

MARCH 2009 • VOL. 70, NO. 2

THE ALABAMA LAWYER

THE ROLE OF
AMICUS BRIEFS

page 114

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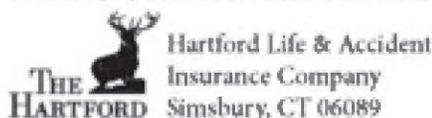


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Spring 2009
Calendar

Live Seminars

MARCH

27 Trial Skills Seminar *Birmingham*

APRIL

3 Domestic Relations Practice *Birmingham*

17 Depositions *Birmingham*

24 Article 9 Update *Birmingham*

MAY

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Orange Beach

Teleseminars

MARCH

17 Raising Business Capital Part 1

18 Raising Business Capital Part 2

20 Incentive Trusts

24 Real Estate Defaults, Workouts & Bankruptcy

26 Torts in Employment Litigation

31 Sales/Exchanges of Partnership/LLC Interests

APRIL

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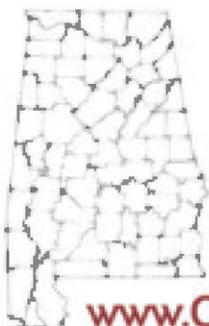
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ALABAMA
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Sarah Mary Taylor, *American*, 1916-2000
Hands Quilt, 1988
Cotton/polyester blend
Montgomery Museum of Fine Arts
Montgomery, Alabama
Gift of Kempf Hogan
2004.20.5

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MARK WHITE

Gathering Clouds and Raging Storms

Before I heard Rev. Joseph Lowery's benediction and President Barack Obama's inaugural address on January 20, I had already prepared my message for this column. However, I was so moved by the message of their oratory that I scrapped my earlier efforts in order to speak—with their help—from my heart.

Like the nation as a whole, we in the Alabama State Bar face "gathering clouds and raging storms." Americans seem to have lost confidence in their government and, for this, we as lawyers must accept our share of the responsibility. In Alabama, we are all too well familiar with the "seeds of greed" and corruption that have flourished in our native soil. This mentality of law-breaking can only be stopped by a deeply and passionately held conviction that law is not only an instrument of secular policy, but is also part of the ultimate purpose and meaning of life. As lawyers and judges, we are the segment of society most directly responsible for instilling and cultivating that conviction in our citizens.

PRESIDENT'S PAGE Continued from page 87

In becoming lawyers, we all swore to support the constitutions of the State of Alabama and of the United States. By entering this noble profession, we joined the “movers and shakers” of our society. As lawyers, we are leaders. Just by being members of the bar, we walk among the privileged and educated. Yet, with privilege comes responsibility. To paraphrase one of the first scholars of legal ethics, George Sharswood, “No person can ever be a truly great lawyer, who is not in every sense of the word, a good person.”

As lawyers, we have chosen the path of action. It is not “the path for the faint-hearted—for those who prefer leisure over work, or seek only the pleasures of riches and fame.” We must honor and uphold the ideals of those who have gone before us and walk in the footsteps of all the men and women who have made America great. We cannot allow the mad scramble for material success and the pressures of day-to-day existence push aside the ideal and goal of working toward a better system of justice for all. We must preserve the legacy found in the principles of the documents that form the basis of our Union. We must not forget that as lawyers, we are the keepers of that legacy. We must keep the candle of freedom burning brightly.

Inauguration Day coincided with our state’s investiture ceremony. As he commissioned five of our appellate judges, Governor Riley recognized that they “got here through a political process, but when you put on that robe, politics are left behind.” We must strive for the day when judges are elected on their individual merits and not on party politics. We must choose “hope over fear, unity of purpose over conflict and discord.” We must “proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas, that for far too long have strangled our politics,” as well as our judicial system.

This new year brings with it the possibility of change and a renewed hope for the future of our country and our state. Let us not neglect this opportunity to participate in the challenge of transformation and redemption that President Obama has offered. Let us all join together to recognize the hardships we face as a state and a nation. Let us all together kneel and ask for guidance and help from above to meet and overcome those obstacles.

As president of the ASB, I feel I have both a personal and professional obligation to do everything I can to enhance and improve our system of justice in Alabama. There is much work to be done. We must make civil legal services available to the poor, upgrade our system of indigent criminal defense and ensure that Alabamians are served by the best judges possible seated by the fairest means possible. For these efforts, I make no apology.

More so than ever before, I am proud to be an American and a citizen of Alabama. Despite its shortcomings, America’s legal and judicial system is the envy of the world, and for that I am most grateful. As your bar president, I have recently traveled to many other states and met with lawyers and judges from even more states. All this has convinced me that we have some of the very best lawyers and judges anywhere right here in Alabama.

I recognize my debt for the liberal use of the words of President Obama and Rev. Lowery, but I don’t think any apology is necessary. I suspect they want their message spread far and wide. “Let all those who do justice and love mercy say Amen. Say Amen. And, Amen.”

NOTE: As typical of any “President’s Page” that has appeared this year, this product starts with some rambling, incomprehensible offering by me which then is subjected to the wisdom and talent of Kitty Brown and Bill Bowen. Anything relevant and coherent that results is thanks to them and I am in their debt.



**ALABAMA STATE BAR
2009-2010 COMMITTEE PREFERENCE FORM**

ALABAMA STATE BAR MISSION STATEMENT

THE ALABAMA STATE BAR IS DEDICATED TO PROMOTING THE PROFESSIONAL RESPONSIBILITY AND COMPETENCE OF ITS MEMBERS, IMPROVING THE ADMINISTRATION OF JUSTICE, AND INCREASING THE PUBLIC UNDERSTANDING OF AND RESPECT FOR THE LAW.

**INVITATION FOR SERVICE FROM THOMAS J. METHVIN
PRESIDENT-ELECT**

We want very much in the upcoming year to broaden participation in bar activities.
If you would like to serve our profession in a volunteer capacity,
please choose a committee in which you are interested.
The Alabama State Bar needs you and will try hard to
involve you in an area of your interest.

APPOINTMENT REQUEST -Terms begin August 1, 2009 and expire July 2010. Indicate your top two preferences from the list by marking 1 or 2 beside the preferred committee (c).

- | | |
|--|---|
| <input type="checkbox"/> <i>Alabama Lawyer</i> , Editorial Board (c) | <input type="checkbox"/> Insurance Programs (c) |
| <input type="checkbox"/> <i>Alabama Lawyer</i> , Bar Directory (c) | <input type="checkbox"/> Law Day (c) |
| <input type="checkbox"/> Alternative Methods of Dispute Resolution (c) | <input type="checkbox"/> Lawyer Referral (c) |
| <input type="checkbox"/> Character & Fitness (c) | <input type="checkbox"/> Lawyer Assistance Program (c) |
| <input type="checkbox"/> Client Security Fund (c) | <input type="checkbox"/> Military Law (c) |
| <input type="checkbox"/> Disciplinary Rules & Enforcement (c) | <input type="checkbox"/> Pro Se Forms (c) |
| <input type="checkbox"/> Diversity in the Profession (c) | <input type="checkbox"/> Quality of Life (c) |
| <input type="checkbox"/> Fee Dispute Resolution (c) | <input type="checkbox"/> Spanish Speaking Lawyers (c) |
| <input type="checkbox"/> Judicial Liaison (c) | <input type="checkbox"/> Unauthorized Practice of Law (c) |
| <input type="checkbox"/> History & Archives (c) | <input type="checkbox"/> Volunteer Lawyers Programs (c) |
| | <input type="checkbox"/> Wills for Heroes (c) |

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Name: _____

Firm: _____

Address: _____ (Street or P.O. Box)
_____ (City, State, Zip)

Phone: (office) _____ (e-mail) _____ (fax) _____

Year of admission to bar: _____ check if new address

Note: A complete description of the work of each committee can be found at www.alabar/members.

INSTRUCTIONS FOR SUBMISSION

Please return this form no later than May 4, 2009 to be considered for an appointment, by mail to Programs, P.O. Box 671, Montgomery, AL 36101-0671; by facsimile to 334-261-6310; or by email to rita.gray@alabar.org. Please remember that vacancies on existing committees are extremely limited as most committee appointments are filled on a three-year rotation basis. **If you are appointed to a committee, you will receive an appointment letter informing you in Aug. 2009.** You may also download this form from our Web site, www.alabar/members, and submit the completed form via email to rita.gray@alabar.org.

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KEITH B. NORMAN

A close-up photograph of a bumblebee with a fuzzy yellow and black body, perched on a vibrant purple flower with many thin, pointed petals. The background is a soft, out-of-focus green.

2008: A Busy Year for the Alabama State Bar

The Alabama State Bar had many significant accomplishments in 2008. These were due to the leadership of state bar presidents Sam Crosby and Mark White as well as the work of numerous volunteers and the bar staff. The list below reflects some of those accomplishments, including updates and improvements to the bar's facilities, other than the bar's traditional regulatory and licensing operations.

1. The fourth Leadership Forum was conducted and 30 attorneys completed all sessions.
2. The fifth Alabama Lawyers Hall of Fame induction ceremony and luncheon was held celebrating the induction of Howell T. Heflin, John Archibald Campbell, Thomas Goode Jones and Patrick W. Richardson.
3. CaseMaker, v. 2, was rolled out to further enhance this valuable, free research tool for bar members.
4. An orientation session was conducted for 12 new members of the Board of Bar Commissioners.
5. The Law Day poster and essay contest resulted in the entry of 323 posters and 117 essays with 27 schools from across the state participating.
6. The 129th Annual Meeting was planned and held at the Hilton Sandestin with more than 1,200 people attending.
7. The practice of hosting a breakfast during the legislative session for the lawyer-legislators was continued.
8. The sixth edition of the *President's and Leaders' Manual* was prepared.
9. Twenty-two road shows and 102 separate ethics training sessions were conducted by ASB and General Counsel staff.

EXECUTIVE DIRECTOR'S REPORT

Continued from page 91

10. The build-out of the third floor of the bar building and refurbishment of the second and first floors were completed.
11. The "Wills for Heroes" program was successfully rolled out statewide with clinics in Tuscaloosa, Montgomery, Dothan, Auburn, Mobile, Huntsville, Birmingham, Baldwin County, and Decatur. Almost 1,100 first-responders received free wills, durable powers of attorney and health care directives.
12. An instructional CD for young lawyers was developed featuring interviews of former state bar presidents sharing their practice experiences.
13. The first full year of *The Complete Lawyer*, an "e-zine" providing useful practice and lifestyle information to bar members at no cost, was completed.
14. Disseminated a short video to members and new admittees about benefits available to ASB members.
15. Implemented a \$200 PHV fee increase with increased funds going to the Alabama Law Foundation for civil access to justice for indigent Alabama citizens.
16. First-ever Board of Bar Commissioners' meeting was held at the University of Alabama School of Law.
17. First Professionalism Consortium was planned and conducted.
18. Three thousand nineteen, or almost one in five, members purchased licenses or special memberships online.
20. New online annual meeting registration system was rolled out.
21. Member I-Profile was developed and implemented online to allow members to select preferred method of receiving communications from the bar.
22. New policies for broadcast e-mails and e-mail list were implemented.
23. An in-house intake center for the Volunteer Lawyers Program was started with a grant from the Alabama Law Foundation.
24. A presidential initiative, "Lawyers Serving Communities," highlighting lawyers' community service through newspaper articles, was completed.
25. A full-time scanning station was set up to continue the scanning of files and documents for the bar's document management system.
26. WiFi network was installed in the bar building.
27. A new proxy firewall, storage area network and other server upgrades were completed in addition to a complete upgrade of all staff computer work stations.
28. The Professionalism Pledge and Honor Roll were made accessible online.
29. The redesigned Web site, www.alabar.org, with new functionality and security features for personal log-in was launched.
30. A mortgage foreclosure assistance program in cooperation with Legal Services Alabama was initiated.

This long list of accomplishments, along with the bar's day-to-day licensing and regulatory activities, would be impossible to achieve without excellent leaders, dedicated volunteers and a helpful staff. This list reveals that the work of the state bar is varied, but with one underlying theme—service. Three months into a new year—2009—we hope to sustain the level of service that has characterized the bar and its members for so many years. With the current economic conditions confronting our nation, state and local communities, the volunteer work and service the legal profession renders will be even more important to those we serve.



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William Brevard Hand

The Honorable William Brevard Hand, senior judge of the United States District Court for the Southern District of Alabama, died in Mobile September 6, 2008 at the age of 84.

Judge Hand was a native of Mobile and attended Murphy High School and the University of Alabama. His education was interrupted by service in Northern Europe where he defended his country as a combat infantry rifleman from the period of the Battle of the Bulge through VE Day, and for his bravery he was awarded the Bronze Star. After additional service with the Occupation Army, he completed law school at the University of Alabama. He entered the practice of law in June 1949 with the firm of Hand, Arendall & Bedsole. He was appointed to the federal bench by President Richard Nixon in 1971.



Judge Hand was a lifetime member of Dauphin Way Methodist Church and served in all lay capacities for which he was recognized as an honorary member of the administrative board and a lifetime steward of the church.

Judge Hand served as chief judge of the U.S. District Court, Southern District of Alabama, from 1981 to 1989, when he became a senior judge. He continued to carry a full caseload for many years. His years of service to the court were marked not just by his devotion to the rule of law and core Constitutional principles, but to establishing a standard of leadership and collegiality that were the benchmarks for the judges, the Clerk's Office and the Probation and Pretrial Services offices. He served for many years as a member of the Alabama State Bar, the Mobile Bar Association, the Federal Bar Association and the Inns of Court. Among his many and well-deserved honors, he was awarded the John Paul, II Religious Freedom Award in 1988 and with an honorary "Doctor of Laws" degree from Mobile College in 1990. He was named by the Rotary Club as a Paul Harris Fellow and the Mobile Bar Association honored him with the Liberty Bell Award.

Judge Hand was preceded in death by his wife, Allison Denby Hand, in April 2008. He is survived by his children, Jane Hand Dukes of Mobile, Virginia Hand Hollis of Germantown and Allison Hand Peebles of Mobile, and seven grandchildren and three great-grandchildren.

—Ian Gaston, president, Mobile Bar Association

WILLIAM BREVARD HAND

**BENJAMIN FRANKLIN
STOKES, III**

GEORGE PEACH TAYLOR

Benjamin Franklin Stokes, III



Benjamin Franklin Stokes, III, a member of the Mobile Bar Association, died July 11, 2008 in Mobile.

Ben Stokes was born in Mobile but raised in Brewton, where he graduated from T.R. Miller High School. He received his bachelor's degree from Birmingham Southern College and his law degree from the University of Alabama. He entered the United States Army in 1955 as a JAG officer and served in that capacity until being discharged in 1958, at which time he began a career of over 50 years in the practice of law in Mobile. He continued to practice until June 2008.

Ben Stokes was elected to the Alabama House of Representatives as a Democrat in 1970 and served one term. All his life he was very proud of his membership in the Democratic Party.

As a member of the house, he never failed to take a clear stand on issues. At one time, the most powerful member of the house was presenting a bill which authorized payment of state funds to a private educational institution, an issue with which Mr. Stokes strenuously disagreed. In spite of his most determined arguments, the bill passed but Ben Stokes never regretted taking a clear and strong position on issues of principle.

He also was particularly quick on his feet in the courtroom. While testifying for a fellow lawyer regarding that plaintiff lawyer's fee, the out-of-town attorney representing the defendant on cross-examination posed the following question to Mr. Stokes: Mr. Stokes, what is your rating in Martindale-Hubbell?" In a microsecond, Ben Stokes shot back with, "I don't know what my rating is in Martindale-Hubbell, but I got a triple A rating at the bank." The response drew an audible chuckle from the judge and the rest of the courtroom. The cross-examination terminated instantly.

Mr. Stokes is survived by his wife, Alice Boles Stokes of Mobile; his children, Elizabeth Terry, Charlotte Eslava, Jennifer Glover and Benjamin Franklin Stokes, IV, all of Mobile; Suzanne Chenoweth and Jacqueline Pierce, both of Birmingham; Steven M. Stokes of Chicago; two step-children, Howard O. Bolton of Mobile and Christopher O. Bolton of Chicago; and 14 grandchildren.

Ben Stokes was a participant in numerous civic affairs and a longtime and dedicated member of Trinity Episcopal Church.

