not intend to suggest that the defendant was entitled to appointed counsel in Rule 32 proceedings, much less counsel of her choice.

Double Jeopardy; Preclusion

***McRath v. State*, CR-12-1166, 2013 WL 5506652 (Ala. Crim. App. Oct. 4, 2013)**

Argument that simultaneous convictions for murder and first-degree robbery violated the double jeopardy clause was a jurisdictional claim not subject to preclusion under Rule 32.2.

DNA

***Lloyd v. State*, CR-12-0748, 2013 WL 5506666 (Ala. Crim. App. Oct. 4, 2013)**

Because *Ala. Code* § 15-18-200's provision for post-conviction DNA testing applies only to capital convictions, non-capital defendant's motion for DNA testing was properly construed as a Rule 32 Petition.

Discharge of Counsel

***Shaw v. State*, CR-12-0674, 2013 WL 5506694 (Ala. Crim. App. Oct. 4, 2013)**

Defendant's convictions for first-degree theft of property and second-degree possession of a forged instrument did not constitute double jeopardy. Defendant's counseled resentencing four days after an uncounseled sentencing did not constitute double jeopardy. Trial court did not abuse its discretion in prohibiting the defendant from discharging defense counsel after the trial commenced.

Rule 404; Brady

***Garzarek v. State*, CR-12-0278, 2013 WL 5506695 (Ala. Crim. App. Oct. 4, 2013)**

Evidence of the arson defendant's prior acts of beating and intimidation of his ex-girlfriend was admissible for proof of his motive to set fire to her workplace under Rule 404(b). Further, the state's evidence of the defendant's telephone conversations recorded while in jail was not exculpatory, thus not falling within the purview of *Brady v. Maryland*, 373 U.S. 83 (1963). | [AL](#)

MEMORIALS



Brabston, James Kenneth

Huntsville
Admitted: 1993
Died: October 8, 2013

Cruse, Hon. Donald Richard, Jr.

Birmingham
Admitted: 1969
Died: October 18, 2013

DeBray, Thomas Richard, Sr.

Montgomery
Admitted: 1981
Died: October 6, 2013

Duffy, James Joseph, Jr.

Mobile
Admitted: 1957
Died: October 19, 2013

Huffstutler, Christopher Mark

Guntersville
Admitted: 2004
Died: October 27, 2013

Limbaugh, Joseph T., Sr.

Birmingham
Admitted: 1949
Died: September 17, 2013

Pullen, Charles Hillman

Huntsville
Admitted: 1989
Died: October 2, 2013

Robertson, Roy Richard, Jr.

Birmingham
Admitted: 1973
Died: October 20, 2013

Schwartz, Leonard Milton

Birmingham
Admitted: 1976
Died: October 13, 2013

Stapp, Mary Lee

Montgomery
Admitted: 1951
Died: October 27, 2013

Taliaferro, Mark Louis, Jr.

Harpersville
Admitted: 1970
Died: September 29, 2013

Weissman, Stanley

Montgomery
Admitted: 1979
Died: July 16, 2013

Williams, Willie Leon, Jr.

Birmingham
Admitted: 1959
Died: September 29, 2013

Transfer to Disability Inactive Status

Suspensions

Public Reprimands

Transfer to Disability Inactive Status

- Mobile attorney **Kimberly Leona Bell** was transferred to disability inactive status, effective September 9, 2013, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the September 9, 2013 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a motion to transfer to disability inactive status filed by Bell. [Rule 27(c), Pet. No. 2013-1675]
- Suspended Mobile attorney **John Douglas Rivers** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective September 26, 2013. [Rule 27(c), Pet. 13-1660]

