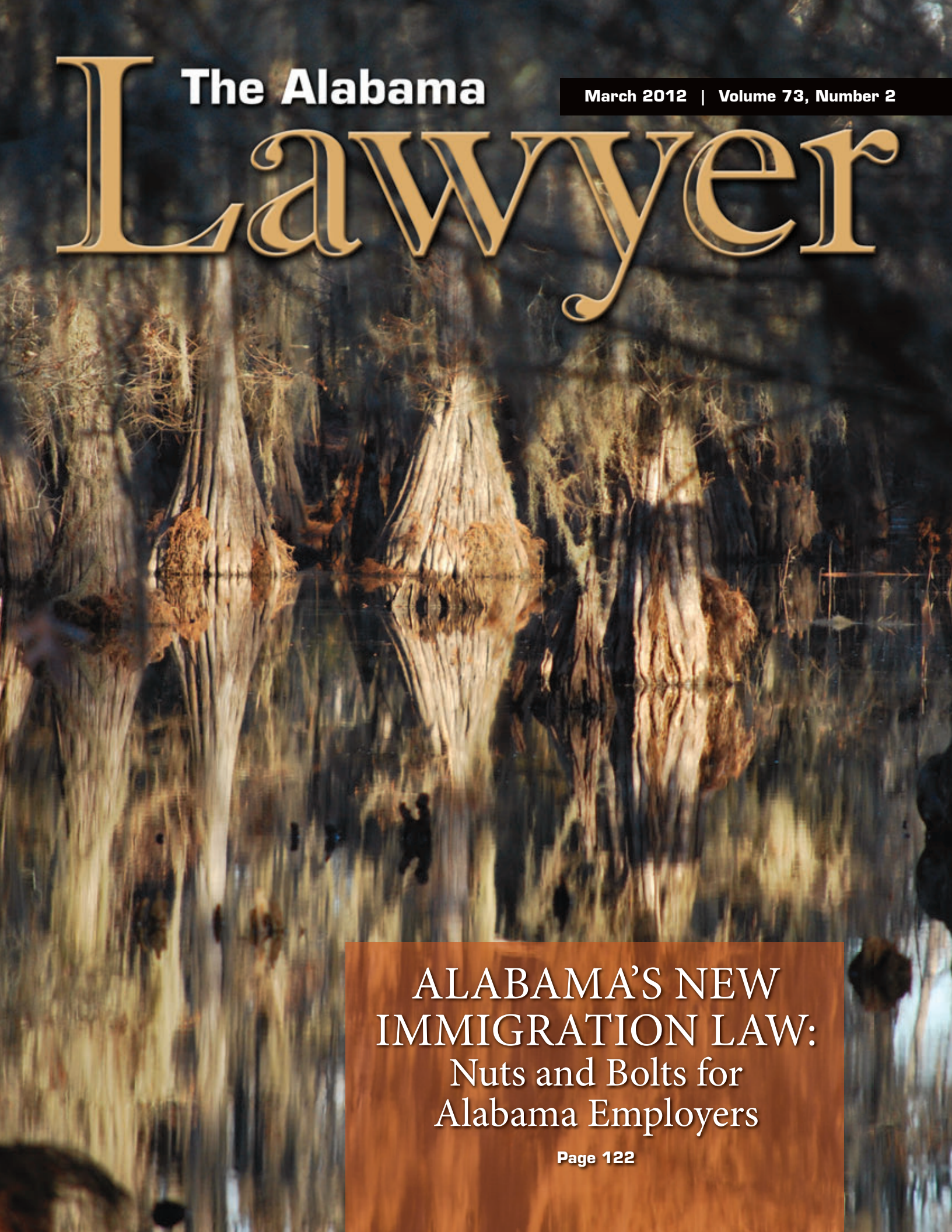
The Alabama Lawyer

March 2012 | Volume 73, Number 2



ALABAMA'S NEW IMMIGRATION LAW: Nuts and Bolts for Alabama Employers

Page 122

Having trouble communicating with your commercial malpractice insurer?

Call AIM: We're willing to talk!

Attorneys Insurance Mutual of The South®
200 Inverness Parkway
Birmingham, Alabama 35242-4813

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

"A Risk Retention Group Organized by and for Attorneys"
www.AttysInsMut.com

JOIN US FOR OUR RETURN TO BAYTOWNE WHARF, JULY 18-21. THE 2012 ALABAMA STATE BAR ANNUAL MEETING

Will feature cutting edge programs with renowned speakers, luncheons, receptions, award ceremonies, exciting activities for children and teenagers, the Fun Run/Walk, silent auction, and more.

Once again, we'll offer focused educational tracks conducted by the Sections to help you get what you need from the meeting with ample time for networking, collegiality and fun!

ALABAMA STATE BAR
415 Dexter Avenue
Montgomery, Alabama 36104

Sandestin Golf and Beach Resort
www.sandestin.com
Baytowne Wharf,
Sandestin Beach & Golf Resort,
Sandestin, FL

CLE ALABAMA
Advancing your practice

OUR MISSION is YOUR SUCCESS

2012 SPRING CALENDAR

APRIL

13 **Solo and Small Firm Practice**
The University of Alabama School of Law

20 **Workers' Compensation Law**
The University of Alabama School of Law

MAY

4-5 **City & County Governments**
Perdido Beach Resort, Orange Beach

18 **Professionalism**
Cahaba Grand Conference Center, Birmingham

LIVE SEMINARS

CAN'T MAKE IT TO A LIVE SEMINAR?

Visit CLEalabama.com for 24/7 access to over 200 online seminars and teleconferences.

HAVE YOU TRIED ONE OF OUR LIVE WEBCASTS?

CLE Alabama now offers lawyers the convenience of watching selected live programs from their home or office computer. Live webcasting allows attorneys from all parts of the state to have access to quality speakers and programs. Lawyers watching live webcasts can interact with the speaker during the program to ask questions. These programs count as "live credit" courses just as if the viewer were in attendance at the seminar.

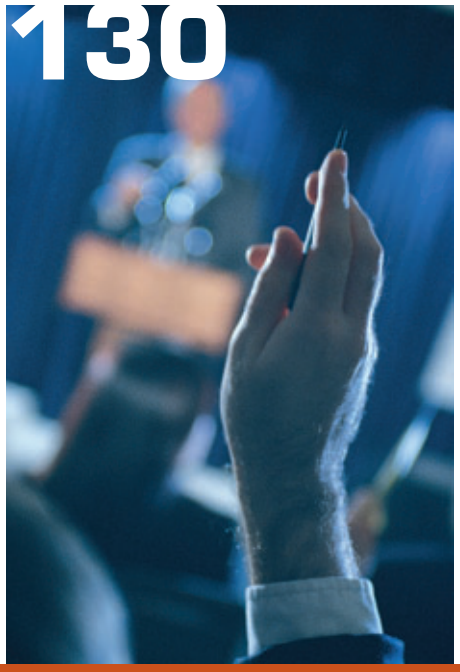
Information about webcasts will be posted on our website at CLEalabama.com, or feel free to call our office if you have any questions at **205/348-6230** or **800/627-6514.**

THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

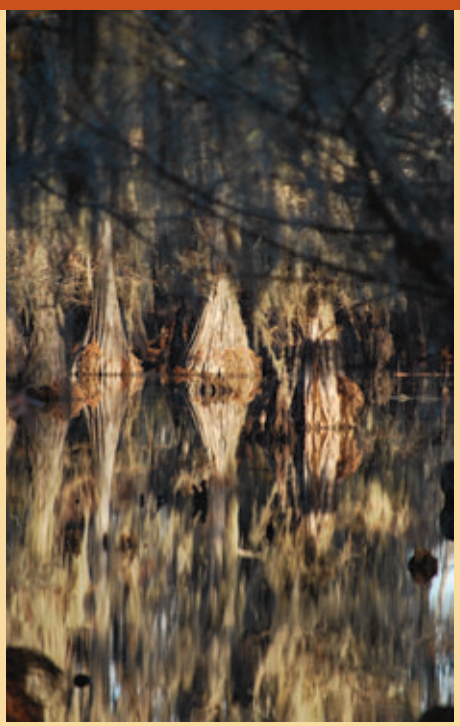
Register now at CLEalabama.com

The Alabama Lawyer

March 2012 | Vol. 73, No. 2



FEATURES



ON THE COVER

Cypress pond in west Alabama in early spring

–Photo taken by a member of the Alabama State Bar

ADVERTISERS

ALABAMA STATE BAR

415 Dexter Avenue
Montgomery, AL 36104
(334) 269-1515 • (800) 354-6154
FAX (334) 261-6310
www.alabar.org

ALABAMA STATE BAR STAFF

Executive Director.....Keith B. Norman
Executive Assistant.....Diane Locke
Information Systems Manager.....O. Hunter Harris
Programmers.....Dolan L. Trout, Larry Pratt
Scanning Operator.....Kristi Neal
Web Administrator.....Willie Murphy
Assistant Executive Director.....Edward M. Patterson
Director of External Relations and Projects.....Christina Butler
Assistant Director of External Relations and Projects.....Mary Frances Garner
Director of Regulatory Programs.....Angela Parks
MCLE Administrative Assistant.....Carol Thornton
Membership Administrative Assistant.....Cathy Sue McCurry
Director of Communications.....Brad Carr
Director of Publications.....Margaret L. Murphy
Communications and Publications Assistant.....Marcia N. Daniel
Director of Admissions.....Dorothy D. Johnson
Admissions Administrative Assistants.....Sonia Douglas, Crystal Jones
Bookkeeper.....Gale Skinner
ASB Foundation Assistant.....Ann Rittenour
Graphic Arts Director.....Roderick Palmer
Receptionist.....Stephanie Oglesby
Director of Service Programs.....Laura A. Calloway
SP Administrative Assistant.....Kristi Skipper
Lawyer Referral Service Secretary.....Renee Avery
Volunteer Lawyers Program Director.....Linda Lund
VLP Assistant.....Katherine L. Church
Intake Specialists.....Deborah Harper, Carrie Black-Phillips
Alabama Lawyer Assistance Program Director.....Jeanne Marie Leslie (834-7576)
ALAP Administrative Assistant.....Sandra Dossett
ALAP Case Manager.....Shannon Knight
Alabama Law Foundation, Inc. Director.....Tracy Daniel
ALF Administrative Assistants.....Sharon McGuire, Sue Jones
Alabama Center for Dispute Resolution Director.....Judith M. Keegan (269-0409)
ADR Assistant.....Patsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

General Counsel.....J. Anthony McLain
Secretary to General Counsel.....Julie Lee
Assistant General Counsel.....Robert E. Lusk, Jr.
Assistant General Counsel.....Jeremy W. McIntire
Complaints Intake Coordinator.....Kim Ellis
Disciplinary Clerk.....Bonnie Mainor
Client Security Fund Coordinator.....Laurie Blazer
Paralegals/Investigators.....Dianne T. Gray, Cheryl L. Rankin, Carol M. Wright
Receptionist.....Sherry Langley

THE FINKLEA GROUP INC. Creative solutions for your marketing strategies — The Alabama Lawyer GRAPHIC DESIGN

davisdirect ready. print. go >> — The Alabama Lawyer PRINTING

The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O.Box 4156, Montgomery, AL 36103-4156.

98

COLUMNS

CONTRIBUTORS

John W. Hargrove *is a partner at Bradley Arant Boult Cummings LLP where he has practiced labor and employment law for 25 years. He is a graduate of Auburn University and Vanderbilt University Law School and currently is the chair of Bradley Arant's labor and employment group.*

Robert P. MacKenzie, III *received his undergraduate degree from the University of North Carolina and his juris doctorate in 1984 from Cumberland School of Law. He is a partner at Starnes Davis Florie LLP in Birmingham.*

Jennifer J. McGahey *is a partner at Bradley Arant Boult Cummings LLP where she has practiced for nine years. She is a graduate of Vanderbilt University and Southern Methodist University School of Law. She practices in the employment and litigation areas of the firm.*

Samuel A. Rumore, Jr. *served as president of the Alabama State Bar during the 2000-2001 term of office. He graduated from the University of Notre Dame, earning a degree in history, and he received his JD degree from the University of Alabama School of Law. In 2010, Rumore received a Master's Degree in Library and Information Studies from the University of Alabama. He is a member of the Birmingham Public Library Board of Trustees and is advisory counsel to the Alabama House of Representatives Committee on Boards, Agencies and Commissions. He also serves as chair of the Alabama Lawyers' Hall of Fame Committee and is on the board of the Alabama Bench and Bar Historical Society.*

Michael D. Yapko, Ph.D. *is a clinical psychologist and depression expert from Fallbrook, California. He is the author of* Breaking the Patterns of Depression and Hand-Me-Down Blues: How to Stop Depression from Spreading in Families. *For more information, visit* www.yapko.com.

James R. Pratt, III
jim@hwnn.com

Adequate Court Funding– A Necessity, Not an Option

The judicial branch of government is co-equal to the other two branches, the legislative and executive, which means that the courts are not just another agency. The Alabama Constitution requires "adequate and reasonable appropriation shall be made by the Legislature for the entire Unified Judicial System . . ."

Notwithstanding this constitutional mandate for adequate funding, since 2009, the trial courts have been prorated $10.1 million. In the 2011-12 budget, the trial courts' funding was reduced by $13.1 million. Therefore, since 2009, there has been a reduction of $23.1 million in the Unified Judicial System budget. The practical effect of these cuts to the court system budget is a reduction in personnel and an inability to address essential needs to support the system. In 2011, the number of clerks statewide was reduced by 30 percent. Currently, the average staffing in the clerks' offices statewide is approximately 50 percent and even lower in the major metropolitan areas. The Administrative Office of Courts has been reduced by 40 percent in terms of personnel. At the same time, much of the equipment relied upon by the court system is more than five years old. We are working with Windows 2003, and the mainframe at the AOC operates on a DOS system.

Speaking with One Voice

On behalf of the court system, **Chief Justice Chuck Malone** has responded to this crisis with a plan of action. He decided the entire court system, as well as the lawyers of the state, need to speak with one voice, and so he organized a working leadership group to develop a proposed budget for this session and review the legislation affecting the courts. Included in this group are the presidents of the Circuit Judges Association, the District Judges Association, the Circuit Clerks Association, and the Alabama State Bar, and the director of the AOC. For months, we have been working diligently to develop a reasonable, practical budget that addresses the need for adequate funding, taking into consideration the reality of the financial situation of the State of Alabama. That budget was submitted by the chief justice and deserves and requires the support of everyone involved in the unified judicial system. Through this budget, we are setting a 70 percent manpower formula as our goal and not 100 percent of the needed personnel. Also, we requested funds to upgrade the mainframe to a server-based system and to allow an upgrade for all individuals involved in the system.

Bar's Effort to Support the Chief Justice

In addition to participating in the chief justice's working management group for the court system, the bar sponsored a court funding summit. Among those invited were legislators involved in the budget process, representatives from the Finance Director's Office, and members of the Governor's staff, the Attorney General's Office, the Circuit Clerks Association, the various state judges' associations, the League of Municipalities, and the County Association Group, as well as other interested stakeholders. The session was informative and resulted in a much greater understanding by those involved in the budget process of the needs of the court and the practicality of the requested budget.

In addition, the bar has worked diligently to provide information and education to those involved in the budget process so that they can make an informed decision about the needs of the court.