—lan Gaston, president, Mobile Bar Association

George Peach Taylor



The very definition of service to others, our father, George Peach Taylor, died December 10, 2008 in Tuscaloosa at the age of 83. His wife of 59 years, Mary Leta Taylor, predeceased him by three months. He is survived by the authors—his four children—and seven grandchildren.

Our father served our country's military in the Navy, including the V-12 program at Howard College; Scouts and Raiders, Ft. Pierce, Florida (the precursor to the Navy Seals); Advanced Naval Intelligence School, New York City; and Operations Officer, Philippine Sea Frontier, Manila.

He entered Birmingham Southern College on a Phi Beta Kappa scholarship, won numerous athletic and academic awards there and graduated in 1948 with both AB and BS degrees. He completed his legal education at the University of Alabama School of Law, earning his LLB degree in 1951 with honors.

He was the very first law clerk to the Alabama Supreme Court, serving for Chief Justice J. Ed Livingston from 1951-1952. In 1952 he joined the Birmingham law firm that became known as Dominick, Fletcher, Taylor & Yeilding. He was active in legal, political, civic, social, and religious work. He served as president of the Young Men's Business Club, and chairman of the Homewood YMCA. He was a plaintiff and co-counsel in *Reynolds v. Sims*, 374 U.S. 802 (1963), landmark reapportionment litigation that helped established the principle "one man-one vote." He was president of both the Birmingham and Alabama Young Lawyers' sections, and was an ASB Bar Commissioner.

Inspired by John and Robert Kennedy, he left a comfortable lifestyle and law partnership in 1965 as he, our mother and the four of us (age six to 12) joined the Peace Corps. For over five years he served as director of the Peace Corps in two different countries, Sierra Leone, Africa and Guyana, South America, with a stint as chief of the West Africa Division of the Peace Corps (Washington, D.C.) between the two.

Sensing another need for service, he opted not to return to his practice in Birmingham after leaving the Peace Corps, but instead went to Mississippi to become chief counsel for the Mississippi Office of the Lawyers Committee for Civil Rights under Law. In Mississippi he

handled criminal and civil rights cases including landmark cases such as *Connor v. Johnson*, 402 U.S. 690 (1971), 404 U.S. 549 (1972) (reapportionment); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (Mississippi prison system); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (reapportionment litigation in Louisiana); and numerous county redistricting and jury discrimination cases. He also was co-counsel for plaintiffs in *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), the civil suit for damages arising out of the shootings of students and by-standers by law enforcement at Jackson State College in 1970.

He joined the faculty of the University of Alabama School of Law in 1973, served as dean of admissions for many years and retired as professor emeritus of law in 1989. He renewed and vastly expanded the trial advocacy program, teaching many current litigators how to try a case. In 1974, federal Judge Frank Johnson appointed him counsel for an indigent prisoner in the Alabama prison system. After trial, Judge Johnson issued one of the most comprehensive decrees in the history of prison reform suits, declaring the Alabama prison system unconstitutional. The case was consolidated with others and reported on appeal as *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Judge Johnson also appointed our father to two committees established during litigation over Alabama's mental health institutions, serving as chairman of the Committee on Sterilization Review and member of the Extraordinary Treatment Committee. During his tenure at the law school, he sought and received appointments as

attorney for indigents, appealing convictions to the Fifth and Eleventh Circuit Court of Appeals, and involved students in preparing briefs and attending oral arguments. Feeling the itch to get back into the courtroom, he took a one-year sabbatical from the law school and became an assistant district attorney for Tuscaloosa County.

In 1989, he retired from the law school after 16 years to serve for four years as chief public defender for Tuscaloosa County, after which he fully retired.

In 2001, his years of service to the country and the legal profession were recognized when he was given the American Bar Association's John Minor Wisdom Award for Service to Civil Rights and the Legal Profession. He was also awarded the Order of the Samaritan by the University of Alabama School of Law.

Our father was the consummate lawyer, whose service to others, often not popular and often at personal sacrifice, is likely not to be equaled by many. He will be sorely missed by his children and grandchildren, his friends and the many lawyers whom he admitted to the law school, mentored while there, taught how to try a case in court, and in whose successes after graduation he rejoiced. His life serves as an example and, indeed, a challenge, not only to the legal community but to our entire society.

—Dr. George Peach Taylor, Jr., Northrop Grumman Corporation, Alexandria, Virginia; Ann English Taylor, U.S. Army Corps of Engineers, Mobile; Jarred O. Taylor II, Maynard, Cooper & Gale, PC, Birmingham; and David K. Taylor, Bradley Arant Boult Cummings, Nashville

Bates, John Burdette

Birmingham
Admitted: 1963
Died: November 30, 2008

Burkett, Morris

Anderson
Montgomery
Admitted: 1941
Died: January 3, 2009

Dominick, Frank

McCoy Jr.
Birmingham
Admitted: 1948
Died: November 14, 2008

**Kendrick, Leonard
Gilbert**

Montgomery
Admitted: 1971
Died: November 22, 2008

**Lipscomb, Hudson
Powell III**

Bessemer
Admitted: 1952
Died: July 1, 2008

McCall, Winston Bush

Birmingham
Admitted: 1934
Died: December 12, 2008

Rainey, Howard Clay III

Tuscaloosa
Admitted: 1969
Died: September 9, 2008

Roemer, Albert Lewis

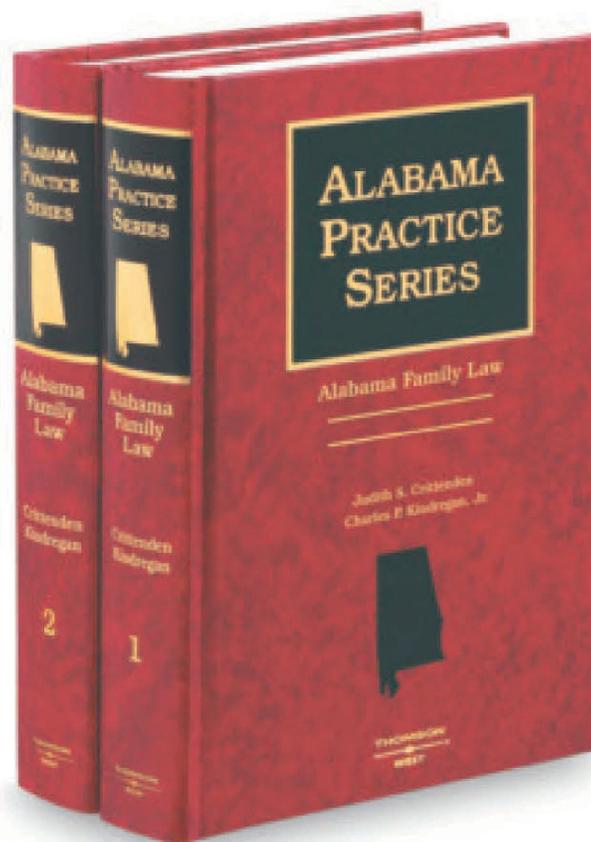
Montgomery
Admitted: 1938
Died: December 27, 2008

**Roseberry, Robert
Clarence**

Greensboro
Admitted: 1981
Died: April 5, 2008

Stanard, Chandler Kite

Spanish Fort
Admitted: 1971
Died: November 2, 2008



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JUDICIAL AWARD
OF MERIT

LOCAL BAR AWARD OF
ACHIEVEMENT

NOTICE OF ELECTION

Judicial Award of Merit

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

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

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

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

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

IMPORTANT ASB NOTICES

Continued from page 97

Local Bar Award of Achievement

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

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

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

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

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

Notice of Election

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

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

- 2nd Judicial Circuit
- 4th Judicial Circuit
- 6th Judicial Circuit, Place No. 2
- 9th Judicial Circuit
- 10th Judicial Circuit, Place No. 1

- 10th Judicial Circuit, Place No. 2
- 10th Judicial Circuit, Place No. 5
- 10th Judicial Circuit, Place No. 8
- 10th Judicial Circuit, Place No. 9
- 12th Judicial Circuit
- 13th Judicial Circuit, Place No. 2
- 15th Judicial Circuit, Place No. 2
- 15th Judicial Circuit, Place No. 6
- 16th Judicial Circuit
- 20th Judicial Circuit
- 23rd Judicial Circuit, Place No. 2
- 24th Judicial Circuit
- 27th Judicial Circuit
- 29th Judicial Circuit
- 38th Judicial Circuit
- 39th Judicial Circuit

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

All subsequent terms will be for three years.

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

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

At-Large Commissioners

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





RICHARD P. CARMODY

- **Richard P. Carmody**, special counsel with Adams & Reese LLP, was recently presented the 2009 L. Burton Barnes, III Public Service Award during the Birmingham Bar Association's Annual Meeting.



Carmody

The award is given annually to a member of the bar who has given freely of his time and energy in public service for the benefit and betterment of the general public. Established in 1994 by the Birmingham Bar Association, this award honors the memory of L. Burton Barnes, III, a distinguished member of the BBA and a true champion of public service. ▲▼▲

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JAMES M. TERRELL

Spring Brings More than Flowers and Showers

The motto of the Alabama State Bar is *Lawyers Render Service*. The arrival of spring provides many great opportunities for you to render service and to become more involved in your Young Lawyers' Section. The first opportunity is to volunteer to assist with our Minority Pre-Law conferences. This year, the Minority Pre-Law conferences will be held in Montgomery April 15th and in Birmingham April 29th. These conferences introduce high school students to our justice system and to the career choices available to them in the legal profession. They also expose the public to lawyers rendering service.

First, high school students and administrators see the impact that attorneys make in their communities. Students observe lawyers who have taken time from their busy schedules to design this program and to teach them about our justice system. Second, students witness the valuable roles that lawyers play in our society. The students observe a mock trial and participate as jurors. At the end of the conference, students deliberate and administer justice. These experiences are invaluable in teaching the public about our profession and our nation's system of justice. Finally, these conferences encourage diversity in our profession by promoting to high school students the various types of careers that are available in the legal profession.

This program has become so successful that Alabama's Young Lawyers' Section received an Award of Achievement from the American Bar Association's Young Lawyers' Division in August 2008. This award is given to the state or local YLS who performed the best minority service project, and Alabama won first place in the mid-size bar category. **J.R. Gaines** (Montgomery), **Kitty Brown** (Birmingham) and **Navan Ward** (Montgomery) have been working hard to put together a great program again this year. Each year, young lawyers volunteer to participate in the mock trial, to lead students to and from the different workshops and to speak to small groups of students about their experiences as a lawyer and to answer questions about the legal profession. I encourage you to contact J.R., Kitty or Navan to volunteer at one of these conferences.

YOUNG LAWYERS' SECTION

Continued from page 101

The second opportunity to render service is through the Young Lawyers' FEMA Disaster Relief Program. This program assists FEMA in securing *pro bono* legal services during times of natural disasters in our state. In the past, young lawyers have helped Alabama citizens whose lives have been affected by hurricanes, tornadoes or other disasters. In the aftermath of hurricanes Ivan and Katrina, young lawyers performed a tremendous amount of *pro bono* service through this FEMA program, and in 2006 the Young Lawyers' Section was awarded the Pro Bono Award (Firm Category) by the Alabama State Bar.

Last year, the YLS FEMA committee, chaired by **Brent Irby** (Vestavia Hills), drafted a disaster assistance manual to assist young lawyers in handling these cases. The comprehensive manual, which is available online at

http://alabamayls.org/ebooks/2008_FEMA_Disaster_Manual.pdf, is a primer on landlord-tenant disputes, insurance law and other common issues that typically arise in the wake of a natural disaster. If you are interested in being added to the list of volunteers willing to assist FEMA in the event that a natural disaster strikes Alabama, please contact Brent.

The third way that you can render service is by volunteering to assist in your local school system. The Young Lawyers' Section participates in the *Lawyer in Every Classroom* program designed and promoted by the Alabama Center for Law and Civic Education. This program sends attorneys into seventh-grade classrooms to teach a course entitled *Play by the Rules: Alabama Laws for Youth*. Through this course, seventh-graders learn about the laws to which they are held accountable. Although the YLS only became involved in this program in the past few years, the program has grown exponentially under the leadership of **Mitesh Shah** (Birmingham). At last count, there were several hundred attorneys around the state who volunteered to participate in it. I encourage you to contact Mitesh to get involved in this worthwhile program.

Finally, after rendering service, young lawyers need to relax. To promote relaxation, networking and collegiality, the Young Lawyers' Section hosts its annual Sandestin Seminar. This year, the seminar will be held May 14-16. It has always been our largest event, and it attracts young lawyers from around the state. There has been a concerted effort this year to recruit a diverse panel of speakers who will appeal to attorneys working in many different practice areas. In addition to the CLE opportunities offered at Sandestin, there are also beach parties, a golf tournament and a cocktail party featuring a silent auction. More detailed information about the seminar will be provided in the next article, but you should be receiving a brochure in the mail about it soon.

If you have any questions about your Young Lawyers' Section, or if you would like to get more involved with your YLS, please contact me.



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Jim Crow and Me, *Stories from my life as a civil rights lawyer*

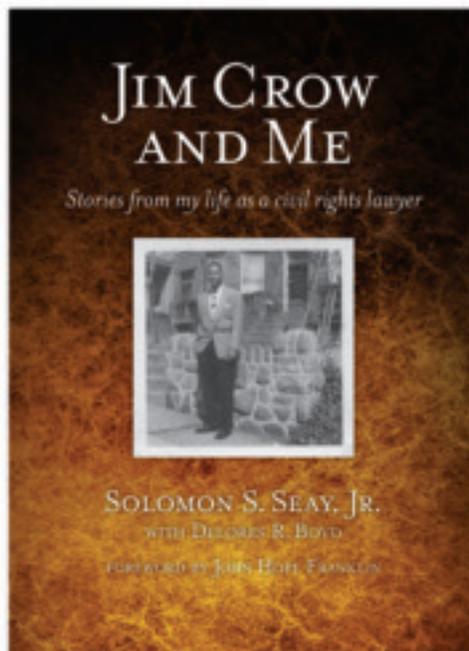
By Solomon S. Seay, Jr.

I'm not actually a book reviewer. I have no (good) idea about how to evaluate whether a book is laudable literature.¹ But, I do know what feels right, and what moves me—what makes me cry, and what makes me smile. I do know what inspires me and, mostly, I know what is readable and keeps me awake and wanting to read more. *Jim Crow and Me, Stories from my life as a civil rights lawyer*, written by Solomon Seay, Jr., with Judge Delores Boyd² does all of that. It is, in my (unlearned) opinion, a work of art.

And, I read it quickly. In one day. I know that's no big deal for most of you—but for me, it's huge. I'm sort of a book-on-tape (my wife says, illiterate) kind of guy. But this book grabbed me. And, it never let go.

As you've likely guessed by now, the book's about Solomon Seay, Jr. or, more accurately, about his experiences fighting racial discrimination in Alabama. Sol is historic. He is a person for the ages. And, he's a member of the Alabama State Bar. He became a member when there were only ten black lawyers in the state.

The book begins with Sol's inspiration. I actually believe he was born to be a civil rights lawyer. Those qualities are in his blood.³ He came from a proud, well-educated and activist family. His mother was a school teacher, and his father, Reverend Solomon Seay, Sr., was a founding member, and later president, of the Montgomery Improvement Association, a peaceful organization that stood unyieldingly against



racial injustice. Rev. Seay's example was one of quiet, yet firm, dignity. He was a role model for MLK, Jr. and for many others, including his son. On one occasion recounted in the book, Rev. Seay boldly, but politely, demanded (and received) his money back from a white ticket-taker at the circus who had rudely declined to put change for the ticket price in Rev. Seay's hand. Little Sol was watching. His father was an inspiration.

Another inspiration was a junior high school teacher who implored her students to seek justice and made plain that justice often flowed only to those who had the guts to grab it. Sol listened to his teacher. He heard her. He became a civil rights lawyer.

And, these are his stories—accumulated over the course of his career. They are beautifully organized into short, compelling

vignettes, and they touch every aspect of his life—the tragic and heartbreaking, the courageous, the funny, the poignant, and the thankfully hopeful. In part, I guess, *Jim Crow and Me* is a love story. Sol lost Ettra almost three years ago after 53 years of marriage. She was a revered early childhood teacher in Montgomery, described by Sol as a fiercely proud black woman who did not suffer discrimination easily. Ettra and Sol shared the triumphs of their careers and the joys of their family, but also endured the heartbreaking loss to illness of two daughters. Sol's poetic ode to Ettra graces his book, and her name still adorns his license plate. She's still with him. I think she always will be.