Suspensions

- Montgomery attorney **Timothy Bell** was suspended from the practice of law in Alabama, effective August 21, 2013, for noncompliance with the 2012 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 13-652]
- Birmingham attorney **Brandon Lee Blankenship** was suspended from the practice of law in Alabama for a period of two years, by order of the Supreme Court of Alabama, effective October 16, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Blankenship's conditional guilty plea, wherein Blankenship pled guilty to assisting a non-lawyer in the unauthorized practice of law, sharing fees with a non-lawyer, failing to supervise a non-lawyer employee and improperly soliciting personal injury clients, violations of Rules 1.15(a); 5.1(a) and (c); 5.3(a), (b) and (c); 5.4(a) and (d); 5.5(a)(2); 7.3(a); and 8.4(a) and (g), *Ala. R. Prof. C.* [ASB No. 2010-867]
- Montgomery attorney **Dayna Renae Burnett** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective September 1, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Burnett's conditional guilty plea, wherein Burnett pled guilty to violating Rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.*

Burnett was ordered to serve 45 days of the suspension, and the remaining 46 days to be held in abeyance. In addition, Burnett was placed on probation for two years. Burnett deposited personal funds and earned legal fees into her client trust account, and repeatedly made personal payments directly from her client trust account. [ASB No. 2013-701]

- Atlanta, Georgia attorney **Kathryn McCain Cigelske** was suspended from the practice of law in Alabama, effective August 21, 2013, for noncompliance with the 2012 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 13-655]
- Former Addison attorney **Denise Marie Learned** was suspended from the practice of law in Alabama, effective August 21, 2013, for noncompliance with the 2012 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 13-662]
- Montgomery attorney **Asim Griggs Masood** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective September 16, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Masood's conditional guilty plea, wherein Masood pled guilty to multiple violations of Rules 1.3, 1.4(a) and (b); 1.5(b); 1.8(1); 1.15(a); 1.16(d); 3.2; 8.1(b); and 8.4(d) and (g), *Ala. R. Prof. C.* Prior to petitioning for reinstatement, Masood shall be required to complete the Practice Management Assistance Program and must submit a full accounting and reconciliation of his client and real estate IOLTA accounts to the Office of General Counsel. In addition to his 91-day suspension, Masood must also make the following restitution: (1) ASB No. 2011-834-\$2,000; (2) ASB No. 2012-1249-\$502; (3) ASB No. 2012-2294-\$192; (4) ASB No. 2013-144-\$250; and (5) ASB No. 2013-580-\$1,480. Masood is required to provide proof to the Office of General Counsel that all restitution has been made. [ASB nos. 2011-834, 2012-1249, 2012-1408, 2012-2294, 2013-144, 2013-412, 2013-431, and 2013-580]
- Montgomery attorney **Asim Griggs Masood** was suspended from the practice of law in Alabama, effective August 21, 2013, for noncompliance with the 2012 Mandatory Continuing Legal Education requirements of the Alabama State Bar. Thereafter, Masood came into compliance with the Mandatory Continuing Legal Education Rules and was reinstated, effective September 13, 2013. [CLE No. 13-664]
- Jackson, Mississippi attorney **Tana Nichole Vollendorf** was suspended from the practice of law in Alabama, effective August 21, 2013, for noncompliance with the 2012 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 13-671]
- Montgomery attorney **Mark Andrew Overall** was previously 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 ordered held in abeyance and Overall was placed on probation for two years. On August 1, 2013, the bar filed a petition to revoke probation based upon three additional bar complaints filed by circuit court judges, evidencing multiple violations of the *Alabama Rules of Professional Conduct* by Overall during his probationary period. On August 8, 2013, Overall filed a consent to revocation of probation, acknowledging failure to abide by the requirements of the conditional guilty plea, and agreed to the revocation of his probation and the imposition of a 91-day suspension of his license. On September 9, 2013, the Supreme Court of Alabama entered an order suspending Overall from the practice of law in Alabama for 91 days, effective September 16, 2013. [ASB nos. 2012-2030, 2013-377, 2013-386, 2013-415, 2013-788, 2013-962, 2013-1020, and 2013-1103]
- Tuscaloosa attorney **John Thomas Sutton** was suspended from the practice of law in Alabama for two years, with all but 30 days deferred, pending his successful completion of a two-year probationary period. Sutton shall serve 30 days of the two-year suspension beginning October 15, 2013. On September 16, 2013, the Disciplinary Commission accepted Sutton's conditional guilty plea to violations of Rules 3.3(a) and 8.4(a), (c) and (g), *Ala. R. Prof. C.* Sutton admitted that he allowed incomplete and inaccurate bankruptcy schedules and an inaccurate certified statement of financial affairs to be submitted to the bankruptcy court in support of his personal bankruptcy petition,