The Alternative

It is often said that justice delayed is justice denied. In the article "The Real Costs of Shortchanged Courts," **Bill Robinson**, president of the American Bar Association, makes the point that like doctors in an emergency room, judges need the tools of their profession to serve the public–even in times of extreme economic hardship. Robinson adds that most people hope never to be in an emergency room, but, if needed, they want things to go smoothly. For that to happen, though, there must be adequate resources. Robinson concludes by stating that the emergency room should never be closed for lack of funds–and neither should the courts.

There are other repercussions to inadequate funding of the courts. Georgia, faced with a similar problem, commissioned an independent economic study. The study revealed that a reduction in the court system's efficiency due to inadequate funding would lead to thousands of lost jobs, mostly in high-wage, knowledge-based industries. The study predicted a loss between $176 million and $375 million in labor income annually and concluded that the adverse impact on Georgia's total economic output would range from $337 million to $802 million annually. The total proposed increase for the Alabama court system's budget this year is just over $18 million. When compared with the economic impact, particularly to the business community and the labor market, it is easy to see the importance of the state's investment in adequate funding.

Moreover, there is a human side to inadequate court funding. Family and juvenile matters and civil disputes take the brunt of these cuts. Battered women unable to receive protection orders from abusive partners; children in foster care unable to have timely adoption hearings; abused and neglected children unable to have their interests protected; vandalism, petty thief and drug offenses–these all threaten the rule of law and the safety and well-being of our communities.

Conclusion

The signs are increasingly visible that our state courts have reached the breaking point in terms of our ability to administer justice with the degree of efficiency that we expect. Because an underfunded court system chills investment, slows job creation and reduces tax revenue, our state can hardly afford *not* to make this investment.

It is not an overstatement to say the rule of law is the glue that binds together our society, and diminishing the ability of the courts to decide the disputes of our citizens or to meet their legal needs tears at the very fabric of our society. *Please do your part by helping educate and inform all who will listen that it is essential that the courts be adequately funded.* (To view the ASB message produced for television, dramatizing the court-funding crisis, go to *http://www.youtube.com/watch?v=MkOoORA9Ao.*) | AL

Keith B. Norman
keith.norman@alabar.org

You Never Know What You Might Find

Several months ago, many newspapers published the story about checks written by Abraham Lincoln and other historic figures that were found in Ohio. The article, which was first reported by the *Plain Dealer* in Cleveland, indicated that 70 checks were found in a vault at Huntington Bank's Columbus, Ohio headquarters. The cache of cancelled checks included one from the First National Bank that Lincoln made out to "Self" for $800 on April 13, 1865, the day before his assassination. Other checks included those signed by George Washington, Mark Twain, Charles Dickens and Thomas Edison. Apparently, the checks had been stored in the bank's vault since 1983 when Huntington Bank took over another bank. The checks were discovered when a bank employee was going through some old boxes.

I am sure that the bank employee had no idea that the boxes contained these significant documents. Likewise, when Alabama State Bar Foundation assistant Ann Rittenour started cleaning out filing cabinets last spring, she had no thought that she would find anything important, namely a letter signed by the 32nd president of the United States.

Franklin D. Roosevelt c. 1933

On July 6, 1935, the 58th meeting of the Alabama State Bar Association was held at the Whitley Hotel in Montgomery. **C. H. Young** of the Anniston bar offered the following resolution:

WHEREAS, the President of the United States, Franklin Delano Roosevelt, is an honored member of the Bar of the State of New York; and

WHEREAS, he has been elected to membership in the Bar of our sister State of Georgia, and other states; and

WHEREAS, we desire to honor him for his sincerity and ability as a President, a lawyer, and a man; and

NOW, THEREFORE, BE IT RESOLVED by the Alabama Bar Association, in our assembly at Montgomery, Alabama, that Franklin Delano Roosevelt, President of the United States of America, be, and he hereby is, elected as an Honorary member of the Alabama Bar Association for life.

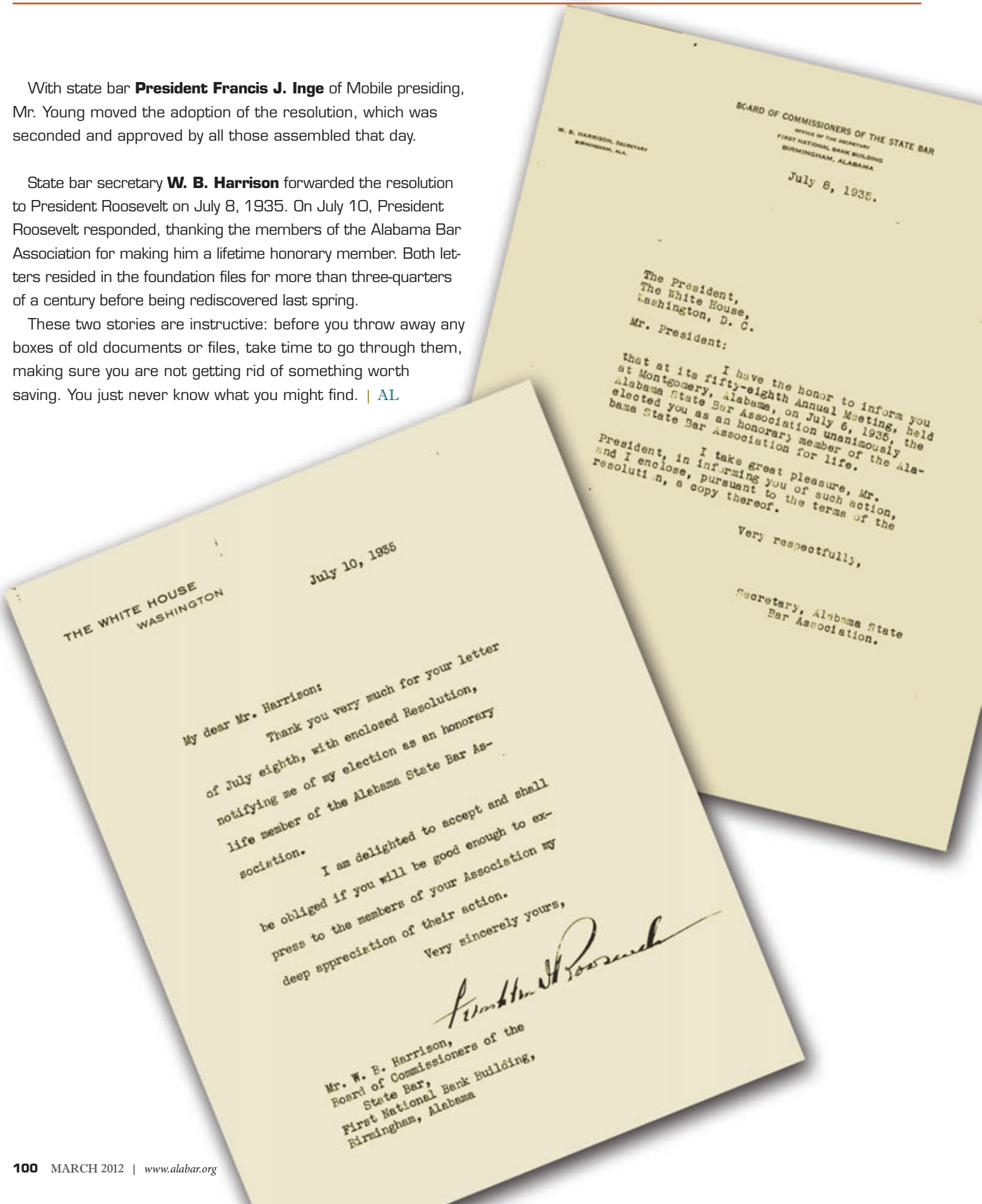
BE IT FURTHER RESOLVED, that a copy of this resolution shall be spread on the minutes of the Alabama Bar Association and that a copy of same be forwarded to Franklin Delano Roosevelt, President of the United States of America, at Washington, D.C.