Civil rights, of course, were, and are, more than a career objective for Sol. Like his wife, he took race discrimination personally, and several of the anecdotes in his book describe, sometimes intensely, and other times more lightheartedly, his responses to it. One example involves the Elite Café, a favorite lunch and nighttime spot for Montgomery's legal, business and political communities. On the very day Lyndon Johnson signed into law the Civil Rights Act of 1964, Sol, Ettra and two of their three young children dined there. They had to wait to be served. The proprietor said he would serve them the very minute the president signed the civil rights bill into law, and not a minute sooner. When that minute passed, according to Sol, the service and food exceeded all expectations.

No slight was too big or too small for Sol to react. When then-Governor John Patterson refused to renew Sol's notary public license, Sol sued in federal court. And, he persisted even when Judge Frank M. Johnson, Jr. urged him to concentrate on more serious violations of law.⁴ Sol also sued the Alabama State Bar when Ettra was excluded from a spouses' function at an annual meeting. When the restaurant inside the Camden Motel in Wilcox County refused to serve Sol lunch, he sued. Despite his contagious charm, Sol simply refused to accept bleep from anyone.

But mostly, of course, Sol devoted his career to others. Along with his close friend and one-time law partner, Fred Gray, Sol handled (I suspect) more race discrimination cases than any other lawyer in the United States, and he probably was more successful in such cases than anyone you know. There was no limit to the kind of cases he handled—school desegregation, employment discrimination, jury discrimination, voting discrimination, criminal cases, and more. It's all in the book.

And, at the time Sol began his fight for civil rights in Alabama in the 1950s, his was not a safe occupation. On one occasion, his dad took a bullet (thankfully a flesh wound) intended for Sol. Sol courted danger. He litigated in many centers of Klan activity, and sometimes the law was hard to distinguish from the Klan.

Still, there are bright spots in Sol's stories—and some of them are white. Judge T. Werth Thagard is an example. Judge Thagard⁵ was circuit court judge in Butler County when Sol defended a black capital murder defendant before an all-white jury. Sol was the first black lawyer to represent anyone in that court. Not only did Judge Thagard extend Sol every professional courtesy, but also he put a forceful end to harassing traffic stops Sol endured every day of the trial. In what Sol describes as the act of an "upright, fearless, and honorable" man, Judge Thagard threatened contempt for the police chief and jail for the offending officer if the harassment did not end immediately. It did.

Mac Sim Butler,⁶ the then-Montgomery County Sheriff, was also a bright spot. Although he arrested Freedom Riders and other demonstrators

in May 1961, his friendly and familiar personality eased tensions during a time of mounting violence and martial law. When Sol, who, along with Fred, represented everyone who was arrested, picked up Rev. Ralph Abernathy from a stay in the county jail, the sheriff remarked that Sol, who had been practically living at his office, looked like the one who had been incarcerated. One night the sheriff drove Fred to buy snacks for folks in custody while Sol busily took statements. The sheriff tried to protect everyone from violence and was generally civil and courteous.

I could go on, but I think you get the picture.⁷ The book's great. Its use of language is captivating.⁸ Its stories are powerful. Solomon Seay, Jr. is someone you want to know—and even more so after reading his book. *Jim Crow and Me*, I believe, captures the essence of this thoroughly delightful, charming and complex man. But, it leaves you wanting to know more.

I feel personally blessed⁹—because I've known Sol and Delores for a long time. I know the commitment—and the heart and the skill—that went into Sol's civil rights practice, and I know the talent and hard work and the devotion (both to Sol and his work) that motivated Delores to help Sol record for us, and for our children, some of his experiences and good works. You should read it—not only because you just should, but also because I believe you will be proud that these folks are Alabama lawyers. ▲▼▲

Endnotes

1. I am, however, familiar with alliteration.
2. Judge Boyd was an exceptional lawyer in Montgomery before her elevation to the Bench. After graduating from Virginia Law School and clerking for Judge John Godbold on the U.S. Court of Appeals, she practiced for many years with Howard Mandell, forming a (pretty unusual for the time) mixed-race law firm. Together, Delores and Howard sued Alabama State University for reverse employment discrimination in a landmark case defended by, of all people, Solomon Seay, Jr. Delores and Howard won. Judge Boyd served remarkably well as a United States Magistrate Judge, and would have been, and may still be, a great federal district court judge, and an even better federal appellate court judge.
3. Those qualities were in his sister's blood, too. Hagalyn Seay Wilson was a doctor who, oblivious to her own safety, rushed to the scene of ongoing rioting to provide medical care to Freedom Riders savagely

beaten at Montgomery's Greyhound Bus Station. Judge Boyd, while growing up, worked in Dr. Wilson's office

4. Judge Johnson served on the United States District Court for the Middle District of Alabama for 24 years and then served another 20 on the U.S. Courts of Appeals for the 5th and 11th circuits. Solomon Seay interacted with Judge Johnson, both on and off the bench, for most of Judge Johnson's service. In *Jim Crow and Me*, Sol says, "Judge Johnson's opinion mattered to me. Without his courageous court decrees in the 1960s and 1970s, the civil rights movement simply would not have defeated Jim Crow in Alabama. I admired and respected him greatly."

That respect did not always translate into Sol's agreeing with the judge. The notary case is an example. In urging Sol to drop the case, the judge told him, "if you are going to be on the forefront in fighting for equal rights, there are some things you just tolerate, and you stay the course." Sol stayed the course, but he didn't drop the notary case.

Although Judge Johnson greatly respected and liked Sol, he showed no favoritism. The book describes an occasion when, due to a miscommunication caused by an assistant U.S. Attorney, Sol did not appear in court for a docket call. The judge directed a United States Marshall to bring Sol before the bench. When found, Sol was plowing in combat boots, dusty fatigues and a skivvy shirt, but the marshal gave him no time to dress before taking him to court. Luckily for Sol, the assistant U.S. Attorney took the heat for the misunderstanding, and the judge told Sol he could get back to plowing.

5. For you older lawyers, Judge Thagard was the father of Tommy Thagard, an excellent lawyer with Balch & Bingham. For you more modestly aged lawyers, Judge Thagard was the grandfather of Maynard Cooper's Tom Thagard.
6. Sheriff Butler was the father of (who I like to call) the fabulous Butler boys, Phil of Bradley Arant and Al of the Alabama Department of Corrections legal staff.
7. Also, Robert Huffaker says I'm too wordy.
8. I also love its footnotes.
9. I guess I don't feel so much actually blessed as just plain lucky. But Sam Crosby is always saying he feels blessed, and it sounds good. So, I thought I would try it.
10. Nor has he met a meaner woman than Margaret Murphy, the managing editor of *The Alabama Lawyer*.



Bobby Segall practices with Copeland Franco Screws & Gill and has done so longer than most of you have been alive. In all those years, he's never met finer lawyers than Solomon

*Seay, Jr. and Judge Delores Boyd.*¹⁰



The Role of *Amicus* Briefs

By Ed R. Haden and
Kelly Fitzgerald Pate

Most lawyers are familiar with the phrase “friend of the court” and its Latin version “*amicus curiae*.” Traditionally, the term was used to describe an independent, neutral brief-writer¹ “who, for the benefit and assistance of the court, informs it on some matter of law with regard to which the court may be doubtful or mistaken.”²

The role of the *amicus*, however, has changed. Today, *amici* are rarely wholly independent from or neutral to the litigation in which they seek to have a say. Indeed, an interest in the litigation is one of the key factors used to determine whether an *amicus curiae* brief will be allowed. This change in the status of *amici* has fostered divergent views on the need for and efficacy of this practice.

Posner-Alito Dispute

Judge Posner, the often-cited Seventh Circuit Court of Appeals judge, has strongly advocated for a restricted approach to allowing *amicus curiae* briefs. In *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542 (7th

Cir. 2003), Judge Posner set out, as he had done before,³ this restrictive approach. The decision to allow *amicus curiae* briefs is one left solely to the court’s discretion.⁴ Under this discretionary view, Judge Posner noted that the court will, accordingly, “not grant rote permission to file such a brief.” This is particularly true when the briefs are duplicative of the parties’ arguments. This policy was supported by the following reasons:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; *amicus* briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, *amicus* briefs drive up the cost of litigation; and the filing of an *amicus* brief is often an attempt to inject interest group politics into the federal appeals process.

Based on these reasons, Judge Posner listed criteria on which the decision to allow the filing of *amicus* briefs should be based: “whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” This criterion would more likely be met, according to the court, when “a party is inadequately represented; or . . . the would-be *amicus* has a direct interest in another case that may be materially affected by a decision in this case; or . . . the *amicus* has a unique perspective or specific information that can assist the court beyond what the parties can provide.” Under this rationale, the court denied the motions for leave to file the *amicus* briefs finding that while the briefs included additional case citations and “slightly more analysis on some points[,]” they were essentially briefs that duplicated arguments of the parties and “announce[d] the ‘vote’ of the amici on the decision of the appeal.”

In contrast to the above restrictive approach, then-Judge Alito, who chaired the Advisory Committee on the Appellate Rules, espoused a more open, practical approach to allowing *amicus curiae* briefs in *Neonatology Associates v. Commissioner of Internal Revenue*, 293 F.3d 128 (3d Cir. 2002). Examining Rule 29 of the *Federal Rules of Appellate Procedure*, the court noted that a broad reading is appropriate.⁵ According to Judge Alito, implicit within Rule

29 are the requirements of “(a) an adequate interest, (b) desirability, and (c) relevance.”

Judge Alito explained that under modern practice instead of being impartial and having no pecuniary interests, an *amicus* is required to have an interest in the case:

...the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.

I begin with the appellants’ argument that an *amicus* must be “an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another.” *Opp.* at 3-4. This description of the role of an *amicus* was once accurate and still appears in certain sources, see 3A C.J.S. *Amicus Curiae* § 2 at 422-23 (1973), but this description became outdated long ago. See Samuel Krislov, “The *Amicus Curiae* Brief: From Friendship to Advocacy,” 72 *Yale L.J.* 694, 703 (1962).

Today, as noted, Rule 29 requires that an *amicus* have an “interest” in the case, see *Fed. R. App. Proc.* 29(b)(1) and (c)(3), and the appellants’ argument that an *amicus* must be “impartial” is difficult to square with this requirement. An accepted definition of the term “impartial” is “disinterested,” *Black’s Law Dictionary* 752 (6th ed. 1990),



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and it is not easy to envisage an amicus who is “disinterested” but still has an “interest” in the case.

....

The appellants suggest, however, that the very term “amicus curiae” suggests a degree of impartiality. The appellants quote the comment that “[t]he term ‘amicus curiae’ means friend of the court, not friend of a party.” Opp. at 3 (quoting *Ryan*, 125 F.3d at 1063). The implication of this statement seems to be that a strong advocate cannot truly be the court’s friend. But this suggestion is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision-making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend.

The argument that an amicus cannot be a person who has “a pecuniary interest in the outcome” also flies in the face of current appellate practice. A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations and other parties with “pecuniary” interests appear regularly as amici.

With regard to desirability, Judge Alito rejected the notion that *amicus* briefs are to be allowed only when the party to be supported is unrepresented or inadequately represented, as this approach could deprive the court of valuable submissions. He stated:

I also disagree with the appellants’ argument that an amicus seeking leave to file must show that the party to be supported is either unrepresented or inadequately represented. Rule 29 does not contain any such provision

The argument that an amicus cannot be a person who has “a pecuniary interest in the outcome” also flies in the face of current appellate practice.

Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.

....

The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent. The decision

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whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. . . . Under these circumstances, it is preferable to err on the side of granting leave.

Relevance requires that the *amicus* deal with an issue that has been raised by the party who is supported. However, the relevance factor typically does not create an obstacle because the waiver rule generally bars an *amicus* from raising an argument not raised in a party's brief.⁶

Under Judge Alito's approach the merits panel is given the opportunity to disregard a brief that may turn out to be unhelpful while not being deprived of a potentially useful brief.⁷ Judge Alito rejected the argument that a restrictive approach to allowing *amicus* briefs is more protective of the court's time and lessens its workload. The open approach to *amicus* briefs thus provides that "motions for leave to file amicus briefs [should be granted] unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id.*

The interplay between the old Posner view and the new Alito view can be very useful. For example, counsel for Southern Nuclear Operating Company sought to file an *amicus* brief in the federal circuit in *Pacific Gas and Electric Co. v. United States*, No. 07-5046 (Fed. Cir.). The Department of Justice opposed the motion for leave to file, citing the Posner view. On reply, Southern Nuclear's counsel cited Alito's view based on the current text of the appellate rules. The federal circuit, which had been restrictive in allowing *amicus* briefs to be filed in the past, granted Southern Nuclear's motion for leave to file the *amicus*.

When Friends Should Be Allowed

The United States Supreme Court traditionally has had an open approach to allowing *amicus curiae* briefs and often cites

to the briefs in its decisions.⁸ Similarly, the Alabama Supreme Court accepts and relies on *amicus curiae* briefs regularly.⁹ While the Eleventh Circuit Court of Appeals does not have a line of jurisprudence detailing or giving insight to its approach regarding *amicus* briefs, from a practitioner's point of view the Court appears to have a more restrictive approach to allowing *amicus curiae* briefs.¹⁰

As a general matter, helpful *amicus* briefs should be allowed. An unhelpful brief is one that is long, simply duplicates one or more of the arguments of a party or argues political points more appropriately reserved for the legislature. In contrast, a helpful *amicus* brief, which should be allowed, is one that is short, focuses simply and briefly on the key decision point(s) and:

- gives the practical effect of a decision on the broader legal scheme at issue;
- demonstrates how the underlying factual process or business works;
- explains how the sought-after rule/decision would affect interests not explained by the parties' briefs; or
- more fully develops the legal analysis for an argument raised in a party's brief.¹¹

Allowing helpful *amicus* briefs will not waste judicial resources or unnecessarily raise the costs of litigation. In fact, allowing helpful *amicus* briefs may help reduce costs by culling the unnecessary and unintended effects a particular decision may have on other litigation and issues. An approach to *amicus* briefs that is over-inclusive gives the ultimate decision-making judges the ability to review, rely on or disregard an *amicus* brief as they deem appropriate at the time that the case and issues are being closely scrutinized. *Amicus* briefs that meet the criteria can result in a more informed decision process for the courts and better opinions for the bar. ▲▼▲

An unhelpful brief is one that is long, simply duplicates one or more of the arguments of a party or argues political points more appropriately reserved for the legislature.

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Endnotes

1. See Comment, *The Amicus Curiae*, 55 Nw. U. L. Rev. 469 n.3 (1960); 23 James Wm. Moore, et al., *Moore's Federal Practice* § 537 App. 100 (3d ed. 2007) ("Originally, the *amicus curiae* was, indeed, the friend and counselor of the court. Courts appointed lawyers to assist them, and the lawyer was the *amicus*, not a client whom the lawyer represented.")
2. *Moore's Federal Practice* § 329.11 (3d Ed. 2007).
3. *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615 (7th Cir. 2000) (Posner, C.J.); *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (Posner, C.J.).
4. *Voices for Choices*, 339 F.3d at 544.
5. *Neonatology Assoc.*, 293 F.3d at 132.
6. See *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60, n.2, 101 S. Ct. 1559, 1563 n.2 (1981) (the Supreme Court will not address issues raised by *amici* that were not decided by the court of appeals or argued by the supported party).
7. *Neonatology Assoc.*, 293 F.3d at 133.
8. See, e.g. *Fed. Express Corp. v. Holowecki*, ___ U.S. ___, 128 S. Ct. 1147, 1155-56 (2008) (considering *amicus* brief of the EEOC in case regarding a claim under the Age Discrimination in Employment Act of 1967 regarding the requirements of a "charge"); *Hall St. Assocs. v. Mattel, Inc.*, ___ U.S. ___, 128 S. Ct. 1396, 1406 (2008) (noting the possible consequences of the decision as raised by the parties' *amicus*); *Medellin v. Texas*, ___ U.S. ___, 128 S. Ct. 1346, 1358 (2008) (citing government's position in an earlier case articulated through its *amicus* brief in action regarding validity of habeas petition based on decision of International Court of Justice and presidential memorandum).
9. See, e.g. *Ex parte Masterbrand Cabinets, Inc.*, 984 So. 2d 1146 (2007) (citing *amicus curiae* which pointed out the legislative purpose for enacting the workers' compensation schedule); *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So. 2d 705, 713 n. 3 (Ala. 2007) (citing *amicus* brief which pointed out that "the vast majority of courts nationwide—over 100 cases from 36 jurisdictions—have upheld and enforced pollution-exclusion clauses like the one at issue here, which bar coverage for harms caused by exposure to a variety of pollutants"); *Fike v. Peace*, 964 So. 2d 651, 661 (Ala. 2007) (agreeing with point made in *amicus* brief filed by the Alabama Defense Lawyers Association).
10. The Eleventh Circuit has, on occasion, characterized an *amicus* as a friend of a party instead of a friend of the court. See *Sierra Club v. TVA*, 430 F.3d 1337, 1348 (11th Cir. 2005) ("TVA, joined by its friend the State of Alabama, contends that increasing the effectiveness of enforcement increases the stringency of any standard that is being enforced.") (emphasis added).
11. More fully developing an argument raised by a party fulfills the relevance factor Judge Alito described. *Neonatology Assoc.*, 293 F.3d at 131.