and that he did not remedy the errors until the Section 341 Meeting of Creditors, prior to which he was notified by the bankruptcy trustee that the trustee was aware of errors in his petition. [ASB No. 13-929]

still being represented by counsel. The solicitation letters also failed to comply with Rule 7.3, *Ala. R. Prof. C.*, in that the letters did not contain the required disclaimer. [ASB No. 2012-2007]

Public Reprimands

- On September 13, 2013, Mobile attorney **James Edward Loris, Jr.** received a public reprimand without general publication for violating Rules 4.2, 7.3(b) and 8.4(g), *Ala. R. Prof. C.* In November 2012, a complaint was filed against Loris by an attorney alleging that Loris had sent improper bankruptcy solicitation letters to the attorney's clients, offering to represent the individuals and seek a "second chance at a successful bankruptcy," when, in fact, the bankruptcy petitions had not been dismissed and the individuals were

- On September 13, 2013, Pinson attorney **Richard Ellis Sandefer** received a public reprimand without general publication for violating Rules 1.3, 1.4(a), 1.4(b), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* In June 2011, Sandefer was hired by a client for \$1,300 to enforce and modify the client's divorce decree. After several months, Sandefer informed the client that her paperwork had been filed with the court and he was awaiting a court date. In January 2012 the client tried contacting Sandefer, but his phone had been disconnected and his office was closed. Thereafter, the client contacted family court and was advised that nothing had been filed with the court by Sandefer on her behalf. [ASB No. 2012-515] | [AL](#)

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J. Anthony McLain



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

QUESTION:

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

ANSWER:

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

DISCUSSION:

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

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

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

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

As in RO 1993-21, the commission noted that “non-refundable fee language is objectionable because it may chill a client from exercising his or her right to discharge his or her lawyer and, thus, force the client to proceed with a lawyer that the client no longer has confidence in.” As such, the overriding principle of RO 1992-17 and RO 1993-21 is that a non-refundable fee would impinge on the right of the client to change lawyers at any time. Allowing an attorney to keep a fee, regardless of whether any service has been performed for the client, would certainly restrict the ability of a client to terminate the attorney and seek new counsel. In reaching this conclusion, the commission also made clear that the rule applied to all arrangements where fees are paid in advance of legal services being rendered. As such, all retainers and fees are refundable to the extent that they have not yet been earned. To conclude that a flat fee is earned at the time of receipt, where the contemplated services have yet to be performed or completed, would be in direct contradiction of this long-standing principle.

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

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

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated,

or elsewhere with the consent of the client or third person. No personal funds of a lawyer shall ever be deposited in such a trust account, except **(1) unearned attorney fees that are being held until earned**, and **(2) funds sufficient to cover maintenance fees**, such as service charges, on the account. Interest, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

(emphasis added) Because flat fees are not earned at the time of receipt, they are unearned attorney fees that must be held in the attorney's IOLTA account until earned in accordance with Rule 1.15.