Continued from page 99

With state bar **President Francis J. Inge** of Mobile presiding, Mr. Young moved the adoption of the resolution, which was seconded and approved by all those assembled that day.

State bar secretary **W. B. Harrison** forwarded the resolution to President Roosevelt on July 8, 1935. On July 10, President Roosevelt responded, thanking the members of the Alabama Bar Association for making him a lifetime honorary member. Both letters resided in the foundation files for more than three-quarters of a century before being rediscovered last spring.

These two stories are instructive: before you throw away any boxes of old documents or files, take time to go through them, making sure you are not getting rid of something worth saving. You just never know what you might find. | AL



BOARD OF COMMISSIONERS OF THE STATE BAR
OFFICE OF THE SECRETARY
FIRST NATIONAL BANK BUILDING
BIRMINGHAM, ALABAMA

W. B. HARRISON, SECRETARY
BIRMINGHAM, ALA.

July 8, 1935.

The President,
The White House,
Washington, D. C.

Mr. President:

I have the honor to inform you that at its fifty-eighth Annual Meeting, held at Montgomery, Alabama, on July 6, 1935, the Alabama State Bar Association unanimously elected you as an honorary member of the Alabama State Bar Association for life.

I take great pleasure, Mr. President, in informing you of such action, and I enclose, pursuant to the terms of the resolution, a copy thereof.

Very respectfully,

Secretary, Alabama State Bar Association.

THE WHITE HOUSE
WASHINGTON

July 10, 1935

My dear Mr. Harrison:

Thank you very much for your letter of July eighth, with enclosed Resolution, notifying me of my election as an honorary life member of the Alabama State Bar Association.

I am delighted to accept and shall be obliged if you will be good enough to express to the members of your Association my deep appreciation of their action.

Very sincerely yours,

Franklin D. Roosevelt

Mr. W. B. Harrison,
Board of Commissioners of the
State Bar,
First National Bank Building,
Birmingham, Alabama

Alabama State Bar Publications Order Form

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

Law As A Career 8½" x 11"
$10.00 per 50 Qty ____ $ _____
Information on the opportunities and challenges of a law career today
☐English

Lawyers and Legal Fees 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
A summary of basic legal procedures and common legal questions of the general public
☐English OR ☐Español ☐Both

Bankruptcy 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Provides information about different types of bankruptcy and answers some of the more commonly-asked questions
☐English OR ☐Español ☐Both

Last Will & Testament 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Aspects of estate planning and the importance of having a will
☐English OR ☐Español ☐Both

Legal Aspects of Divorce 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Offers options and choices involved in divorce.
☐English OR ☐Español ☐Both

Consumer Finance/"Buying On Time" 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Outlines important considerations and provides advice on financial matters
☐English OR ☐Español ☐Both

Foreclosure Resources 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Provides answers to some of the more commonly-asked questions
☐English OR ☐Español ☐Both

Mediation/Resolving Disputes 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
An overview of the mediation process in question-and-answer form
☐English

Arbitration Agreements 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Answers questions about arbitration from the consumer's perspective
☐English

Advance Health Care Planning 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
Complete, easy to understand information about health care directives in Alabama
☐English OR ☐Español ☐Both

Alabama's Court System 3¾" x 8½"
$10.00 per 100 Qty ____ $ _____
An overview of Alabama's Unified Judicial System
☐English OR ☐Español ☐Both

Acrylic Stand 4¼" x 8"
$ 7.00 each Qty ____ $ _____
Individual stand for use at distribution points. Only pamphlets measuring 3¾" x 8½" will fit in stands.

Shipping & Handling $5.00

TOTAL $ _____

Please Print Legibly

Firm name: _____

Physical Mailing Address (not P.O. Box): _____

City, State, Zip, Phone# _____

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

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2012 Annual Meeting, July 21 at Baytowne Wharf in Sandestin.

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, 2012**. Applications may be obtained from *www.alabar.org,* or by contacting Christina Butler at (334) 517-2166 or *christina.butler@alabar.org.*

Notice of Election and Electronic Balloting

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

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

2nd Judicial Circuit
4th Judicial Circuit
6th Judicial Circuit, Place 2
9th Judicial Circuit
10th Judicial Circuit, Place 1
10th Judicial Circuit, Place 2
10th Judicial Circuit, Place 5
10th Judicial Circuit, Place 8
10th Judicial Circuit, Place 9
12th Judicial Circuit
13th Judicial Circuit, Place 2
15th Judicial Circuit, Place 2
15th Judicial Circuit, Place 6
16th Judicial Circuit
18th Judicial Circuit, Place 2
20th Judicial Circuit
23rd Judicial Circuit, Place 2
24th Judicial Circuit
27th Judicial Circuit
29th Judicial Circuit
38th Judicial Circuit
39th Judicial Circuit

Additional commissioners will be elected in circuits for each 300 members of the state bar with principal offices therein as determined by a census on March 1, 2012 and vacancies certified by the secretary no later than March 15, 2012. All terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. PDF or fax versions may be sent electronically to the secretary as follows:

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

Either paper or electronic nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 27, 2012).

As soon as practical after May 1, 2012, members will be notified by e-mail with a link to the Alabama State Bar website that includes an electronic ballot. ***Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot.*** A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 18, 2012). Election rules and petitions are available at *www.alabar.org*.

At-Large Commissioners

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

James P. Alexander

Judge Alexander Travis Howard, Jr.

William Ennis Shanks, Jr.

James P. Alexander

James P. Alexander, a shareholder and one of the founding members of Littler Mendelson's Birmingham office, passed away Monday, November 21. A distinguished lawyer with more than 30 years of experience, Alexander was considered among the leading lawyers in the profession, earning numerous industry accolades. He served as a Fellow in the College of Labor and Employment Lawyers, among a number of other distinctions.

During his vast legal career, Alexander defended employers trying single-plaintiff and class action claims involving employment discrimination and harassment. He practiced before federal and state courts, including the United States Supreme Court, as well as administrative agencies such as the Equal Employment Opportunity Commission, the National Labor Relations Board and the Employment Standards Administration. In addition to maintaining a successful practice, Alexander spent 21 years as an adjunct professor at the University of Alabama School of Law teaching employment discrimination law.

He attended Duke University where he received both his J.D. (1969) and A.B. (1966).

Active in a number of professional and community organizations, Alexander was a member of the American Bar Association, the Birmingham Bar Association, the Birmingham Civil Rights Institute and the National Multiple Sclerosis Society. He also served as an arbitrator for the American Arbitration Association and was a member of the Local Rules Committee for the United States District Court for the Northern District of Alabama.

Alexander is survived by his wife, Jeannie, and their two daughters and respective families.

Judge Alexander Travis Howard, Jr.

Judge Alexander (Alex) T. Howard, Jr., 86, a distinguished member of the bench and bar, died February 10, 2011.

Judge Howard was born in Mobile to Judge Alexander Travis Howard and Cecile Morrisette Howard. Upon graduating from Murphy High School, he attended Auburn University and then enlisted in the Army. He served with the 106th Infantry Division, was a veteran of the Battle of the Bulge and commissioned to 2nd Lieutenant at the age of 20. After WWII, he entered the University of Alabama and later graduated from Vanderbilt Law School.

Judge Howard loved the law and had a distinguished legal career for many years at Johnstone, Adams, Bailey, Gordon & Harris. He was a member of the International Society of Barristers, the Maritime Law Association of the United States, the American Bar Association and the Mobile Bar Association, where he served as president in 1973. He was editor for the *Port of Mobile* for the American Maritime Cases.

In 1986, Judge Howard was appointed by President Ronald Reagan to United States District Judge for the Southern District of Alabama. He served as chief judge from 1989 to 1994.

Judge Howard was a longtime member of Dauphin Way United Methodist Church, where he served on several committees and made mission trips overseas. He had a great love for travel and was a private pilot.