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These days,
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have all of its ducks in a row
in order to successfully remove a case.

Removal under *Lowery v. Alabama Power Co.*,

483 F.3d 1184 (11th Cir. 2007), cert. denied sub nom.

Hanna Steel Corp. v. Lowery, — U.S. —, 128 S. Ct. 2877, — L. Ed. 2d — (2008)

By J. Brannon Maner

As most practitioners are aware, proper removal of an action from Alabama state courts to Alabama federal courts based on diversity jurisdiction under 28 U.S.C. § 1332 is not as simple as it used to be. These days, a removing defendant must have all of its ducks in a row in order to successfully remove a case. The Eleventh Circuit's holding in *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), cert. denied sub nom. *Hanna Steel Corp. v. Lowery*, __ U.S. __, 128 S. Ct. 2877, __ L. Ed. 2d __ (2008), substantially narrowed the evidence that a district court may consider in determining whether the amount in controversy exceeds the jurisdictional minimum required for diversity jurisdiction. This article discusses the effects of *Lowery* and its application by the federal courts sitting in the state of Alabama.

Removal— Procedurally

“Any civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court.” *Tapscott v.*

MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11th Cir. 1996) (citing 28 U.S.C. § 1441(a)), abrogated on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). Under 28 U.S.C. §§ 1331 and 1332, removal is premised either on federal-question jurisdiction or diversity jurisdiction. For the purposes of this article, only diversity jurisdiction under 28 U.S.C. § 1332¹ will be addressed.

Federal courts may exercise diversity jurisdiction over all civil actions where the amount in controversy exceeds \$75,000, exclusive of interest and costs, and the action is between citizens of different states. 28 U.S.C. § 1332(a), 28 U.S.C. § 1441(a) (“(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.”). However, “[b]ecause removal jurisdiction raises significant federalism concerns, federal

courts are directed to construe removal strictly ... [i]ndeed, all doubts about jurisdiction should be resolved in favor of remand to state court.” *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) (internal citations omitted). “Accordingly, when a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power.” *Id.* at 409. “Simply put, once a

federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.” *Id.* at 410 (citing *Ex parte McCardle*, 74 U.S. 506, 19 L. Ed. 264 (1868)). Otherwise, a party could “work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them.” *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000-01 (11th Cir. 1982) (quoting *Am. Fire & Cas. Co. v. Finn*,

341 U.S. 6, 18, 71 S. Ct. 534, 95 L. Ed. 702 (1951)).

Generally, a notice of removal must “be filed within thirty days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.” 28 U.S.C. § 1446(b).² However, if a determination of jurisdiction cannot be made by the face of the complaint or documents attached thereto, “a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” *Id.* After removal to federal court, a party may move to remand the cause to state court based on any defect in the removal, including lack of subject-matter jurisdiction. 28 U.S.C. § 1447(c).³ A motion to remand based on a procedural defect in the removal must be made within 30 days after the filing of the notice of removal. *Id.* However, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” *Id.*

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Proving the Amount in Controversy

The Eleventh Circuit has made it very clear that “in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence.” *Lowery*, 483 F.3d at 1208 (citing *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (adopting the “preponderance of the evidence” standard after examining the various burdens of proof in different factual contexts), *overruled on other grounds, Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000).

Therefore, “the removing defendant must establish the amount in controversy by ‘[t]he greater weight of the evidence, ... [a] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline fair and impartial mind to one side of the issue rather than

the other.” *Lowery*, 483 F.3d at 1209 (quoting *Black’s Law Dictionary* 1220 (8th ed. 2004)). While proving the amount in controversy has historically seemed easy for most removing defendants, that is no longer the case under *Lowery* and a series of related cases.

- a. The Underlying Case of *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007), *cert. denied sub nom. Hanna Steel Corp. v. Lowery*, – U.S. –, 128 S. Ct. 2877, – L. Ed. 2d – (2008).

On January 24, 2003, Katie Lowery and eight other individual plaintiffs filed suit in Jefferson County Circuit Court against 12 industrial and manufacturing plants and 120 fictitious entities for discharging particulates and gases into the air and ground water of Jefferson County, Alabama. *Id.* at 1187. Plaintiffs originally demanded recovery for compensatory and punitive damages of \$1,250,000 per plaintiff. *Id.* at 1188. However, the plaintiffs later amended their complaint three times, adding more

than 400 plaintiffs and amending their prayer for relief removing any specific monetary amount the plaintiffs were claiming. *Id.* On July 17, 2006, defendant Alabama Power Co. filed a notice of removal under the “mass action” provision of the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(11), removing the action to the United States District Court for the Northern District of

failed to meet its burden of establishing federal jurisdiction because nothing in the notice of removal or the amended complaint indicated the specific amount of damages the plaintiffs were actually claiming. *Id.* at 1189. Alabama Power filed a supplement to its notice of removal on August 4, 2006, stating that federal jurisdiction had been established because the case involved more than 100

...in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence.

Alabama. *Id.* In its removal, Alabama Power asserted that each of the plaintiffs’ claims exceeded the jurisdictional minimum of \$75,000, and the claims totaled in excess of \$5,000,000, CAFA’s minimum aggregate amount in controversy for diversity jurisdiction.⁴ *Id.*

Plaintiffs filed a motion to remand the case to the Jefferson County Circuit Court asserting that Alabama Power

persons resulting in the aggregate of plaintiffs’ claims exceeding \$5,000,000 even if each plaintiff’s claims were only valued at \$12,500. *Id.* Alabama Power also argued that subject matter jurisdiction existed because plaintiffs in recent mass tort actions in Alabama had received either jury verdicts or settlements for greater than \$5,000,000. *Id.* In addition to its notice of removal,

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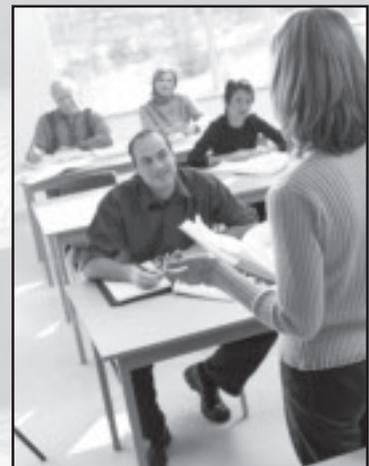
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Alabama Power also filed for leave to engage in discovery, including requests for admission regarding plaintiff's claims for recovery in excess of \$75,000. *Id.*

On October 24, 2006, the district court issued a memorandum opinion holding that, as a threshold matter, it lacked jurisdiction over the claims against the defendants who had been made parties prior to CAFA's effective date. *Id.* at 1192. For the remaining defendants (Alabama Power and Filler Products), the court provided that CAFA had not changed the rule that "when a state court complaint is uncertain or silent

In affirming the Northern District's remand of the case, the Eleventh Circuit addressed four distinct issues, the two most important of which for the purposes of this article are "the applicable burden of proof in establishing subject matter jurisdiction in a removed case in which damages are unspecified" and "what a district court may consider in reviewing the propriety of removal that is timely challenged by a motion to remand." *Lowery*, 483 F.3d at 1193. The court first discussed its application of the "preponderance of evidence" standard that it specifically adopted in

the evidence" standard where the court has nothing before it but bare pleadings, which is generally the case when a case is removed within the first 30 days. *Lowery*, 483 F.3d at 1210.

We note, however, that in situations like the present one—where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to meaningfully apply the preponderance burden. We have no evidence before us by which to make an informed assessment of the amount in controversy. All we have are the representations relating to jurisdiction in the notice of removal and the allegations of the plaintiffs' third amended complaint. As such, any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon. See *Lindsay v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) (noting, in a removed class action, that "it was not open for defendants to attempt to show" the requisite amount in controversy per capita where the complaint made insufficient allegations, "[n]or was it open to the district court to speculate" on whether the jurisdictional facts existed).

Lowery, 483 F.3d at 1210-11. Even though the Eleventh Circuit provided its criticisms of the "preponderance of the evidence" standard, it used the standard in the *Lowery* case in affirming the district court's remand of the case. *Id.* at 1211 ("Regardless, our precedent compels us to continue forcing this square peg into a round hole.").

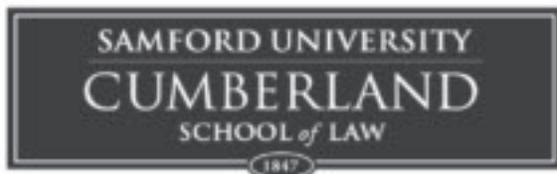
All of this begs the question: How does one show by a "preponderance of the evidence" that an amount in controversy exceeds \$75,000 if there is no specific monetary amount sought in the complaint? Prior to *Lowery*, Alabama cases were routinely removed based on the removing party asserting the existence of more than \$75,000 in controversy by relying on jury verdicts or settlements in excess of that amount in similar Alabama cases. See, e.g., *Carswell v. Sears, Roebuck & Co.*, No. 2:06-cv-01098-WKW, 2007 WL 1697003, *1

...when a state court complaint is uncertain or silent on the amount being sought, the removing defendant under 28 U.S.C. § 1332 has the burden of proving the jurisdictional amount by a preponderance of the evidence.

on the amount being sought, the removing defendant under 28 U.S.C. § 1332 has the burden of proving the jurisdictional amount by a preponderance of the evidence." *Lowery v. Honeywell Int'l Inc.*, 460 F. Supp. 2d 1288, 1296 (N.D. Ala. 2006). The district court ruled that these defendants had not satisfied their burden to show that a single plaintiff had claims in excess of \$75,000, or, in the alternative, that all of the plaintiffs' claims exceeded \$5,000,000 in the aggregate. *Id.* at 1297.

Tapscott v. MS Dealer Service Corp., 77 F.3d at 1357. The court traced its roots of the "preponderance of the evidence" standard back to the Supreme Court's opinion in *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936) ("[T]he court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.").

Next, the court discussed the difficulties of applying the "preponderance of



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(M.D. Ala. June 12, 2007). With *Lowery*, however, it is clear that those days have passed. *Lowery*, 483 F.3d at 1220-21.

“In *Lowery*, the Eleventh Circuit held that when the amount in controversy is based on the value of a lawsuit, the party asserting federal jurisdiction must provide a document containing ‘an unambiguous statement that clearly establishes federal jurisdiction.’” *State Farm Fire & Casualty Co. v. Knoblett*, 561 F. Supp. 2d 1256, 1258 (M.D. Ala. 2008) (quoting *Lowery*, 483 F.3d at 1215, n. 63). Specifically, the court in *Lowery* provided:

Thus, under § 1446(b), in assessing the propriety of removal, the court considers the document received by the defendant from the plaintiff—be it the original complaint or a later received paper—and determines whether that document and the notice of removal unambiguously establish federal jurisdiction. . . . In assessing whether removal was proper in such a case [where the

plaintiff’s complaint does not plead a specific amount], the district court has before it only the limited universe of evidence available when the motion to remand is filed—i.e., the notice of removal and accompanying documents. If that evidence is insufficient to establish that removal was proper or that jurisdiction was present, neither the defendant nor the court may speculate in an attempt to make up for the notice’s failings. See *Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) (holding that, where a complaint did not specify the number of plaintiffs in a class action, it was not open to the defendants or the court to speculate that the class was small enough to establish the minimum amount in controversy).

...

We think it highly questionable whether a defendant could ever file a notice of removal on diversity

grounds in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11.

Lowery, 483 F.3d at 1213-15, n. 63. In addition to the court’s reference to Rule 11 in *Lowery*, a removing defendant who is unaware of or fails to comply with *Lowery* also subjects himself to the mercy of the court regarding the payment of “just costs and actual expenses, including attorney fees” as a result of an improper removal. 28 U.S.C. § 1447(c).

Applying the court’s narrowing standard of evidence to be considered from *Lowery*, district courts in Alabama have ended the days of the Alabama “punitive damages” general rule and the “past precedent” rule commonly used by removing defendants. See, e.g., *Carswell v. Sears, Roebuck & Co.*, No. 2:06-cv-

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01098-WKW, 2007 WL 1697003, *1 (M.D. Ala. June 12, 2007) (“District courts in this circuit are no longer able to ‘speculate in an attempt to make up for the notice’s failings,’ nor are the courts able to consider ‘evidence regarding the value of other tort claims.’”); *Constant v. Int’l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007) (remanding the case and stating that “the day of knee-jerk removal of diversity tort cases from state to federal court within the three (3) states comprising the 11th Circuit came to an end on April 11, 2007, when *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), was decided.”); *Howell v. Fields Realty, LLC*, No. 2:08-cv-492-WKW, 2008 WL 2705383, *2 (M.D. Ala. July 10, 2008) (remanding a personal injury case and stating “a demand for punitive damages is insufficient to satisfy the amount in controversy requirement.”); *Johnson v. Ansell Protective Products*, No. CA 08-0394-CG-C, 2008 WL 4493588, *7 (S.D. Ala. Oct. 2, 2008) (remanding a combined product liability and worker’s compensation action where the removing defendant relied on expected punitive damages claims to be asserted by the plaintiff to try to show an amount in controversy in excess of the jurisdictional minimum); *Siniard v. Ford Motor Co.*, 554 F. Supp. 2d 1276, 1278-79 (M.D. Ala. 2008) (remanding a product liability case arising out of a motor vehicle accident where the removing defendant relied on verdicts from similar cases).

When the plaintiff fails to provide a specified amount in its complaint, the factual information establishing jurisdictional amount must come from the plaintiff, not the defendant. *Lowery*, 483 F.3d at n. 66. By eliminating the “punitive damages” rule and “past precedent” rule, *Lowery* has given the plaintiff, as the drafter of the original complaint, the power to generally prohibit removal within the first 30 days if a specified amount in excess of \$75,000 is not included.

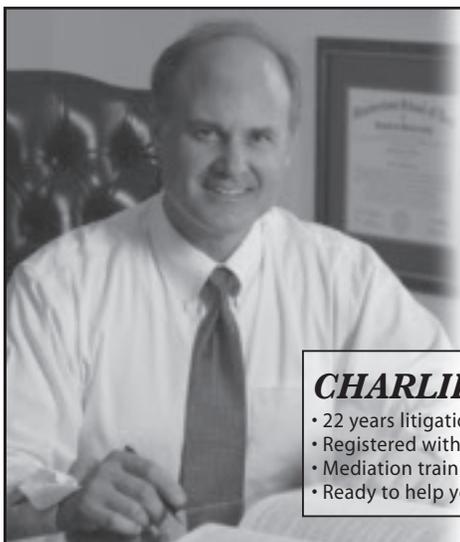
Discovery

In cases where an unspecified amount is pled in the complaint, is there any chance to remove under 28 U.S.C. §§ 1332, 1441 and 1446 based on the removing party including jurisdictional discovery with its notice of removal?