However, the entire flat fee is not required to be held in trust until the conclusion of the representation. Rather, an attorney may withdraw portions of the fee from the trust account as the fee is earned. Exactly when and what amount of the fee is earned during the representation is a question of reasonableness. It is generally recognized that the first yardstick used in assessing the reasonableness of an attorney fee is the time consumed. *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). For example, an attorney may withdraw portions of the flat fee that have been earned based on the time the attorney has spent on the matter and his normal hourly rate. In doing so, the attorney should notify the client when portions of the fee are withdrawn from the trust account by sending a statement or invoice to the client stating the date and the amount of the withdrawal.

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



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For more information about the institute, visit www.ali.state.al.us.



A Preview of the 2014 Legislative Session

The new year is upon us and, as well documented in this column in November, it is not just any year, but an election year. This year, each of Alabama's 140 legislative seats will be up for election. This means a couple of things in relation to this year's legislative session: first, the session starts a month earlier than the past two years, and second, it should be an interesting one.

In the fourth year of each quadrennium, which this year is, the legislature convenes on the second Tuesday of January. This year, that day falls on January 14. From there the length of the session remains constant. The legislature may meet a total of 30 legislative days over a 105-calendar day period. This schedule will put the close of the session toward the end of April at the latest.

There are a number of issues already percolating in advance of the session that will be of note. First, the work of the Constitutional Revision Commission has concluded. The commission, established by resolution during the 2011 session, has been meeting regularly over the past three years and will report its findings and recommendations to the legislature this month. I will cover these recommendations in depth over the course of the coming months as we get an idea of how the legislature intends to take action on these recommendations. In the meantime, the report of the commission can be viewed at www.ali.state.al.us.

The second area of note to be addressed during the session is increased regulation on elected officials and their campaign practices. During this quadrennium, a remarkable number of elected officials have decided to leave their elected office early to focus on private sector employment. The response to this is a desire to tighten up the current revolving-door statute that currently allows a member of the legislature to leave office and immediately lobby the other chamber of the legislature. Multiple bills have been pre-filed to address this issue. The legislature is also likely to continue tweaking the Fair Campaign Practices Act.

As for the work of the institute, the ALI Council met in November and approved six acts to be presented for consideration by the Alabama Legislature during the 2014 session:

The Limited Liability Company Act of 2015

This act was first presented to the legislature during the 2013 session, but did not clear passage of the second house. It was detailed in depth in this column last year, so I will not repeat all of the technical details, but, upon passage, it would ensure that Alabama LLCs have the fullest and best advantages available. Passage of this act would significantly improve the statutory governance and formation provisions of the law for this most popular business entity type.

Amendments to UCC Article 9

This act is the second carry-over from the 2013 session. As it was being considered for final passage by the senate, midnight struck and adjournment sine die occurred. This act was also profiled at length in this column last year, so I will keep it short by suggesting that passage of this act will bring Alabama back in line with national uniformity in the area of

secured transactions. Most of these amendments are technical in nature dealing with the way in which the name of the debtor is tracked.

Alabama Restrictive Covenants Act

Section 8-1-1 of the *Alabama Code* dates back to the *Code of 1923* standing for the proposition that contracts in the restraint of trade are void. This statute has resulted in extensive litigation and a great many opinions from the Alabama Supreme Court, which turn on innumerable fact patterns. Often it is difficult, if not impossible, to advise how such a dispute over a restrictive covenants will turn out.

This act was the result of a great deal of scholarly work over the past two years by a committee of judges, professors and practitioners with extensive backgrounds in this area of the law. The proposed act attempts to provide some clarity and statutory structure to this area of the law, while

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— Henry Ford.



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not varying widely from the current black-letter principles in Alabama.

The act provides guidance on what is a protectable interest, when a restraint is appropriate and reasonable, and the circumstances in which a court can modify or enforce such agreements. The committee was capably chaired by **Will Hill Tankersley**.

Alabama Uniform Partition of Heirs Property

The Uniform Partition of Heirs Property Act attempts to address a problem faced by many middle- to low-income families who own real property: dispossession of their land through a forced sale. For many of these families, real estate is their single most valuable asset.