Judge Howard is survived by his wife of 59 years, Ann Boykin Howard; his son, Alexander Travis Howard, III; his daughter, Catherine Howard Dawson; five grandchildren; and numerous other close family members.

—Wesley Pipes, president, Mobile Bar Association

William Ennis Shanks, Jr.

William (Bill) E. Shanks, Jr. died September 11, 2011 in Birmingham. In 1976, Bill received a J.D., *cum laude,* from Emory University where he was a member of the Order of the Coif and served as the research editor of the *Emory Law Journal*. Bill received an LL.M. in taxation with highest honors from the University of Alabama in 1979. He joined Balch & Bingham LLP upon his graduation from law school and spent his entire 35-year law career with the firm, where he was well-loved by his partners and clients. Among many other contributions at Balch & Bingham, most recently Bill served as the chair of both the wealth management and employee benefits practice and the pension investment committee.

Bill's enthusiasm extended to a wide range of interests and involvement in a number of community activities. He served as president of the Terrific New Theatre Board and was vice president and incoming president for the Red Mountain Theater Company. He was a regular patron of the Alabama Symphony Orchestra, Opera Birmingham, Virginia Samford Theatre and Theatre Downtown. He was a past president of the Harvard Club of Birmingham and continued to maintain strong ties to his alma mater. Bill was an active member of Independent Presbyterian Church where he was a dedicated participant in the Friday Morning Men's Bible Study and served as a trustee on the Independent Presbyterian Church Foundation Board. He was an ardent golfer, a passionate gardener and a longtime supporter of the UAB men's basketball program. Bill was a supportive and loving husband, father and son. | AL

Barker, Hon. Joseph Vance
South Pittsburg, TN
Admitted: 1979
Died: December 3, 2011

Boles, George Milton
Birmingham
Admitted: 1968
Died: December 9, 2011

Booth, Joseph Thomas, IV
Prattville
Admitted: 1985
Died: December 15, 2011

Cannon, Robert E.
Elba
Admitted: 1952
Died: October 21, 2011

Darby, Willis Carey, Jr.
Mobile
Admitted: 1948
Died: December 21, 2011

Givhan, Robert Marcus
Birmingham
Admitted: 1987
Died: November 16, 2011

Harper, Hon. Robert Martin
Auburn
Admitted: 1963
Died: December 22, 2011

Jorde, Erik Lee
Bremerton, WA
Admitted: 1982
Died: June 17, 2011

Langner, James Earl
Oneonta
Admitted: 1954
Died: December 13, 2011

Newman, Graydon Leonard, Jr.
Birmingham
Admitted: 1965
Died: November 30, 2011

Parsons, Douglas McArthur
Birmingham
Admitted: 1976
Died: November 15, 2011

Phelps, Sam Moore
Tuscaloosa
Admitted: 1958
Died: April 18, 2011

Walker, Jacob Allen, Jr.
Opelika
Admitted: 1956
Died: November 24, 2011

Wilson, Marvin Arthur
Florence
Admitted: 1956
Died: March 24, 2011

Woodall, Lynda Knight
Montgomery
Admitted: 1976
Died: December 24, 2011

Marc A. Starrett

Jason B. Tompkins

By Marc A. Starrett

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

Decisions of the United States Supreme Court–Criminal

Miranda; Initial Refusal to Speak to Police and Subsequent Interrogation

Bobby v. Dixon, 132 S. Ct. 26 (2011)

Police officers did not violate the defendant's *Miranda* rights by interrogating him five days after he refused to speak to them without an attorney during a noncustodial "chance encounter." The Court also noted that there is no case law prohibiting police from encouraging a suspect to confess before another suspect does so.

Federal Habeas Corpus Procedure; State Court's Sufficiency of Evidence Finding Entitled to Deference

Cavasos v. Smith, 132 S. Ct. 2 (2011)

The Court reversed the court of appeals' granting of habeas relief to a defendant convicted in state court of causing a child's death from "Shaken Baby Syndrome." The Court concluded that the evidence before the jury could not be reweighed, and that the state appellate court's conclusion that sufficient evidence supported the verdict was entitled to deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Federal Habeas Corpus Procedure; State Court's Adjudication of Issue Governed by Federal Law in Effect at Time of Adjudication

Greene v. Fisher, 132 S. Ct. 38 (2011)

Under the AEDPA, the federal court's review of the state court's interpretation of federal law must be based on the law that was in effect at the time of the state court's decision, rather than the law in effect when the decision became final.

Federal Habeas Corpus Procedure; Confrontation Clause

Hardy v. Cross, 132 S. Ct. 490 (2011)

The Court reversed the court of appeals' holding that a state prosecutor failed to adequately show that a sexual assault victim was unavailable to testify for purposes of the Confrontation Clause. To satisfy the Sixth Amendment, the prosecutor was not required to "exhaust every avenue of inquiry, no matter how unpromising" to find a witness before introducing her previous testimony at trial.

Decisions of the Eleventh Circuit Court of Appeals–Criminal

Federal Habeas Corpus Procedure; *Miranda;* Invocation of Right to Remain Silent

Lumpkins v. Sec'y, Dept. of Corr., No. 11-11159, 2011 WL 6760332 (11th Cir. Dec. 27, 2011)

The state court's denial of motion to suppress the defendant's statement was not an unreasonable application of federal law; he did not unambiguously invoke his right to remain silent, and the detectives' act of allowing (notably, not preventing) him to speak to his family did not constitute coercion.

"Fair Warning" Provision of the Due Process Clause

Magwood v. Warden, Ala. Dept. of Corr., No. 07-12208, 2011 WL 6306665 (11th Cir. Dec. 19, 2011)

The defendant's death penalty sentence violated the Due Process Clause because he did not have "fair warning" that the aggravating circumstance making his act a capital offense–the killing of a law enforcement officer–would be considered at sentencing by the trial judge.

Right to Counsel; Resentencing

Duharte v. Sec'y, Dept. of Corr., nos. 09-11322, -11539, -13783, 2011 WL 6152346 (11th Cir. Dec. 12, 2011)

The defendant possessed a right to counsel under the Sixth Amendment at resentencing, a "critical stage" of her proceedings in this case. The trial court did not simply perform a ministerial act of resentencing; rather, it required the defendant to argue regarding the validity of a prior conviction and made a finding regarding her habitual offender status.

Federal Habeas Corpus Procedure; Deference to State Court's Factual Findings; *Brady; Giglio; Gardner*

Consalvo v. Sec'y, Dept. of Corr., No. 10-10533, 2011 WL 6141663 (11th Cir. Dec. 12, 2011)

The defendant failed to show that the state court's findings that the prosecution did not withhold evidence or present false evidence, and that his death sentence was not based on evidence in violation of his due process rights, were contrary to, or an unreasonable application of, federal law.

Federal Habeas Corpus Procedure; *Giglio*

Guzman v. Sec'y, Dept. of Corr., No. 10-11442, 2011 WL 6061337 (11th Cir. Dec. 7, 2011)

The defendant was entitled to habeas relief because the state court's conclusion that the prosecution's use of false evidence at trial was not material was an objectively unreasonable application of federal law.

Federal Habeas Corpus Procedure; Death Penalty/Mental Retardation

Hill v. Humphrey, No. 08-15444, 2011 WL 5841715 (11th Cir. Nov. 22, 2011)

The state court's requirement that the defendant prove mental retardation beyond a reasonable doubt did not violate clearly established federal law prohibiting the execution of the mentally retarded.

Continued from page 107

Federal Habeas Corpus Procedure; Tolling of AEDPA Limitation Period

Walton v. Sec'y, Dept. of Corr., 661 F. 3d 1308 (11th Cir. 2011)

The defendant's failure to comply with the state procedural requirement for filing a second post-conviction petition rendered that petition not "properly filed," thus failing to toll the AEDPA limitation period.

Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel

Frazier v. Bouchard, 661 F. 3d 519 (11th Cir. 2011)

The Alabama Court of Criminal Appeals' holding that the defendant failed to sufficiently plead his ineffective assistance claim in an *Ala.R.Crim.P.* Rule 32 petition was a reviewable merits determination, rather than a rejection of the claim on procedural grounds for purposes of procedural default. However, the denial of relief on the claim was not contrary to, or an unreasonable application of, federal law.

Federal Habeas Corpus Procedure; Successive Petition

Campbell v. Sec'y, Dept. of Corr., No. 10-12404, 2011 WL 4840725 (11th Cir. Oct. 13, 2011)

Because, following *Magwood v. Patterson*, 130 S. Ct. 2788 (2010), a habeas petition seeking relief from a resentencing is not deemed successive under the AEDPA, the district court was required to reconsider the defendant's second petition.

Federal Habeas Corpus Procedure; Double Jeopardy

Delgado v. Fla. Dept. of Corr., 659 F. 3d 1311 (11th Cir. 2011)

The state courts' denial of relief on a double jeopardy claim was not contrary to, or an unreasonable application of, federal law; the reversal of the defendant's conviction did not bar retrial because it was based on a legal, rather than factual, error.

Decisions of the Alabama Supreme Court–Criminal

Lesser-Included Offenses

Ex parte State (v. Howard), No. 1090763, 2011 WL 5009782 (Ala. Oct. 21, 2011)

The evidence that ultimately resulted in the defendant's capital murder conviction did not support an instruction on manslaughter as a lesser included offense.

Double Jeopardy; Verdict Form

Ex parte Lamb, No. 1091668, 2011 WL 5110206 (Ala. Oct. 28, 2011) and *Ex parte T. D.M.*, No. 1091645, 2011 WL 5110207 (Ala. Oct. 28, 2011)

In both cases, the court held that the jury verdict form finding the defendant not guilty could not be subsequently altered to a guilty verdict after the jury's discharge; jeopardy attached when the trial court accepted the verdict and discharged the jury. In both cases the court emphasized the importance of polling the jury and reviewing the verdict forms.

Hearsay; Interplay between Rule of Evidence and Statute

M.L.H. v. State, No. 1101398, 2011 WL 6004617 (Ala. Dec. 2, 2011)

The court found that a witness's statement that does not constitute a hearsay exception under *Ala.R.Evid.* Rule 801(d)(1)(A) may still be admissible as substantive evidence under *Alabama Code* (1975) § 15-25-31 (governing admissibility of out-of-court statement by child under 12 regarding exploitation or physical/sexual abuse).

Ala.R.Crim.P. Rule 32; Recusal; Mandamus Relief

Ex parte Jones, No. 1101129, 2011 WL 6117895, (Ala. Dec. 9, 2011)

The court directed the court of criminal appeals to vacate its order requiring a trial judge to recuse himself from the defendant's Rule 32 proceedings concerning alleged juror misconduct. Recusal was not required because the trial judge would not be a material witness during the proceedings.

Decisions of the Alabama Court of Criminal Appeals

Resentencing of Nonviolent "Technical" Probation Violators

Ballard v. State, CR-10-0123, 2011 WL 5252756 (Ala. Crim. App. Nov. 4, 2011)

Under *Alabama Code* (1975) § 15-22-54.1 (allowing resentencing of certain classes of inmates whose probation was revoked due to "technical" violations), the inmate was ineligible for resentencing because his split sentence, rather than probation, had been revoked.

Procedural Due Process; Notice of Trial Date

State v. Harwell, CR-10-0568, 2011 WL 52527534 (Ala. Crim. App. Nov. 4, 2011)

Reversing the pretrial dismissal of the defendant's charges, the court held that the state was denied procedural due process when it was not given notice of the trial date.

Ala.R.Crim.P. Rule 32; Ineffective Assistance of Counsel; Speedy Trial

Yocum v. State, CR-10-1271, 2011 WL 5252752 (Ala. Crim. App. Nov. 4, 2011)

The defendant pleaded sufficient facts in a Rule 32 petition to support an ineffective assistance of counsel claim, asserting that trial counsel was ineffective by failing to pursue a speedy trial claim arising from the 45-month delay between his arrest and guilty plea.

Habitual Felony Offender Act

Gomillion v. State, CR-08-1062, 2011 WL 6279027 (Ala. Crim. App. Dec. 16, 2011)

The defendant's prior felony guilty pleas could not be used as "prior convictions" for sentence enhancement under the Alabama Habitual Felony Offender Act, *Alabama Code* (1975) § 13A-5-9, where the record did not indicate that he had been adjudicated guilty on those pleas.

Waiver of Right to Counsel

Presley v. City of Attala, CR-10-0935, 2011 WL 6278308 (Ala. Crim. App. Dec. 16, 2011)

The court reversed the defendant's convictions because the record did not expressly show that he voluntarily waived his right to counsel during his jury trial.

Ala.R.Crim.P. Rule 32; Voluntariness of Guilty Plea; Parole Eligibility

McCray v. State, CR-10-0863, 2011 WL 6278307 (Ala. Crim. App. Dec. 16, 2011)

The defendant pleaded guilty to first-degree sodomy of a child and was sentenced to life imprisonment. Pursuant to *Alabama Code* (1975) § 15-22-27.3, however, a defendant convicted of a sex offense against a child is ineligible for parole. The defendant's timely filed Rule 32 petition alleged that his plea was involuntary due to the trial court's failure to

Continued from page 109

inform him of his ineligibility for parole under the statute. Agreeing that his plea was involuntary if he was not so informed, the court remanded for the trial court to determine whether he was informed of the parole ineligibility.

Miranda; Invocation of Right to Counsel

Thompson v. State, CR-10-0714, 2011 WL 6278306 (Ala. Crim. App. Dec. 16, 2011)

The defendant's statement during custodial interrogation, "I guess I got to call an attorney if I needed one, right? Is this the time now when I need to[,]" was not an unequivocal invocation of his right to counsel; further, the investigator clarified any ambiguity in that statement by specifically asking him whether he understood his *Miranda* rights.

Possession of Child Pornography; Unit of Prosecution

C.B.D. v. State, CR-10-0640, 2011 WL 6278305 (Ala. Crim. App. Dec. 16, 2011)

The court affirmed the juvenile's delinquency adjudication for 11 counts of possession of child pornography. Among other holdings, the court concluded that each visual depiction constituted a separate offense under the 2006 amendment to *Alabama Code* (1975) § 13A-12-190.

Search and Seizure; Warrantless Search of Cell Phone

Gracie v. State, CR-10-0596, 2011 WL 6278304 (Ala. Crim. App. Dec. 16, 2011)

The police officer's warrantless search of the call log and text messages of the defendant's cell phone was proper under the "search incident to arrest" exception to the Fourth Amendment's warrant requirement.

Ethics Act

State v. Turner, CR-10-0501, 2011 WL 6278303 (Ala. Crim. App. Dec. 16, 2011)

The court reversed the trial court's dismissal of the defendant's indictment under *Alabama Code* (1975) § 36-25-5 for using an official position or office for personal gain, finding that the statute is not unconstitutionally vague. Further, because the statute does not designate a culpable mental state, nor provide for strict liability, it may be committed intentionally, knowingly, recklessly or as the result of criminal negligence, with varying degrees of punishment.

Ala.R.Crim.P. Rule 32; Split Sentence Act

Brand v. State, CR-10-0376, 2011 WL 6278302 (Ala. Crim. App. Dec. 16, 2011)

While the court may review an illegal sentence at any time, the defendant's illegal sentence claim presented in his Rule 32 petition was meritless. Under the Split Sentence Act, *Alabama Code* (1975) § 15-8-8, the trial court could properly sentence the defendant, convicted of two sexual abuse offenses, to consecutive sentences of five years' imprisonment and ten years' probation on each conviction.