The Eleventh Circuit held that allowing jurisdictional discovery to go forward while the case is pending in the federal district court was not an option in *Lowery*. *Lowery*, 483 F.3d at 1215; see also *Cox v. Triad Isotopes, Inc.*, No. CA 08-0315-KD-C, 2008 WL 2959845 at *4 (S.D. Ala. July 29, 2008) (“*Lowery* can be read in no other manner than to disallow ‘[p]ost-removal discovery for the purpose of establishing jurisdiction in diversity cases[.]’”). Allowing such discovery is inconsistent with the parties’ obligation under Fed. R. Civ. P. 8 to set

forth the factual basis for jurisdiction, as well as their ethical obligation under Fed. R. Civ. P. 11. *Lowery*, 483 F.3d at 1215. Even though post-removal jurisdictional discovery was once considered as a viable option for a court examining its jurisdiction, “[s]ound policy and notions of judicial economy and fairness ... dictate that we not follow this course.” *Id.* at 1216. “The court should not reserve a ruling on a motion to remand in order to allow the defendant to discover the potential factual basis of jurisdiction. Such fishing expeditions would clog the federal judicial machinery, frustrating the limited nature of federal jurisdiction by encouraging defendants to remove, at best, prematurely, and at worst, in cases which they will never be able to establish jurisdiction.” *Id.* at 1217.

In reaching this conclusion, the court relied, by analogy, on the prohibition of allowing jurisdictional discovery had the plaintiff originally brought the case in federal court and was facing a motion to dismiss for lack of subject matter jurisdiction. *Id.* at 1216. By filing an action in federal court, the plaintiff is making a representation to the court that the action is properly before the court. If the plaintiff’s representations in its original complaint are accurate but a material element of the court’s subject matter jurisdiction is lacking, a defendant is free to move for dismissal and, assuming the facts to remove are provided, will be successful. *Id.* The court, in essence, relies on the



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same expectation of the defendant to accurately represent that subject matter jurisdiction exists when a defendant removes a case. For example:

If plaintiff's counsel concedes that the plaintiff lacks the evidence to cure the deficiency, the court may dismiss the action for failure to state a claim or want of jurisdiction... In our hypothetical diversity case, should the plaintiff request leave to conduct discovery to support its assertion that the case is properly before the court, the court would deny such a request. In such a situation, the court would not reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not—before coming through the courthouse doors... In deciding if dismissal is proper, a court would look only to the facts as alleged in the complaint and would not waste limited judicial resources by directing its inquiry elsewhere.

...

[In a removed case,] a removing defendant must also allege the factual allegation for federal jurisdiction in its notice of removal under § 1446(a) ... Having made this representation, the defendant is no less subject to Rule 11 than a plaintiff who files a claim originally.

Thus, a defendant that files a notice of removal prior to receiving clear evidence that the action satisfies jurisdictional requirements, and then later faces a motion to remand, is in the same position as a plaintiff in an original action facing a motion to dismiss. [As the court discussed above where the plaintiff would not be allowed to conduct discovery to cure jurisdictional deficiencies,] the court should not reserve ruling on a motion to remand in order to allow the defendant to discover the potential factual basis of jurisdiction.

Id. at 1216-17.

Not only did the *Lowery* court disallow jurisdictional discovery, it also provided that requests for jurisdictional discovery by defendants "is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exist[ed]." *Id.* at 1217. Because the court considers a request for discovery as an admission, the court follows that remand of such cases is proper. *Id.* at 1218.

Removal after Conducting Discovery in State Court May Be Only Option Left

Even though *Lowery* precluded the removing party from conducting jurisdictional discovery as part of the removal, a party is not prohibited from using discovery while the case is in the state court to request and receive the "unambiguous" statement or paper from the plaintiff that provides notice to a defendant that the case may then be removed under 28 U.S.C. § 1446(b). Keep in mind that removal based on § 1332 is allowed 30 days from the receipt of an amended pleading, motion, order or other paper from the plaintiff that establishes federal jurisdiction if the removal takes place within one year from commencement of

...requests for jurisdictional discovery by defendants "is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exist[ed]."



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the action. *See* 28 U.S.C. § 1446(b). The first three are self-explanatory, however courts have not articulated a bright-line test for identifying “other paper” that suffices for jurisdictional purposes. *See Lowery*, 483 F.3d at 1213. Even without an established standard, courts have held that “other paper” includes responses to formal discovery requests, settlement offers and deposition testimony. *Id.* (citing *Wilson v. Gen. Motors Corp.*, 888 F.2d 779, 780 (11th Cir. 1989) (responses to requests for admissions), *Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 761-62 (5th Cir. 2000) (settlement offers), *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (interrogatory responses), *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996) (deposition testimony)). In addition, a district court has the discretion to hold a hearing and allow the parties to offer evidence related to the sufficiency of the removing documents if it so desires. *See Lowery*, 483 F.3d at n. 66.

The court in *Lowery* did provide one exception to the rule that the court is limited to considering only the removal documents: “A defendant would be free to introduce evidence regarding damages arising from a source such as a contract provision whether or not the defendant received the contract from the plaintiff. In such situations, the underlying substantive law provides a rule that allows the court to determine the amount of damages. For example, in contract law, the default measure of damages is expectations damages; a court may look to the contract and determine what those damages would be.” *Id.* However, the expectations damages that will be considered by the court must be the damages that would flow to the plaintiff in the event the plaintiff prevails.

Injunctive Relief—How to Determine the Amount in Controversy

In addition to having the burden to satisfy the “preponderance of the evidence”

rule, a removing party in cases involving injunctive relief must prove the jurisdictional minimum by proving that the object of the litigation that would be awarded to the plaintiff exceeds \$75,000. Where only injunctive or declaratory relief is sought “it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 120 F.3d 216, 218 (11th Cir. 1997) (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 345, 97 S. Ct. 2434, 2443, 53 L. Ed. 2d 383 (1977)); *see also Occidental Chemical Corp. v. Bullard*, 995 F.2d 1046, 1047 (11th Cir. 1993). Even though there is a split in the circuits between the plaintiff-viewpoint and the either-party viewpoint regarding the proper standard in determining the “amount in controversy” where injunctive relief is involved, the Eleventh Circuit, relying on prior Fifth Circuit rulings, confirmed that it would use the “plaintiff-viewpoint rule” where injunctive relief is at issue. *Ericsson GE Mobile Communications, Inc.*, 120 F.3d at 219. “The value of injunctive or declaratory relief for amount in controversy purposes is the monetary value of the object of the litigation that would flow to the plaintiffs if the injunction were granted.” *Leonard v. Enterprise Rent-a-Car*, 279 F.3d 967, 973 (11th Cir. 2002) (citing *Ericsson*, 120 F.3d at 218).

In *Ericsson* the mayor of Birmingham determined that the City of Birmingham (“City”) needed a new public safety communications system and hired a consultant to assist the City in evaluating competing bids. *Id.* at 217. Plaintiff *Ericsson GE Mobile Communications, Inc.* (“EGE”) provided a bid of \$9,758,053 and defendant *Motorola Communications & Electronics Inc.* (“Motorola”) provided a bid of \$11,336,282. *Id.* The City rejected the bids and then negotiated a new contract with Motorola. *Id.* EGE brought an action to enjoin the enforcement of the contract between Motorola and the City and to have itself declared the lowest responsible bidder. *Id.* The district court tried the case to an advisory jury and concluded that the City’s decision to purchase the system advances by Motorola

was the result of improper influence by Motorola on the City's decision-makers and, therefore, violated the Alabama Competitive Bid Law. *Id.* at 218. Adopting the jury's verdict, the district court voided the negotiated contract between the City and Motorola. *Id.*

The court in *Ericsson* relied on several cases from the former Fifth Circuit to reiterate that the plaintiff-viewpoint rule remains the standard in the Eleventh Circuit. See, e.g., *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962) (see below); *Texas Acorn v. Texas Area 5 Health Systems Agency, Inc.*, 559 F.2d 1019, 1023 (5th Cir. 1977) ("Surely a plaintiff cannot satisfy the jurisdictional amount any time a private defendant's annual budget exceeds [the requisite amount in controversy]."); *Vraney v. County of Pinellas*, 250 F.2d 617, 618 (5th Cir. 1958) (dismissing an action for lack of subject matter jurisdiction because "there is no averment showing or tending to show that the value to the plaintiff of the object or right sought to be enforced exceeds the [jurisdictional] sum or value.") (emphasis in original). In particular, the court discussed the Fifth Circuit's holding in *Alfonso* where a group of homeowners brought a class action seeking to enjoin the expansion of a county airport. *Ericsson*, 120 F.3d at 219. The *Alfonso* court rejected the defendants' contention that "the amount in controversy is the air rights to the defendants." *Alfonso*, 308 F.2d at 727. In *Ericsson*, the Eleventh Circuit agreed that the value of the object of the litigation is not the value shifting to the defendant but only the recovery that would go to the plaintiff if successful. 120 F.3d at 221.

Under the Alabama Competitive Bid Law, EGE could not recover monetary damages based on the loss of contract but could only ask the court to consider any contract in violation of this article as void without ordering the defendant to be required to perform under a prior bid that was rejected. *Id.* Therefore, the court held that any benefit that EGE could receive from the injunctive relief awardable by the district court was too speculative and immeasurable to satisfy the amount in controversy requirement even though bids in excess of \$9,000,000 were at issue. *Id.* at 222. Because EGE cannot reduce the speculative benefit resulting

from a rebid "to a monetary standard, there is no pecuniary amount in controversy" and the case was remanded to the district court with instructions to dismiss for lack of subject matter jurisdiction. *Id.*

Therefore, a removing defendant must show to the district court that the recovery allowed under Alabama law would entitle the plaintiff to recover an amount in excess of \$75,000 based on the claims plaintiff pled in its complaint. Without evidence that the injunctive relief sought by the plaintiff exceeds the jurisdictional minimum, district courts in the Eleventh Circuit will remand the cause to state court.

Conclusion

After *Lowery*, the evidence a district court may use in order to evaluate whether a case was properly removed within the first 30 days has been narrowed to the removing documents, which generally include only the notice of removal and complaint. Without a specified amount pled in the complaint or a document attached thereto, a district court in Alabama is unlikely to agree with a removing defendant that the court has subject matter jurisdiction over the cause. In addition, because post-removal discovery is clearly disfavored under *Lowery*, a removing party will likely have to wait to see if or when it may try to remove a case based on discovery served while the case is pending in the state court. As provided in *Lowery*, the removing defendant must show that the removing documents "unambiguously establish federal jurisdiction." Similarly, a removing defendant in a case involving only injunctive relief must prove to the court that the "value" of the injunctive relief to the plaintiff exceeds the jurisdictional minimum. ▲▼▲

Endnotes

1. "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335 and

section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."

28 U.S.C. § 1332.

2. Section 1446(b) provides, in part:

"The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable...." 28 U.S.C. § 1446(b).

3. Section 1447(c) provides:

"A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1556(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case." 28 U.S.C. § 1447(c).

4. "Although *Lowery* itself involved the Class Action Fairness Act ("CAFA"), it interprets general removal statutes and has been applied by courts outside of the CAFA context." *Spivey v. Fred's Inc.*, 554 F. Supp. 2d 1271, 1274, n. 1 (M.D. Ala. 2008); see, e.g., *Constant v. Int'l House of Pancakes*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007) (J. Ackerl).



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The Agency Argument—

What ERISA Plaintiffs and Defendants Need to Know

**By Thomas O. Sinclair and
Jenifer Champ Wallis**

The Employee Retirement Income Security Act of 1974, commonly known as ERISA, governs most employer-provided employee welfare benefits. If an employer provides its employees with benefits such as group disability insurance, ERISA may govern legal disputes that arise concerning those benefits. In practical effect, ERISA (a federal statute) may preempt any state law claims an employee would otherwise have and subject those claims to the increasingly specialized area of ERISA litigation. This article is written for ERISA practitioners on both sides of the bar and for corporate counsel who are faced with ERISA questions arising in the administration of employee benefits.

Mrs. Smith worked more than 15 years for an employer she respected in a job she enjoyed. When Mrs. Smith was diagnosed with a potentially debilitating medical condition, she planned to obtain treatment and continue working. More than five surgeries later, Mrs. Smith and her attending physicians concluded she was simply no longer physically capable of working. Luckily for Mrs. Smith, one of the employee benefits provided by her employer was a group disability insurance plan, one which paid 60 percent of her pre-disability salary in monthly Long-Term Disability (“LTD”) benefits upon a finding of total disability under the policy.

Mrs. Smith submitted a claim for disability benefits with ABC Insurance, the LTD insurance carrier, was approved for benefits and began receiving a monthly check for disability benefits. Mrs. Smith readjusted her life plan and set a new goal—meeting her daily needs on only 60 percent of her former salary. Within a few months, ABC Insurance offered to arrange for Mrs. Smith to be represented

in a claim for Social Security Disability (“SSDI”) benefits. ABC Insurance made clear that Mrs. Smith would not be responsible for obtaining representation in the SSDI claims process but rather that ABC Insurance itself would “help her” obtain representation. Mrs. Smith accepted the insurer’s offer.

Mrs. Smith was then contacted by Government Benefit Advocates, an entity that represents individuals in claims for Social Security Disability benefits. One of the initial forms Government Benefit Advocates requested Mrs. Smith sign was one allowing Government Benefit Advocates to release information on the status of her SSDI claim to the LTD carrier, ABC Insurance. Mrs. Smith executed the form and provided Government Benefit Advocates with the contact information for all her attending physicians—contact information she had also provided ABC Insurance. Government Benefit Advocates contacted Mrs. Smith’s attending physicians and obtained her medical records. Government Benefit Advocates also had consultants review Mrs. Smith’s medical records and these consultants opined that

Mrs. Smith was unable to perform the job duty requirements for any occupation in the national economy.

Government Benefit Advocates then submitted the medical records and reports outlining Mrs. Smith's inability to perform any occupation in the national economy to the Social Security Administration in support of Mrs. Smith's claim for Social Security Disability benefits. Government Benefit Advocates then represented to the Social Security Administration and to the administrative law judge at the hearing on Mrs. Smith's claim for Social Security Disability benefits that Mrs. Smith was unable to work in any occupation. Mrs. Smith was found to be "disabled" by the Social Security Administration and awarded Social Security Disability benefits. Mrs. Smith then received a check for \$50,000 in retroactive Social Security disability benefits, covering the same period of time she was receiving LTD benefits and also received notice that she would receive monthly Social Security Disability benefits in the future. Her future monthly benefit from Social Security was less than the monthly LTD benefits she was presently receiving from ABC Insurance.

Throughout her claim for Social Security Disability benefits, Government Benefit Advocates kept ABC Insurance updated on the progress of Mrs. Smith's Social Security Disability claim through e-mails and phone conversations.

Government Benefit Advocates communicated regularly with Mrs. Smith's insurer, notifying ABC Insurance when medical records were requested and keeping ABC Insurance apprised of the status of Mrs. Smith's claim for Social Security Disability benefits. Upon the award of Mrs. Smith's Social Security Disability benefits, Government Benefit Advocates notified ABC Insurance of the award and provided ABC Insurance with a copy of the award letter from the Social Security Administration. Government Benefit Advocates then notified Mrs. Smith that she would be responsible for reimbursing ABC Insurance for the resulting "overpayment" of benefits¹ and that Government Benefit Advocates would coordinate repaying ABC Insurance.² Government Benefit Advocates later notified Mrs. Smith that the amount of the "overpayment" was \$50,000, the total amount of her retroactive Social Security Disability benefit payment, and that she was required to pay this amount to ABC Insurance.³

Mrs. Smith submitted the \$50,000 check to Government Benefit Advocates who immediately turned over the funds to ABC Insurance. ABC Insurance paid Government Benefit Advocates for its services in representing Mrs. Smith in her claim for Social Security Disability benefits and recovering the "overpayment." Shortly thereafter, Mrs. Smith received notification from ABC Insurance that it was ABC Insurance's determination that she was not disabled pursuant to the terms of her group LTD disability policy and that ABC Insurance would no longer pay her monthly LTD benefits. Mrs. Smith received no further LTD benefits from ABC Insurance.

What Happened to Mrs. Smith's Social Security Award?

Most disability insurance plans contain reimbursement provisions that provide that upon an insured's receiving a Social Security Disability award, the insured must pay back what is deemed an "overpayment" of benefits. In many cases, as is illustrated by the case of Mrs. Smith, this overpayment will constitute the entire amount of the insured's initial lump sum Social Security award paid for past-due benefit periods. These reimbursement provisions have been discussed in depth by other ERISA practitioners⁴ and therefore will not be discussed at length here. It is sufficient for the purpose of this article to note that most plans provide that even if the insured chooses not to

apply for Social Security Disability benefits, the LTD insurer may have the contractual right to estimate the amount of those benefits and reduce the amount of monthly benefits the LTD insurer is paying accordingly. Thus, insureds have little choice in determining whether to apply for Social Security Disability benefits.