This act preserves the right of a co-tenant to sell his interest in inherited real estate, while ensuring that the other co-tenants will have the necessary due process to prevent a forced sale: notice, appraisal and right of first refusal. If the other co-tenants do not exercise their right to purchase property from the seller, the court must order a partition-in-kind if feasible, and if not, a commercially reasonable sale for fair market value.

This act would supplement Chapter 6 of Title 35 of the *Code of Alabama* which would continue to apply to partition of all property not deemed to be heir property.

The committee was chaired by **Bill Gamble** and aided by **Bob McCurley**, who served as reporter.

Alabama Uniform Certificate of Title for Vessels Act

Currently, all 50 states have a certificate of title law for motor vehicles. These laws vary only slightly with respect to which motor vehicles are covered, and all or almost all of the laws are based on where the vehicle is principally garaged. As a result, there is no significant overlap or duplication of coverage.

In contrast, more than one-third of states, including Alabama, do not have a certificate of title law for boats and other vessels. The lack of uniformity among states on this issue allows for extensive fraud: title to a stolen vessel can be washed by moving the vessel to a new jurisdiction that either has no titling law or has a statute that does not cover the type of vessel stolen.

Alabama's lack of a titling law for vessels is a particular hardship on owners whose vessel is damaged, destroyed or lost in a natural disaster. Following such events, residents are often left with the difficult task of proving ownership of lost or damaged vessels.

The Uniform Certificate of Title for Vessels Act addresses all of these problems. In general, the act covers all vessels at least 16 feet in length and all vessels propelled by an engine of at least 10 horsepower. Exceptions exist for seaplanes, amphibious vehicles for which a certificate of title is issued pursuant to a motor vehicle titling act, watercraft that operate only on a permanently fixed, manufactured course, certain houseboats, lifeboats used on another vessel, and watercraft owned by the United States, a state or a foreign government.

The act applies if the vessel is used principally on the waters of Alabama. An owner must apply for a certificate of title. However, no application is required for a federally documented vessel, a foreign documented vessel, a barge, a vessel under construction, or a vessel owned by a dealer.

A title application must include information about the owner or owners, the vessel and any secured parties. The application must be accompanied by documentary evidence showing the applicant to be an owner of the vessel. Most of the information in the application will then be put on the certificate. The titling office will maintain its records so that searches about vessels can be conducted by the vessel's hull identification number, by the vessel number or by the owner's name.

The committee was chaired by **E.B. Peebles** and aided by **Professor Bill Henning**, a national expert on this topic, who served as reporter.

Amendments to Title 10A: Mergers and Conversions

In 2011, the new *Alabama and Nonprofit Entities Code* became effective. Since then, the institute created the Standing Committee on Business Entities to continuously address amendments to improve the operation of Alabama's business formation and governance laws, as needed over time.

These proposed revisions to the merger and conversion portions contained in Chapter 1 of the *Alabama Business and Nonprofit Entities Code* make up the second project completed by this committee. During the 2012 legislative session, the Alabama Legislature passed a bill to amend aspects of the name reservation process as recommended by the committee. Similarly, this bill improves the operation of the laws related to the conversion and merger of business entities.

The committee is chaired by **Jim Wilson** of Birmingham.

As is usually the case, this session appears to be interesting and lively. The body of work of this legislature has been significant during the first three years of this quadrennium, and this year there is no reason to believe things will be any different. | [AL](#)

Celebrating the United States Constitution 225 years



SCALIA

Photo credit: The Collection of the Supreme Court of the United States



McCULLOUGH

Photo credit: William B. McCullough

CONSTITUTIONAL SYMPOSIUM

Please join the State Bar of Georgia in celebrating the United States Constitution 225 years after its ratification.

March 12-14, 2014

**The Westin Buckhead Atlanta
Atlanta, Ga.**

Confirmed speakers include:

U.S. Supreme Court Justice Antonin Scalia and David McCullough, two-time winner of the Pulitzer Prize and recipient of the Presidential Medal of Freedom.