Resentencing of Nonviolent "Technical" Probation Violators

McQuieter v. State, CR-09-1760, 2011 WL 6278301 (Ala. Crim. App. Dec. 16, 2011)

The inmate, convicted of murder, was not convicted of a "nonviolent offense" and therefore was ineligible for resentencing as a "technical" probation violator under *Alabama Code* (1975) § 15-22-54.1.

Possession of Controlled Substances

Wells v. State, CR-09-1735, 2011 WL 6278300 (Ala. Dec. 16, 2011)

Overruling *Holloway v. State*, 979 So. 2d 839 (Ala. Crim. App. 2007), the court held that the defendant's simultaneous possession of separate, different controlled substances (here, methamphetamine and morphine) may result in separate convictions of unlawful possession of a controlled substance. The type of substance is an element of the offense, rather than a means to commit the offense.

Ala.R.Crim.P. Rule 32; Ineffective Assistance of Counsel

Moody v. State, CR-09-0641, 2011 WL 6278299 (Ala. Crim. App. Dec. 16, 2011)

The defendant's claims that counsel rendered ineffective assistance in their pretrial representation were precluded under Rule 32.2 because they could have been raised before trial, at trial or in a post-trial motion. He voluntarily waived the right to counsel and represented himself at trial, and his resulting *pro se* status did not accord him "special treatment" so as to allow him to ignore the procedural rules requiring him to raise the claims at the first practicable opportunity.

Confrontation Clause

Woodward v. State, CR-08-0145, 2011 WL 6278294 (Ala. Crim. App. Dec. 16, 2011)

Among other holdings in this capital murder case, the court found no confrontation clause violation in the admission of cell phone tower records showing the defendant's

Continued from page 111

location at the time of the offense. The defendant cross-examined the custodians of the records, each of whom had extensive knowledge of the towers/calls, and one of the custodians had generated a map of the towers.

Ala.R.Crim.P. Rule 32; Amendments to Petition

Apicella v. State, CR-06-1059, 2011 WL 6278293 (Ala. Crim. App. Dec. 16, 2011)

The trial court erred in refusing to allow the Rule 32 petitioner to file a third amendment to his petition approximately three months before the evidentiary hearing; no prejudice to the state or undue delay was caused by the amendment.

By Jason B. Tompkins

Jason B. Tompkins *is an associate in the Birmingham office of Balch & Bingham LLP. His practice encompasses business and healthcare litigation, including appellate matters. Tompkins served as special counsel to the Judiciary Committee for Senator Jeff Sessions and clerked for the Honorable Karon O. Bowdre, United States District Court for the Northern District of Alabama. He is a graduate of Erskine College (B.S.,* cum laude, *2002) and Cornell Law School (J.D.,* magna cum laude, *2005). He is a member of* The Alabama Lawyer *Editorial Board.*

Decisions of the Alabama Supreme Court–Civil

Wrongful Injunction Damages

Sycamore Management Group, LLC and DirecPath, LLC v. Coosa Cable Company, Inc., No. 1091505 (Ala. Sept. 30, 2011)

A security bond securing preliminary injunctive relief that has been discharged upon entry of a permanent injunction is reinstated upon reversal of the permanent injunction. The party wrongfully enjoined may then recover wrongful injunction damages for the period of time the bond was in force even though it did not appeal the discharge of the bond.

Arbitration; Unjust Miscalculation of Damages

Turquoise Properties Gulf, Inc. v. Overmyer, No. 1100160 (Ala. Sept. 30, 2011)

An arbitration award that orders a party to pay damages that have already been paid amounts to a materially unjust calculation. Such an evident material miscalculation is one of the narrow circumstances under which a state court may alter an arbitration award.

Fictitious Party; Relation Back

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

Substitution of a party for a fictitiously named defendant does not relate back to the original complaint if the plaintiff has not exercised due diligence to determine the defendant's identity. Reviewing the case file, pleadings and media articles is not due diligence.

Personal Jurisdiction; Conspiracy

Ex parte McNeese Title, LLC, No. 1100764 (Ala. Oct. 7, 2011)

A plaintiff seeking to rely upon allegations of conspiracy to establish personal jurisdiction must expressly allege so. Allegations of conspiracy directed to the merits of claims not identified as bases for personal jurisdiction do not suffice.

Arbitration; Waiver

Aurora Healthcare, Inc. v. Ramsey, No. 1091561 (Ala. Oct. 21, 2011)

Substantial invocation of the litigation process will not result in waiver of the right to compel arbitration unless coupled with a showing of "substantial prejudice" to the party opposing arbitration.

Administrative Appeal

Ex part Sutley, No. 1100970 (Ala. Nov. 4, 2011)

A party appealing a final decision of an administrative agency must name the agency that issued the decision as a respondent within the time limitations of the Alabama Administrative Procedure Act. Naming an incorrect body may result in waiver of the right to review of the agency decision.

Class Certification

National Security Fire & Casualty Co. v. DeWitt, No. 1091225 (Ala. Nov. 18, 2011)

Common questions of law and fact did not exist to support a class action against the insurance company. The company paid

general contractor overhead and profit when it was reasonably foreseeable that a contractor would be necessary–a decision it made on a case-by-case basis. Thus, each plaintiff would be required to present evidence that it was reasonably foreseeable that a contractor would be necessary for each of their claims.

Expert Testimony

Springhill Hospitals, Inc. v. Dimitrios Critopoulos, No. 1090946 (Ala. Nov. 18, 2011)

In order to testify as to the standard of care in a medical malpractice case, the expert must be similarly situated to the defendant healthcare providers. In this case, a wound-care specialist was not similarly situated to cardiac recovery nurses.

Default Judgment; Insurance

Travelers Indemnity Co. v. Miller, No. 1100619 (Ala. Dec. 2, 2011)

The insurance company was not liable for a default judgment against the insured where it was never given notice of the occurrence leading to the lawsuit. Its first notice–after entry of a default judgment–was not within a "reasonable time" of the occurrence, as required by its policies.

Post-Judgment Motion; Rule 60(b)

Ex parte Limerick, No. 1101201 (Ala. Dec. 9, 2011)

A Rule 60(b) motion cannot be used to seek what is in essence reconsideration of an issue raised by an earlier Rule 59 motion that was denied. Rule 60 is not a substitute for appeal.

Subject Matter Jurisdiction; Advisory Opinion

University of S. Ala. Medical Center v. Mobile Infirmary Ass'n, No. 1091560 (Ala. Dec. 9, 2011)

Continued from page 113

A court lacks subject-matter jurisdiction over an action seeking purely an advisory opinion despite allegations in the complaint of an actual controversy. A summary judgment entered in such a case is void.

Appeal Deadline; Rule 54(b)

Coughlin v. Hale, No. 1100333 (Ala. Dec. 16, 2011)

The failure to take a timely appeal from a partial judgment certified as final under Rule 54(b) will preclude review of certified issues on an attempted appeal from the final judgment. The appeal from the final judgment was untimely as to previously certified issues.

Laches; Terms of Settlement

Oak Grove Resources LLC v. White, No. 1100525 (Ala. Dec. 16, 2011)

The doctrine of laches barred plaintiffs and class counsel from challenging the placement of air-monitoring stations in proceedings to enforce the terms of a settlement agreement because they had input into and acquiesced to placement of the stations during implementation of the modified class settlement.

Personal Jurisdiction; Stream of Commerce

Ex parte City Boy's Tire and Brake, Inc., No. 1100205 (Ala. Dec. 30, 2011)

The stream-of-commerce analysis for personal jurisdiction cannot be applied to the provision of services; it may only be used in connection with the sale of goods.

Alabama Court of Civil Appeals–Civil

Common Fund Doctrine

Mitchell v. State Farm Mutual Automobile Insurance Co., No. 2100184 (Ala. Civ. App. Oct. 7, 2011)

An insurance company's notice that it may pursue its own subrogation claim and demand to the driver's insurance company is insufficient to avoid the common fund doctrine.