...it is the existence of a right of control, notwithstanding whether it is actually exercised, that is a factor to be considered when determining the existence of an agency relationship.

Considerations for Claimants and Insurers

ERISA practitioners who represent parties in litigation resulting from an insurer's denial of disability benefits should recognize the events related above raise important legal issues that could weigh on the success of a lawsuit seeking to recover additional LTD benefits. Questions pertinent for ERISA practitioners are whether medical records gathered by Government Benefit Advocates and the information therein could be imputed to ABC Insurance and whether ABC Insurance may be judicially estopped from arguing that Mrs. Smith is capable of working in a job in the national economy as a result of Government Benefit Advocates' representations to the Social Security Administration during Mrs. Smith's claim for Social Security Disability benefits. The answer to these issues hinges on whether Government Benefit Advocates can be deemed ABC Insurance's agent or whether Government Benefit Advocates' actions link itself, the group LTD Plan and ABC Insurance so tightly that the agency argument is unnecessary.⁵ Alabama law is clear that the facts, not how the parties characterize their relationship, are determinative as to the existence of an agency relationship.⁶ Alabama law is also clear that it is the existence of a right of control, notwithstanding whether it is actually exercised, that is a factor to be considered when determining the existence of an agency relationship.⁷ For this reason, an agency analysis will require a case-by-case factual determination. Such

facts include the existence and contents of any service agreement between the LTD insurer and its purported agent, communications between the LTD insurer and its purported agent, payment of the purported agent by the LTD insurer and the level of control exerted by the LTD insurer over its purported agent.

A request from the claimant for documents evidencing any of these factors is likely to result in a discovery battle. From the LTD insurer's perspective, it neither wants its purported agent to be deemed as such nor does it want to produce any service agreement between the LTD insurer and its purported agent. LTD insurers could consider such service agreements to be proprietary information and refuse to produce them on that basis. The service agreement, however, may contain provisions that specify the amount of control the LTD insurer retains over its purported agent—a key issue in determining the existence of agency. Communications between the LTD insurer and its agent will be relevant for similar reasons but will likely also be the subject of discovery disputes. Therefore, consideration must be given to the unique discovery issues raised in ERISA cases.

Discovery in An ERISA Case

Although the Employee Retirement Income Security Act of 1974⁸ was enacted to promote the interests of employees . . . in employment benefit plans and to protect their contractually defined rights[,]⁹ the body of law of ERISA has, in practical effect, created hurdles rather than reprieve for many ERISA plaintiffs.¹⁰ The most notable manner in which ERISA plaintiffs are hindered and insurers favored is in the context of discovery. Although the ERISA statute doesn't set forth limits on discovery, the scope of what would constitute admissible evidence is limited, and as such the scope of discovery is, in large part, determined by the applicable standard of review employed by the court in an ERISA case. The standards of review range from *de novo*, in which the insurer's denial of a claim for benefits is afforded no deference and the court is free to review evidence outside the "ERISA record," to arbitrary and capricious, in

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which an insurer's denial of a claim for benefits will not be overturned unless it is determined to be both arbitrary and capricious. In cases in which an arbitrary and capricious, or modified arbitrary and capricious standard of review applies, arguments are often presented that the scope of admissible evidence is limited to the "ERISA record," or those documents that were before the insurer at the time it made the determination to deny further benefits.

In cases such as Mrs. Smith's, the scope of what is deemed the "ERISA record" could be affected by whether the entity that represented her in her claim for Social Security Disability benefits (here "Government Benefit Advocates") is deemed her LTD insurer's agent. If so, should the Government Benefit Advocates' documents used in the Social Security proceeding be considered as documents that were before the defendant insurer, ABC Insurance, at the time ABC Insurance made its determination to deny further benefits? If so, ABC Insurance's defense in the LTD litigation then would be affected by the scope of the "ERISA record" being much larger than just the claim file it maintained on Mrs. Smith's claim.

Defining the "ERISA Record"

A finding of agency in an ERISA case is significant for the potential that the LTD insurer could be imputed with the knowledge in the records garnered by its agent and those records could be considered as part of the ERISA record. Knowledge that an agent acquires within the scope of his employment is imputed to his principal.¹¹ "[N]otice to [an] agent while engaged in the business of the principal, acting within the scope of the agent's authority in respect to a transaction depending, is imputed to the principal, and when the principal adopts the acts of the agent, he does so in the light of such imputed notice."¹² Moreover, "the principal cannot take the benefit of the agent's act without taking also the burdens resulting from the agent's knowledge and intentions."¹³

In Mrs. Smith's case, Government Benefit Advocates obtained medical records that her LTD insurer, ABC Insurance, did not. Government Benefit Advocates also obtained reports based on physician reviews and examinations ABC Insurance did not. Moreover, ABC Insurance benefited by Government Benefit Advocates' representation by receiving Mrs. Smith's entire lump sum award for past due Social Security disability benefits. In an ERISA action based on the subsequent denial of her claim for LTD benefits, Mrs. Smith's attorney should consider obtaining Government Benefit Advocates' records and submitting them to the court as part of the ERISA record. Mrs. Smith's attorney could also argue that the knowledge of these documents is necessarily imputed to the LTD insurer due to the agency relationship.

Therefore, it is important for ERISA practitioners to realize the potential that if an agency relationship is supported by the facts of the case, those records garnered by the agent may be submitted for consideration of the court as part of the ERISA record and the knowledge of their contents imputed to the LTD insurer. In an ERISA case, where the war is often won or lost based on who wins the discovery battle over what constitutes the "ERISA record," this is a significant point.

...the principal cannot take the benefit of the agent's act without taking also the burdens resulting from the agent's knowledge and intentions.

Because of judicially created doctrine, insurers whose policies are governed by ERISA do not have a duty to investigate the claim, unlike insurance claims governed by state law. Thus, an LTD insurer could and normally has policy language placing the burden of properly documenting the claim on the claimant, a result that often finds a disabled layman trying to navigate the system of properly documenting an ERISA claim during the administrative process. Because judicial review is often limited to the "ERISA record," proper documentation of the claim during the administrative process can win or lose the

subsequent litigation. Thus, insurers whose policies are governed by ERISA have no incentive other than moral grounds to gather every single record supportive of a claim. Contrasted with Social Security advocates who seek to fully document SSDI claims, the "ERISA record" can contain much less evidence of the extent of the claimant's condition and current vocational abilities than that found in the Social Security record. The litigation advantages of having those SSDI records outside of the "ERISA record" are significant for the LTD insurer, and the effect of including the SSDI records in the LTD litigation can be substantial.

Could Judicial Estoppel Apply?

Equally important to the issue of whether the SSDI record should be included in the ERISA record is whether the LTD carrier can be bound by representations to the Social Security Administration in its insured's claim for Social Security Disability benefits. In Mrs. Smith's case, her insurer retained a third party who represented to the Social Security Administration that Mrs. Smith was not capable of working in any occupation in the national economy. That third party was successful in obtaining Mrs. Smith's Social Security disability benefits. Is the LTD insurer now judicially estopped from taking a contrary position to those statements made in that prior proceeding?

It is important to note at the outset that this issue of judicial estoppel due to representations to the Social Security Administration is a completely different issue than whether the insurer is necessarily bound by a Social Security Administration's determination of disability. The answer to this latter question is decidedly no.¹⁴ However, judicial estoppel,

which “precludes a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding”¹⁵ may still apply.

Although the application of judicial estoppel in this specific context may be an issue of first impression for many judges, the United States Supreme Court has offered some guidance by setting forth the factors to be applied in determining whether to invoke judicial estoppel:

First, a party’s later position must be “clearly inconsistent” with its earlier position. Second, ... whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position at a later proceeding would create “the perception that either the first or the second court was misled.” ... A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”¹⁶

Although the Eleventh Circuit has not spoken on this particular issue, other circuits have squarely addressed it. In *Darland v. Fortis Benefits Ins. Co.*, the Sixth Circuit held that “the principles of judicial estoppel certainly weigh against [an LTD insurer] taking such inconsistent positions.”¹⁷ The Seventh Circuit, without addressing the potential of a formal agency relationship, found judicial estoppel *principles* persuading in *Ladd v. ITT Corp.* but remained hesitant to extend the doctrine itself:

It brings the case within the penumbra of the doctrine of judicial estoppel—that if a party wins a suit on one ground, it can’t turn around and in further litigation with the same opponent repudiate the ground in order to win a further victory. The doctrine is technically not applicable here, because MetLife and ITT, the defendants in this suit, were not parties to the proceeding before the Social Security Administration. Yet they “prevailed” there in a practical sense because the grant of Social Security benefits to

Ladd reduced the amount of her claim against the employee welfare plan. If we reflect on the purpose of the doctrine, which is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant, we see that its spirit is applicable here. To lighten the cost to the employee welfare plan of Ladd’s disability, the defendants encouraged and supported her effort to demonstrate total disability to the Social Security Administration, going so far as to provide her with legal representation. To further lighten that cost, it then turned around and denied that Ladd was totally disabled, even though her condition had meanwhile deteriorated. In effect, having won once the defendants repudiated the basis of their first victory in order to win a second victory. This sequence casts additional doubt on the adequacy of their evaluation of Ladd’s claim, even if it does not provide an independent basis for rejecting that evaluation.¹⁸

In both *Ladd* and *Darland*, the courts recognized the potential injustice resulting from an LTD insurer’s pressing its insured to apply for Social Security disability benefits, paying for representation in the claim for Social Security disability benefits, accepting the benefit of those proceedings by accepting repayment of the “overpayment” created by those proceedings and then refusing to pay further disability benefits.

Conclusion

The implications of an LTD insurer hiring or even referring its insureds to third parties to represent its insureds in claims for Social Security disability benefits are many—ranging from discovery disputes regarding whether the Social Security record should be part of the “ERISA record” to the issue of whether the LTD insurer could find itself judicially estopped from taking positions contrary to the prior representations regarding its insured’s ability to work. ERISA practitioners on both sides of



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the bar should take careful note of the presence of such an argument in their ERISA cases and adjust their litigation strategy accordingly. Moreover, those attorneys who routinely represent plaintiffs in ERISA litigation should take special care to tailor their initial client interview to determine the potential for those agency arguments. ▲▲▲

Endnotes

1. Most group disability insurance contracts contain an "offset" provision that the amount of disability benefits the LTD insurer is required to pay may be reduced by the amount of monthly Social Security disability benefits its insured receives.
2. It is important to note the additional layer of a potential agency relationship created by ABC Insurance's retention of Government Benefit Advocates in the recovery of ABC Insurance's benefit "overpayment." Some LTD insurers will hire a recovery specialist separate and apart from the SSDI representative or undertake this function "in-house" to recover this "overpayment" on the LTD insurer's behalf. This practice would help to insulate LTD insurers from this additional factor supportive of a finding of an agency relationship.
3. Whether Government Benefit Advocates' representation of Mrs. Smith's legal obligation to forfeit her Social Security benefits to ABC Insurance was a correct statement of law is a topic recently addressed by David Martin in a prior issue of this publication. See David P. Martin, *Taking Benefits Back: Reimbursement Under ERISA*, 69 Ala. Law. 44 (2008).
4. See generally, David P. Martin, *Taking Benefits Back: Reimbursement Under ERISA*, 69 Ala. Law. 44 (2008).
5. Because this article addresses the agency argument, the issue of whether Government Benefit Advocate's actions on behalf of the plan bind ABC Insurance and the plan itself in resulting litigation is not addressed herein. It is sufficient, for the purposes of this article, to note that the practical effects discussed, *i.e.*, Government Benefit Advocates' documents being imputed to ABC Insurance and the issue of judicial estoppel do not wholly depend on a finding of agency. Where the fictional "ERISA Plan" is named in an ERISA case (as some jurisdictions have determined it must be) and an entity such as Government Benefit Advocates has acted as a fiduciary of that plan, the same legal issues described herein may be raised without the necessity of finding an agency relationship between Government Benefit Advocates and ABC Insurance.
6. See *Semo Aviation, Inc. v. Southeastern Airways Corp.*, 360 So. 2d 936, 940 (Ala. 1978) ("In Alabama, agency is determined by the facts, and not how the parties may characterize the relationship."); See also *Butler v. Aetna Finance Co.*, 587 So. 2d 308, 310-311 (Ala. 1991) ("[A]gency is to be determined by the facts and not by how the parties characterize the relationship.")
7. See *Wood Chevrolet Co., Inc. v. Bank of the Southeast*, 352 So. 2d 1350, 1352 (Ala. 1977) ("It has been said that there can be no agency relationship absent a right of control by the principal over his agent. . . . It is not essential that the right of control be exercised so long as that right actually exists.")
8. 29 U.S.C. § 1001 *et seq.*
9. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S. Ct. 948, 956, 103 L. Ed. 2d 80 (1989).
10. See Hon. William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 Cumb. L. Rev. 285, 287 (1998-1999). ("[ERISA's legislative] history suggests that the recipients of retirement and medical benefits were the objects of great concern. Yet, as the statute is applied, the real beneficiaries of ERISA, if any, turn out to be the fiduciaries, the administrators, the employers and the insurers. . . . The defendant-fiduciary-administrator-employer-insurer invariably wants ERISA to govern because of ERISA's severely limited or absent remedies for the plaintiff-employee-participant-beneficiary.")

11. See *Harris v. Gulf Refining Co.*, 240 F.2d 249, 252 (5th Cir. 1957) ("[S]ince he undoubtedly was the agent of one of the defendants the knowledge he acquired within the scope of his employment is chargeable to his master."). See also, *Stone v. Mellon Mortgage Co.*, 771 So.2d 451, 457 (Ala. 2000).
12. *Life & Cas. Ins. Co. of Tennessee v. Crow*, 231 Ala. 144, 164 So. 83, 85 (Ala. 1935).
13. *Connecticut Fire Ins. Co. v. Commercial Nat. Bank of San Antonio*, 87 F.2d 968, 969 (5th Cir. 1937).
14. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832, 123 S. Ct. 1965, 155 L.Ed.2d 1034 (2003).
15. *Lett v. Reliable Ruskin*, 2006 WL 2056582 at *3 (M.D. Ala. 2006).
16. *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001).
17. 317 F.3d 516 (6th Cir. 2003), *overruled on other grounds by Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003).
18. 148 F.3d 753, 755-756 (7th Cir. 1998).



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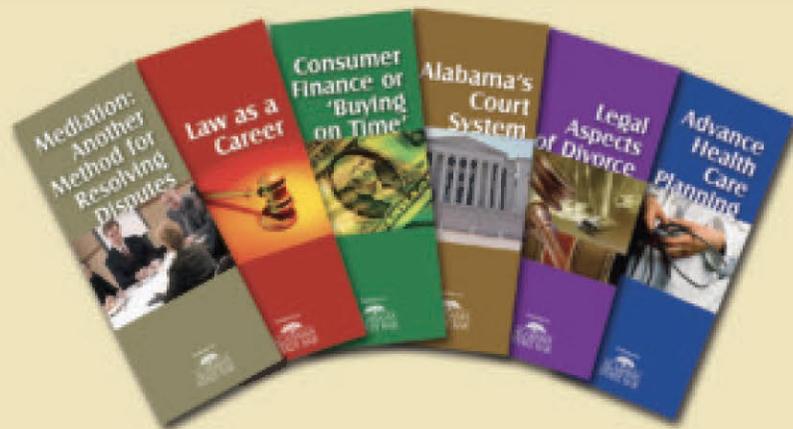
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Also, in keeping with Chief Justice Sue Bell Cobb’s commitment to openness in the judicial branch, the general public, most of whom will not be subscribers to AlaCourt, will be able to electronically access court documents through a program called, “Just One Look.” Under this program, for a flat fee of \$9.95, anyone with Internet access will be able to go into AlaVault and view the case action summary on any case in the state; and, to the extent that pleadings, orders or other documents in that case are in AlaVault, those documents may be accessed for the same fee that members of the public are charged for copies of documents from court files in clerks’ offices. ▲▼▲

Endnotes

1. “Access” will include any of the following: (1) viewing the document online, (2) printing a paper copy of the document or (3) downloading a storable PDF copy of the document. The “per-page” charge will be incurred regardless of whether one or all of these types of access are utilized.
2. By the end of 2004, there were 2.65 million pages of documents recorded and available for online access through AlaCourt. At the end of 2005, there were 20.5 million pages of documents in AlaVault. By the end of 2006, 34.9 million pages were available online, and at year’s end in 2007, there were 64.83 million pages available. Currently, there are over 100 million pages of court documents available to be accessed from AlaVault via AlaCourt.