For more information, contact the Institute of Continuing Legal Education at constitution@iclega.org.



Please email announcements to Margaret Murphy, margaret.murphy@alabar.org.

About Members

Richard E. Browning PC of Mobile announces a name change to **Browning Law Firm PC**.

David W. Shipper announces the opening of the **Shipper Law Firm LLC** at 1604 Mockingbird Ct., Ste. B, Florence 35630. Phone (256) 275-3769.

Among Firms

Ables Baxter Parker & Smith in Huntsville announces that **William C. Love** joined as of counsel.

Julia J. Weller, clerk, **Supreme Court of Alabama**, announces that **Julianne M.W. Sinclair** and **Erin LeGay Dunagan** are now staff attorneys with the court.

Baker Donelson announces that **Ross Cohen** joined the Birmingham office as of counsel.

Bradley Arant Boulton Cummings LLP announces that **Brooke Bates**, **Ashley Burkett**, **Jennifer S. Gisi**, **Jessica Kramer Givens**, **Blair Graffeo**, **Holly S. Hosford**, **Ambria L. Lankford**, **Michele Polk Marron**, **Sarah E. Merkle**, **Carly Miller**, and **J. Sims Rhyne, III** joined the Birmingham office as associates.

Copeland, Franco, Screws & Gill PA announces that **Joel T. Caldwell** joined as an associate.

Hand Arendall LLC announces that **D. Tatum Davis** joined the Birmingham office as an associate, **Jessica A. Hatcher** joined the Mobile office as an associate and **Douglas Hughes** joined the Birmingham office as of counsel.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Alex L. Holtsford, III** and **Joseph G. VanZandt** joined as associates in the central Alabama office.

Johnston Barton Proctor & Rose LLP announces that **Sarah**

Canzoniero Blutter and **Anna-Katherine Bowman** joined as partners, **Katie Boyd Britt** joined as an associate and **Caroline D. Walker** joined as a member.

Jones, Wyatt & Davis PC of Tuscaloosa is now **Jones, Davis & Jones PC** and **Thomas Matthew Jones** is a member.

Lanier Ford Shaver & Payne PC announces that **C. Gregory Burgess** and **Terry R. Bynum** are shareholders and **Michael W. Rich** is an associate.

Leitman, Siegal, Payne & Campbell PC announces that **John C. Guin** and **Yawanna N. McDonald** are associates.

Maynard, Cooper & Gale PC announces that **Matthew J. Parker** joined as an associate in the Huntsville office; **Robert W. Bledsoe**, **J. Ryan Brooks**, **W. Wesley Hill**, **Patrick J. Mulligan**, and **T. Brannon Parker** joined as associates in the Birmingham office; **Thomas S. Rue** and **David C. Hannan** joined as shareholders in the Mobile office; and **J. Ben Segarra** and **Reilly K. Ward** joined as associates in the Mobile office.

Ogletree Deakins announces that **Earlisha S. Williams** joined as an associate.

Satterwhite, Buffalow & Tyler LLC announces a name change to **Satterwhite & Tyler LLC**.

Shinbaum & Campbell announces that **Josh C. Milam** joined as an associate.

Starnes Davis Florie LLP announces that **David W. Bunt**; **William A. Davis, IV**; **Michael D. Florie**; and **Christopher E. Vinson** joined as associates.

Tanner & Guin announces that **J. Harris Hagood** joined the Tuscaloosa office.

Waller Lansden Dortch & Davis LLP announces that **Colin H. Luke** joined as a partner in the Birmingham office. | [AL](#)

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

About Members

This section announces the opening of new solo firms.

Among Firms

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

free•dom:

noun

**the power to determine
action without restraint.**

free•dom court re•porting:

proper noun

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more freedom by handling
your legal support needs.**



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