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J. ANTHONY MCLAIN

Confidential/Sealed Settlements

QUESTION:

"I read something not too long ago which I cannot now put my hands on. It had to do with attorneys accepting a 'non-refundable retainer fee' in, for example, a divorce case. I believe I recently read somewhere that a non-refundable retainer fee was not allowed under the *Alabama Rules of Professional Responsibility*. I would appreciate your referring me directly to any opinion or memo issued by your office to that effect. I tried to find this provision in the rules, but I was not able to put my hands on it immediately. If these are strictly outlawed by the bar association, I would appreciate your getting me a copy of whatever it is that outlaws such a practice.

"Secondly, I would like to ask you about an event which recently happened to us in the course of settling a fraud case. Our firm was representing a young lady against a prominent Alabama statewide bank. The case was being settled for a certain sum. The defendant required that my client enter into a confidentiality agreement which essentially provided that she would not disclose the amount or any of the terms of the settlement itself; however, she was not prohibited from discussing the facts of the case with anyone. However, the defendant's lawyers went a step further and required our law firm separately from the client to agree not to disclose anything having to do with the case, including but not limited to the facts, terms of the settlement, amount of settlement, etc. We were also required to agree not to disclose any of the information in this case to any publication, newspaper, journal, etc.

"I have grave concerns about the ability of a defendant and a defense law firm imposing on a plaintiff's law firm certain restrictions as a condition of settlements.

OPINIONS OF THE GENERAL COUNSEL Continued from page 141

"I can easily see how this type of weapon can be used by the defense bar to create a potential conflict of interest between the plaintiff's existing counsel and the plaintiff herself due to the fact that it is not necessarily in our best interest to settle the case according to the terms imposed upon the law firm alone by defense counsel, whereas it may be in the client's best interest. It seems amazing that, in this case, the plaintiff is not prohibited from discussing the facts of this case, yet the plaintiff's lawyers are prohibited from such discussion or communications.

"In an effort to get this case resolved and to prevent any possible conflict with the client, our firm went ahead and agreed to the terms which were being imposed on us by the defendants. However, before this situation arises again, I would appreciate your advising us on the following points:

"1. Is a confidentiality agreement imposed on the plaintiff's attorneys, which is more restrictive than the confidentiality provisions imposed on the plaintiff himself, a violation of the *Rules of Professional Responsibility* in that they present a potential conflict of interest between the plaintiff and his attorneys?

"2. Can a defendant impose a confidentiality requirement on plaintiff's counsel in that the plaintiff's counsel is not a party to the suit and is not receiving any consideration from the defendant for any confidentiality agreement?

"3. Are any bonds or limitations placed on such confidentiality agreements by the *Rules of Professional Responsibility*? If so, what are they?

"I would appreciate your giving us the benefit of your wisdom and insight into these many and complex issues raised by the confidentiality agreements to which plaintiffs and their lawyers are being 'bound and gagged' and the effect of professional responsibility rules on them."

ANSWER QUESTION ONE:

The Disciplinary Commission has, on a number of occasions, considered the question of non-refundable retainers and has consistently held that there must be some connection between the attorney's fee and the legal services rendered.

ANSWER QUESTION TWO:

The *Alabama Rules of Professional Conduct* require that a lawyer must abide by a client's decision to accept an offer of settlement in a matter and to defer to the client regarding third parties who might be adversely affected. Consequently, a lawyer may participate in a confidential settlement even though there may be a possibility of adverse consequences on third parties or the public. The Disciplinary Commission recognizes, however, that there may be circumstances where confidential settlements conceal information that might prevent health and safety consequences for the public. Such circumstances clearly demonstrate the need for a revised approach to confidential settlements either by statute, court rule or a rule of professional conduct.

DISCUSSION QUESTION ONE:

With regard to non-refundable legal fees, the beginning principle is that the 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)."

The court also points out that when a client discharges a lawyer, the discharge ordinarily does not constitute a breach of contract even with a contract of employment which provides for the payment of a contingent fee and that part performance of a contract, prior to being discharged, entitles one to recover on *quantum meruit* for those services rendered.

Additionally, Rule 1.16(d) of the *Rules of Professional Conduct* provides:

“Rule 1.16 Declining or Terminating Representation

* * *

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

The lawyer may retain papers relating to the client to the extent permitted by other law.”

Based on the above, it is the view of the Disciplinary Commission that no retainer should be non-refundable to the extent that it exceeds a reasonable fee. That is to say that there should be some nexus between the fee charged and the services performed by the lawyer. For factors for determining the reasonableness of the fee, see *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983) and Rule 1.5(a) of the *Alabama Rules of Professional Conduct*.

The Disciplinary Commission applied the above rule to contingent fee contracts in RO-91-05 holding that a client, after entering into a contingent contract, may discharge the lawyer and the lawyer then being entitled to compensation only on a *quantum meruit* basis. It must be said, however, that a contingent fee client cannot wait until a favorable settlement offer has been received to discharge the lawyer.

In that situation, the lawyer can recover on the contract if the discharge was without cause. See *Kaushiva v. Mutter*, 454 A.2d 1373 (D.C. App. 1983), cert. denied 464 U.S. 820, 104 S.Ct. 83 (1983).

DISCUSSION QUESTION TWO:

While the *Alabama Rules of Professional Conduct* do not specifically address the ethical propriety of a lawyer participating in the formation of a confidential settlement they, nevertheless, may be interpreted in a manner making such conduct permissible.

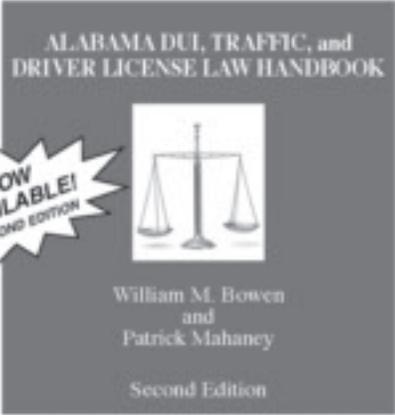
Rule 1.2 of the *Rules of Professional Conduct* specifically states in sub-paragraph (a) that “a lawyer shall abide by a client’s decision whether to accept an offer of settlement of

a matter” and, in the Comment to that rule, that a lawyer should defer to the client regarding “concern for third parties who might be adversely affected.” Thus, a fair reading of this rule requires the lawyer to abide by a client’s decision to enter into a confidential settlement agreement even if that agreement has potential to harm third parties or the public.

This theme is carried forward in the Comment to Rule 4.4, “Responsibility to a client requires a lawyer to subordinate the interest of others to those of his client,” but with the caveat that “that responsibility does not imply that a lawyer may disregard the rights of third persons.” While Rule 4.4 does recognize the rights of third persons, it does not make the lawyer morally autonomous to the extent that he or she could disregard the desires of his client to enter into a confidential settlement even though that settlement

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OPINIONS OF THE GENERAL COUNSEL Continued from page 143

might shield the public from adverse health and safety information. Although Rule 2.1 provides that a lawyer in rendering advice may refer to other considerations such as moral and social considerations, there is nothing in the rules that requires the client to follow this advice. Thus, the lawyer is left with the obligation to abide by a client's decision to accept an offer of settlement as clearly provided in Rule 1.2. (See Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?* 66 Notre Dame L. Rev. 117 (1990)).

With regard to the specific questions listed in your request, it is the Commission's view that it is not a violation of the *Rules of Professional Conduct* for a confidential settlement agreement to impose more restrictions on a plaintiff's lawyers than the plaintiff. Since the lawyer must abide by the client's decision in this matter, in accordance with Rule 1.2(a), there would be no conflict between the lawyer and his client in such a settlement.

Moreover, if there is a conflict in such a situation, it is no more than the conflict inherent in any lawyer/client relationship where a fee is negotiated/charged. With regard to the second specific question, it is the view of the Disciplinary Commission that a defendant or defendant's counsel may require confidentiality as a condition of settlement, even though counsel is technically not a party to the suit. With regard to question three, the current *Rules of Professional Conduct* place no limitations on the formation of confidential settlements by lawyers.

In reaching the above conclusion, the Disciplinary Commission is not unmindful of the ongoing efforts in state legislatures, Congress and the courts to fashion a solution that would fairly balance the privacy and property rights of the litigants and the safety and public health concerns of the public. (See e.g., *Andrew Blum, Protective Order Battle Continues*, Nat'l L.J., January 11, 1993 at 1 and *Bob Gibbins, Secrecy versus Safety, Restoring the Balance*, A.B.A.J., December 1991 at 74). [RO 1992-17] ▲▼▲



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Ethics Laws for Lawyers

The Alabama State Bar has been at the forefront in providing rules for ethical conduct to their members. Alabama's *Code of Professional Responsibility*, written in 1887, was the model used when the American Bar Association promulgated their rules for ethical conduct. Before one can be admitted to practice law in Alabama, one must pass a separate ethics exam. Annually, each lawyer must attend at least one hour of CLE ethics training to maintain their bar license. As a preventive measure, a lawyer may call or request an opinion of the state bar's general counsel on ethical questions. Violations of Alabama's *Rules of Professional Conduct* can result in suspension or disbarment.

Ethics Laws for Public Officials

In 1973, Alabama adopted the *Code of Ethics for Public Officials, Employees, Ala. Code* § 36-25-1. This act has been amended at least seven times.

In *Rampey v. State*, 415 So.2d 1185 (Ala. Crim. App. 1982) the court stated the legislature passed this chapter to prevent public officials from using their offices to reap private gains. The "conflicts of interest" referred to in this chapter are conflicts between an official's private interest and his official duties.

The very first speaker in the legislative orientation every four years is the director of the state Ethics Commission. Jim Sumner presents the legislators with a *Handbook for Public Officials* produced by the Ethics Commission and reminds them of their required filings under the "Fair Campaign Practices Act" concerning reporting their campaign funds and expenditures.

The law covers any person elected to public office in any level of government and any person appointed to a position in any level of government. It also sets requirements for lobbyists.

Most state employees know they have to file a Statement of Economic Interest if their base pay is at least \$50,000.

Lawyers are often asked by elected officials and other public officials if the public official can accept a trip, receive a gift, attend a function or do any of a number of things. Lawyers also are asked to become a lobbyist or advise lobbyists as to their responsibilities.

It has been said if you feel there may be an ethical problem then don't do it. However, the corollary is the part that gives people trouble. If you don't think there is an ethical problem there may still be a violation of the Ethics Act.

LEGISLATIVE WRAP-UP

Continued from page 145

The Alabama Law Institute and the legislative leaders who comprise the Legislative Council of the legislature conducted two seminars, one for legislative staff and the other for legislators, on “A Practical Guide to Legislative Ethics.” A representative from the Center for Ethics in Government for the National Conference of State Legislatures joined Montgomery attorney Joe Espy of Melton, Espy & Williams and Mobile attorney Matt McDonald of Jones, Walker, Waechter, Poitevent, Carrere & Denegre to present a program on ethics from a different approach.

Espy, who represents primarily Democrats, and McDonald, who primarily represents Republicans, presented a list of scenarios or examples of ethical dilemmas for staff and legislators and gave them guidance on how to address these issues.

From a general standpoint, Espy and McDonald presented four “safe harbors” contained in the Ethics Act, § 36-25-1(31)(b):

1. Seasonal gifts: an annual aggregate amount of \$250 with any single gift being less than \$100. (Christmas, Easter, birthdays, possibly anniversaries, etc.);
2. Promotional items given by a company to everyone, generally, and not specifically public employees or public officials;
3. Meals of less than \$250 and the host is present at the meal. If the host is not present, then food and beverage are outside of the safe harbor. Sometimes, people refer to meals as hospitality and include tickets to sporting events, plays, etc., in the same category. The test is the same—less than \$250 per person with the host being present; and
4. Travel and lodging at association meetings, conferences, educational functions, etc.—the basic rule being that these activities must *not* extend beyond three consecutive days. Also, the cost per day per person should not be in excess of \$250.

Technically, one can get into a number of other subcategories. A couple of other things to remember:

1. In the event the costs for hospitality, sporting events, lodging, travel, etc. exceeds more than \$250 per day,

the host is required to report the entire amount to the Ethics Commission. This burden is upon the host, not the public employee or public official; and

2. Any hospitality, sporting event, etc. provided should not be continuous in nature.

Legislative employees in their session on “practical ethics,” held prior to the session, took this very seriously with 95 percent of them being present while others may have attended the conference by listening to the broadcast through speakers in their office in the State House.

The legislators’ “practical ethics” session was held the second week of the session in the House Chamber. Unlike previous ethics conferences where the law was read and explained, these conferences were addressed from the Socratic method of using fact situations and how the ethics law safe harbors applied to specific facts.

Lawyers, legislators and government officials do not start out by thinking, “I am going to violate an ethics rule.” Sometimes, through past practices and the lack of specificity in the law, actions are taken that result in charges of ethical misconduct.

Legislators throughout the country, as well as in Alabama, are faced with situations in the gray areas on an everyday basis (just as lawyers are). If you are asked for advice outside the safe harbors, you may want to consult with the Alabama Ethics Commission, at (334) 242-4840 or www.ethics.alabama.gov.

Ethics Laws for Lobbyists

In her January 2009 article in the *State Legislators’ Magazine*, Peggy Kerns, director of the NCSL’s Center for Ethics in Government, quoted California lobbyist Greg Cook of the Governmental Affairs Consulting in Sacramento as saying, “Lobbying is truly the third house in the legislative process.” She notes that in reaction to the onslaught of lobbyists in state legislatures, some states have gone so far as to enact a “no cup of coffee” rule, prohibiting legislators and staff from accepting anything of value.

Former Florida Speaker of the House John Thrasher, rather than run for another office after being term-limited out of the legislature, joined a lobbying firm and is thought of as a "super lobbyist." He is quoted as saying, "Having been on both sides the best you can do as a lobbyist is to have a good academic argument and tell the truth."

Legislators and lobbyists generally agree that scandals are usually the impetus for reforms. The biggest change in the past 25 years has been the decrease in corporate lobbyists and increase in contract lobbyists. If one is asked to lobby on behalf of a special interest group, one must register with the Alabama Ethics Commission. In 2008, there were 671 registered lobbyists. The Ethics Commission's Web site is <http://ethics.alabama.gov/forms-lobby2.aspx> and provides guidelines for lobbyists/principals for compliance under the Alabama Ethics Law and sets forth the following top ten list of ways lobbyists can avoid violating the Alabama Ethics Law:

1. Don't offer a public official or employee anything in exchange for official action. (Section 36-25-7, *Code of Alabama* 1975)
2. Register to lobby with the Ethics Commission by January 31st each year or within ten days of entering into any lobbying activity. (Section 36-25-18)
3. Modify your registration as necessary throughout the year by adding any new clients or principals. (Section 36-25-18(c))
4. File your quarterly statements in a timely manner. (Section 36-25-19)
5. Report any hospitality expenditures in excess of \$250 per calendar day which were expended on behalf of a public official or employee and members of their household. (Section 36-25-19(a)(1))
6. Report any financial transactions between you or your principal and a public official, candidate or members of their household in excess of \$500 in the prior quarter. (Section 36-25-19(a)(2))
7. Detail any loans or direct business associations or partnerships between you or your principal and a

public official, candidate or members of their household. (Section 36-25-19(a)(3)(4))

8. File notice of termination of lobbying activities in a timely manner. (Section 36-25-20)
9. Know that no lobbyist or principal can enter into a contingency fee arrangement having to do with the passage or defeat of any legislative action. (Section 36-25-23(c))
10. Be sure you know what is an allowed gift under the law. (Section 36-25-1(31)(b)(2))

Law Institute Bills

2009 Regular Session

A discussion of these bills can be found in the January 2009 and November 2008 editions of *The Alabama Lawyer*. Copies of the bills and the drafts with commentary are available on the Alabama Law Institute's Web site.

1. Redemption from Ad Valorem Tax Sales
Representative Mike Hill (HB)
Senator Wendell Mitchell (SB)
2. Uniform Revised Lt. Partnership Act
Representative Cam Ward (HB)
Senator Roger Bedford (SB)
3. Uniform Satisfaction of Residential Mortgages
Representative James Buskey (HB)
Senator Myron Penn (SB)
4. Business and Nonprofit Entities Code
Representative Marcel Black (HB)
Senator Rodger Smitherman (SB)
5. Electronic Recording of Real Estate Records
Representative Marc Keahey (HB)
Senator Del Marsh (SB)

The Alabama Law Institute Web site (www.ali.state.al.us) has been revised. One may obtain Institute legislation (both the official bill and the ALI draft with Comments). One may also find any legislator as well as any bill pending in the legislature.



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Transfers to Disability

- Selma attorney **George Edward Jones, III** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective October 30, 2008. [Rule 27(c); Pet. No. 08-63]
- Birmingham attorney **Chalice Elaine Tucker** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective October 30, 2008. [Rule 27(c); Pet. No. 08-64]

Suspensions

- Fairfield attorney **Calvin David Biggers** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated November 13, 2008. The Disciplinary Commission found that Biggers's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [ASB nos. 08-47(A); 08-113(A); 08-186(A); 08-219(A) (formerly CSP No. 08-931(A)); Rule 20(a); Pet. No. 08-31]
- Effective August 20, 2008, attorney **Lisa Cheek Temple** of Montgomery has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-08]
- Jasper attorney **Gary Thomas Ward, Jr.** was interimly suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective November 14, 2008. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Ward had failed to respond to requests for information from a disciplinary authority and that probable cause exists that Ward has misappropriated and mismanaged client trust funds. [Rule 20(a); Pet. No. 08-65]

Public Reprimands

- On October 31, 2008, Fort Payne attorney **Sherry Ann Weldon Dobbins** received a public reprimand with general publication for violating rules 1.3, 1.4(a) and 1.4(b), *Ala. R. Prof. C.* In or about May 2005, the complainant retained Dobbins to represent her in a divorce. The complainant paid Dobbins a \$30 filing fee and \$690.50 for attorney's fees and court costs. The divorce involved no property or custody matters. The complainant attempted on several occasions to contact Dobbins to obtain the divorce paperwork but Dobbins failed or refused to communicate with her.

Due to Dobbins's failure to initially respond to this bar complaint her law license was summarily suspended and then converted to a 45-day suspension. After she learned of her summary suspension, Dobbins provided a response to the complaint. She stated that she did prepare and file the divorce on behalf of the complainant. The court continued the case due to lack of service on the complainant's husband. In November 2005, the complainant's husband acknowledged he had been served. The case was reset for a hearing on February 28, 2006. The complainant's husband failed to appear. The court thereupon made findings of fact and directed Dobbins to prepare the order for the judge's signature. The prepared order was finally received by the clerk of the court and filed September 13, 2007, over six months after the court requested same. [ASB No. 07-111(A)]

- Jasper attorney **Jonathan Lee Draper** was ordered to receive a public reprimand with general publication for violations of rules 1.3, 1.4(a), 1.4(b), 1.16(d), 8.4(a), and 8.4(c), *Alabama Rules of Professional Conduct*. Draper was retained to represent a client before the Nursing Board and to withdraw a consent to probation the client signed in regard to charges of a positive drug test. During the course of the representation, the client paid Draper a total of \$3,900 in legal fees. On or about December 31, 2005, the client received notice that her nursing license was suspended for non-compliance with the terms of her probation. Throughout January 2006, Draper continued to tell the client the suspension of her license was a mistake and that a court date was scheduled for February 2006. Draper failed to meet with the client on the date of the alleged hearing and informed

the client the hearing had been rescheduled for March 6, 2006. Draper informed the client to meet him at his office and that they would attend the hearing together. Draper subsequently failed to appear at his office and informed the client the hearing had again been rescheduled for April 6, 2006. Draper again instructed the client to meet him at his office but failed again to appear at the designated time. The client contacted Draper's law partner and was ultimately informed that Draper never took any action in her case and that a hearing date had never been set. Draper admitted that he failed to file anything on behalf of the client and lied to her about the court dates. Draper willfully neglected a legal matter entrusted to him, failed to communicate with his client and failed to return unearned fees. [ASB No. 07-202(A)]

- On October 31, 2008, Huntsville attorney **Joe N. Lampley** received a public reprimand with general publication for violations of rules 8.4(d), 8.4(e) and 8.4(g), *Ala. R. Prof. C.* On January 10, 2008, Panel I of the Disciplinary Board of the Alabama State Bar Board entered an order finding Lampley guilty of violating the above-referenced rules. The board ordered Lampley to receive a 180-day suspension, to be held in abeyance for five years, with Lampley placed on probation during the five-year period. The terms and conditions of the order also instructed that Lampley receive the public reprimand with general publication. On November 30, 2003, Lampley had a telephone conversation with a Madison County Assistant District Attorney. During this conversation Lampley made statements regarding the settlement of his client's criminal case. Lampley offered to make a payment of \$10,000 to the prosecutor in exchange for a favorable settlement. The offer was perceived as an attempted bribe. Because no condemnation action had been initiated in conjunction with the criminal case, the board found that the offer was improper and was in violation of the *Alabama Rules of Professional Conduct*. Lampley's prior discipline was also taken into consideration as an aggravating factor in making the decision. The Disciplinary Board found that Lampley's conduct was prejudicial to the administration of justice in that he attempted to improperly influence a government official, and that he thereby engaged in conduct that adversely reflected on his fitness to practice law. [ASB No. 03-330(A)]

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- Jasper attorney **Byron Gustavis McMath** was ordered to receive a public reprimand with general publication and a 30-day suspension for violations of rules 1.15(a), 1.15(g), 8.1(a), 8.4(a), and 8.4(g), *Alabama Rules of Professional Conduct*. Said suspension will be effective December 1, 2008. In addition, McMath was ordered to complete seven hours of continuing legal education in ethics within one year of the order and to enroll in and complete the Practice Management Assistance Program of the Alabama State Bar. McMath deposited personal funds into his trust account, including earned attorney fees from the State of Alabama, the Town of Parish and other clients. McMath also commingled personal and client funds. Specifically, McMath wrote checks out of his trust account for personal items, repeatedly used a check card linked to his trust account for the purchase of personal items and requested and authorized funds to be automatically withdrawn from his trust account to cover overdrafts on his operating account. McMath also failed to hold the funds of clients in an IOLTA account and failed to remit interest earned by client funds to either the client or to the Alabama Law Foundation or the Alabama Civil Justice Foundation. McMath also failed to designate deposit slips and checks drawn on his trust account as either an "Attorney Trust Account," an "Attorney Escrow Account" or an "Attorney Fiduciary Account." McMath also knowingly made false statements during the Alabama State Bar's disciplinary investigation regarding his conduct and handling of his trust account and client funds. [ASB No. 07-130]
- On October 31, 2008, Birmingham attorney **Gregg Lee Smith** received a public reprimand without general publication for violations of rules 1.4(a) and 1.4(b), *Ala. R. Prof. C*. On April 24, 2008, Panel VI of the

DISCIPLINARY NOTICES

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Disciplinary Board of the Alabama State Bar entered an order accepting Smith's guilty plea in this matter. In or about September 2001, the complainant and others were terminated from their employment with a Florence, Alabama bank. They retained Smith to pursue claims under the Older Workers' Benefit Protection Act and the Age Discrimination in Employment Act. Smith filed a complaint on behalf of these employees in the United States District Court for the Northern District of Alabama. The defendant filed a motion for summary judgment and on or about May 6, 2004, the court granted the motion.

Smith informed the complainants that he would appeal the dismissal of the case. On one or more occasions, Smith told the complainant and/or the other plaintiff employees that he was continuing to pursue the appeal. However, in or about May 2006, the complainant called the Eleventh Circuit Clerk of Court and was advised that the case had been dismissed in May 2004. Smith failed or refused to communicate the fact of the dismissal to the complainant. [ASB No. 06-171(A)]



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About Members

Joseph Madison Carlton, Jr. announces the opening of **Joe Carlton, Attorney At Law**. The mailing address is P.O. Box 214, Sylacauga 35150. Phone (256) 245-0525.

Ronald L. Davis announces the opening of **The Law Offices of Ronald L. Davis LLC** at 1927 Seventh St., Tuscaloosa 35401. Phone (205) 366-3669.

Gary W. Fillingim announces the opening of **The Law Offices of Gary**

W. Fillingim LLC at 2053 Dauphin St., Mobile 36606. Phone (251) 445-7257.

Robert L. Hagler Jr. announces the opening of **Robert Hagler LLC** at 1745 Main St., Ste. D, Daphne 36526. Phone (251) 625-6688.

Among Firms

The Alabama Board of Pardons and Paroles announces that **Meridith Hamilton Barnes** has joined the agency's legal division.

Armstrong & Gray PC announces that **Sirena L. Saunders** has joined as an associate.

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| 10 | \$9 | \$9 | \$11 | \$18 | \$25 | \$42 | \$67 |
| 15 | \$11 | \$11 | \$13 | \$24 | \$37 | \$53 | \$86 |
| 20 | \$13 | \$13 | \$18 | \$30 | \$47 | \$70 | \$118 |
| 30 | \$22 | \$24 | \$33 | \$48 | \$72 | \$140 | |

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

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ABOUT MEMBERS, AMONG FIRMS

Continued from page 153

Ball, Ball, Matthews & Novak announces that **Jason R. Watkins** has become a partner.

Battaglia Law Office LLC announces the opening of additional offices in Birmingham and Huntsville, and that **Stanley Moorhouse, Dana McGowin** and **Troy Pierce** have joined as associates.

Beers, Anderson, Jackson, Patty & Fawal PC announces that **Sean T. Mims** has joined as an associate.

Bond, Botes, Shinn & Donaldson PC announces that **Mary Conner Pool** has joined as an associate.

Boyd, Fernambucq, Vincent & Dunn PC announces that **Heather Fann** has joined as an associate.

Capell & Howard PC announces a new shareholder, **Chad W. Bryan**, and two new associates, **April Dunaway Wise** and **Patricia Romano**.

Regina Cash, Elizabeth Kanter and **Eric Wade** were recently named shareholders of **Carr Allison**.

Brian M. Cloud and **Jay E. Tidwell** announce the opening of **Cloud & Tidwell LLC** at 1625 Richard Arrington Jr. Blvd. S., Birmingham 35205. Phone (205) 322-6060. **E.B. Harrison Willis** has joined as an associate.

S. Kay Dansby PC announces that **Stacy Gray Bence** has joined as an associate.

George C. Day, Jr. and **Joseph M. Willoughby** announce the formation of **Day & Willoughby PC** at 1925

Rainbow Dr., Gadsden 35901. Phone (256) 543-1660.

Estes, Sanders & Williams LLC announces that **Lauren Shine** has joined as an associate.

Jett T. Jackson has joined **Fish~Nelson LLC** as an associate.

Henry I. Frohsin, James F. Barger, Jr. and **J. Elliott Walthall** announce the formation of **Frohsin & Barger LLC** at One Highland Place, 2151 Highland Ave, Ste. 310, Birmingham 35205. Phone (205) 933-4006.

Gaines, Wolter & Kinney PC announces that **Ashley E. Manning, John B. Welsh** and **Brandon T. Bishop** have become partners.

Gidiere Hinton Herndon & Christman announces that **Matthew R. Griffith** has joined as an associate.

M. Clay Martin and **Tara L. Helms** announce the opening of **Martin & Helms PC** at 401 Holmes Ave., NE, Ste. C, Huntsville 35804. Phone (256) 539-1990.

Hogan Law Office PC announces that **Jamin W. Hogan** has joined as an associate.

Hoiles, Dasinger & Hollon PC announces that **S. Russ Copeland** has become a member of the firm.

Johnston Barton Proctor & Rose LLP announces that **Shayana Boyd Davis** and **Max A. Moseley** have become partners.

The Kullman Firm announces that **Matthew T. Scully** has joined the firm.

Lehr Middlebrooks & Vreeland PC announces that **Don Harrison** has joined as senior counsel.

Maynard, Cooper & Gale PC announces that **Frank Ozment** has joined as *of counsel*, **Jennifer R. McCain** and **Frances King Quick** have joined as shareholders and **L. Justin Burney** has joined as an associate.

Gregory Morris and **Jeffrey W. Brumlow** announce the opening of **Morris & Brumlow PC** at 1100 East Park Dr., Ste. 402, Birmingham 35235. Phone (205) 833-1303.

Norris Injury Lawyers PC announces that **Stephen C. Norris** has joined as an associate.

Siniard, Timberlake & League PC announces that **Christopher M. Wooten** has joined as an associate.

Turner Padgett Graham & Laney PA has elected **Richard S. Dukes** to shareholder.

The U.S. Department of Housing and Urban Development announces the appointment of **Elizabeth Brassell Joiner** to the position of chief counsel of the Birmingham field office.

Waller Lansden Dortch & Davis LLP announces that **Brian J. Malcom** has joined as an associate.

Andrew C. Allen has joined **White Arnold & Dowd PC** as a shareholder.



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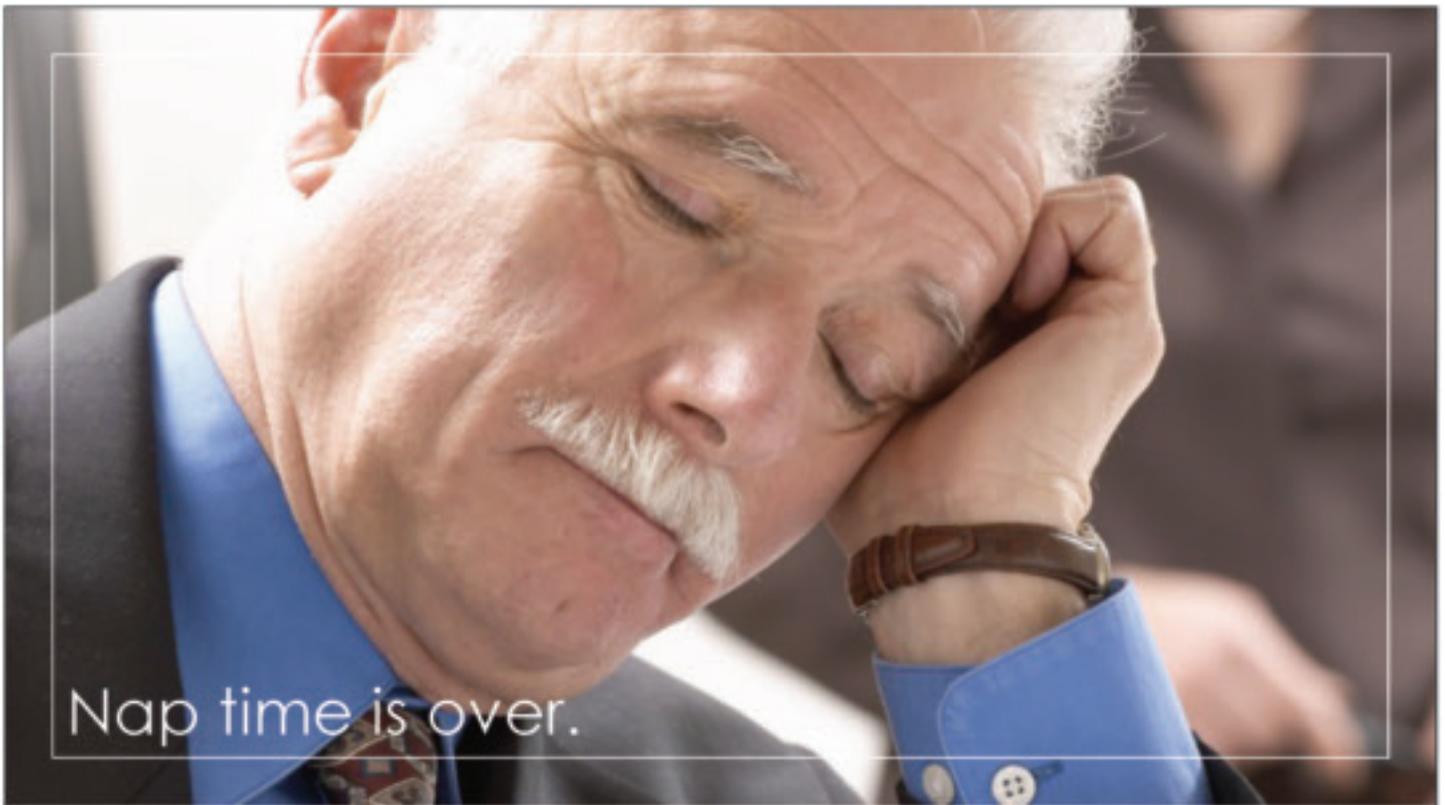
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