Res Judicata

Franklin v. Woodmere at the Lake, No. 2100692 (Ala. Civ. App. Oct. 21, 2011)

Because an appeal of a district court's ruling to circuit court generally results in a trial *de novo*, the doctrine of res judicata does not bar re-litigation of counterclaims.

Attorneys' Fees; Res Judicata

Ex parte Ocean Reef Developers II, LLC, No. 2100942 (Ala. Civ. App. Nov. 4, 2011)

The plaintiff hired attorneys in both Florida and Alabama to pursue claims that the defendant breached a purchase agreement. The Florida court entered judgment for the plaintiff and awarded attorneys' fees to compensate the Florida lawyer. Res judicata barred the plaintiff from seeking fees for his Alabama lawyer in the Alabama action. The right to attorneys' fees in both actions was premised solely on the defendant's breach of the purchase agreement.

Administrative Procedure; Certificate of Need

Ex parte Affinity Hospital, LLC d/b/a Trinity Medical Center of Birmingham, nos. 2100614 and 2100630 (Ala. Civ. App. Dec. 9, 2011)

On review of the administrative certificate of need proceedings, the trial court erred by remanding the appeal to the State Health Planning and Development Agency for additional evidentiary proceedings when the evidence was already properly before the agency on an intervenor's application for reconsideration.

Affidavit

Perry v. Federal National Mortgage Ass'n, No. 2100235 (Ala. Civ. App. Dec. 30, 2011)

Statements from an affidavit are inadmissible if the affiant relies upon business records as the source of the information but fails to attach those business records to the affidavit.

Eleventh Circuit Court of Appeals–Civil

All Writs Act; Contempt

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

When two individuals who opted out of a class settlement filed a competing "general public" (i.e., quasi-class) action in California, the district court entered an injunction barring "anyone" from prosecuting a released claim "for the benefit of" a class member. The Court of Appeals vacated the injunction, noting that the proper procedure would be to initiate contempt proceedings based on interference with the settlement approved by the district court.

Fraudulent Transfers

Perkins v. Haines, No. 10-10683 (11th Cir. Oct. 27, 2011)

A bankruptcy trustee cannot avoid and recover transfers for value made to upstream investors in a Ponzi scheme. Transfers to Ponzi scheme investors were not "fraudulent transfers."

Migrant Workers; Wage Credits

Ramos-Barrientos v. Bland, No. 10-13412 (11th Cir. Oct. 27, 2011)

Consistent with an interpretation of the Secretary of Labor, an employer cannot credit the cost of housing in the wages paid to migrant workers but is entitled to wage credits for the costs of meals for the workers. In this case, the Court of Appeals also held that the defendant was not liable for the fees that third parties charged the workers related to their efforts to obtain employment with the defendant.

Class Actions

Faught v. American Home Shield Corp., No. 10-12496 (11th Cir. Oct. 31, 2011)

A class notice to consumers of the defendant's home warranty was adequate even though it did not include a detailed recitation of the litigation history. The 12 factors from *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for determining the reasonableness of the class counsel's attorneys' fees, need not be applied unless the fee exceeds the 25 percent benchmark for common fund fees established by Eleventh Circuit precedent.

Copyright

Hermosilla v. Coca-Cola, No. 11-11317 (11th Cir. Nov. 3, 2011)

A contract exists under Florida law when one party's definite proposal is unconditionally accepted by the other party, regardless of form. Thus, a singer's e-mail offering to assign rights to his adaption of a song for credit and "one dollar" was effective to do so. The Court of Appeals affirmed the dismissal of the singer's copyright infringement lawsuit.

Antitrust

CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, No. 11-13254 (11th Cir. Nov. 10, 2011)

The hedge funds' alleged collective conduct to force the plaintiff to pay above-market prices to redeem convertible senior notes early was not a violation of the Sherman Act.

Free Speech

Keeton v. Anderson-Wiley, No. 10-13925 (11th Cir. Dec. 16, 2011)

A public university may impose a remediation plan to address perceived deficiencies in a counseling student's "ability to a multi-culturally competent counselor." The American Counseling Association's Code of Ethics prohibits imposition of personal religious views on clients—an intent the student had expressed. | AL

Reinstatements

- Opelika attorney **Stephanie Northcutt Johndrow** was reinstated to the practice of law in Alabama by order of the supreme court, effective October 25, 2011. The supreme court's order was based upon the decision of Disciplinary Board, Panel III, granting the reinstatement. [Rule 28, Pet. No. 11-1014]

- On October 25, 2011, the Supreme Court of Alabama entered an order reinstating Cullman attorney **Michael Allen Stewart, Sr.** to the practice of law in Alabama based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Stewart's license to practice law was suspended July 12, 2000 for 91 days. Panel III had continued Stewart's initial petition for reinstatement, which he had filed in 2006, pending the finalization of bar disciplinary matters. Stewart subsequently entered a conditional guilty plea to violations of rules 1.3, 1.4(a), 1.4(b) and 8.4(g), *Ala. R. Prof. C.*, and received a three-year suspension. [Pet. No. 2011-964; ASB nos. 00-263(A), 00-266(A), 00-267(A), 01-112(A), 01-256(A), 01-269(A), 01-281(A), 01-282(A), 03-14(A), and 03-324(A)]

- Birmingham attorney **Leotis Williams** was reinstated to the practice of law Alabama, effective September 22, 2011, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Williams on June 9, 2011. Williams was suspended from the practice of law in Alabama by order of the supreme court for 91 days, effective February 23, 2011, by order of the Disciplinary Board of the Alabama State Bar. [Rule 28, Pet. No. 2011-1022]

Transfers to Disability Inactive Status

- Montgomery attorney **Mitch McBeal** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective December 13, 2011. [Rule 27(c), Pet. No. 11-2020]

- Birmingham attorney **Dorris McDowell Samsil, Jr.** was transferred to disability inactive status, pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective December 2, 2011, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(b), Pet. No. 2011-1974]

Disbarments

- The Supreme Court of Alabama adopted the October 7, 2011 order of Panel I of the Alabama State Bar Disciplinary Board, disbarring Auburn attorney **James Boyd Douglas, Jr.** from the practice of law in Alabama, effective October 25, 2011. On October 4, 2011, the Disciplinary Board accepted Douglas's consent to disbarment. Douglas admitted that he converted funds in excess of $2,000,000 from his firm's IOLTA account to his own personal use. [Rule 23(a), Pet. No. 2011-1634; ASB No. 2011-1623]

- Montgomery attorney **Frederick Ball Matthews** was disbarred from the practice of law in Alabama, effective November 30, 2011, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the November 30, 2011 order of consent to disbarment of Panel I of the Disciplinary Board of the Alabama State Bar. Matthews's consent to disbarment was based on his intent to enter a guilty plea in federal court to a felony offense involving child pornography. [Rule 23(a), Pet. No. 2011-1863]

Suspensions

- Montgomery attorney **Johnnie Lynn Branham Smith** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective October 5, 2011. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Smith's conditional guilty plea wherein Smith pled guilty to violating rules 1.5(a), 1.5(c), 8.1(b) and 8.4(g), *Alabama Rules of Professional Conduct*.

  Smith was retained to represent a client in pursuing a wrongful death claim for the estate of the client's deceased mother. An estate was opened and the client was named administratrix of the estate. According to Smith, she was retained on a 45 percent contingency basis to defend the estate against unknown heir claims. In October 2003, the wrongful death case settled, and the client and her sister each received one-third of the settlement proceeds, as heirs of the estate. Approximately one-third of the settlement funds were placed in Smith's trust account pending a possible claim by a third heir.

Continued from page 117

In 2006, Smith concluded that it was safe to disburse the one-third held in trust, and apportioned 45 percent of the funds as her fee for defending the estate from any claims by unknown heirs. However, Smith failed to remove her fee from her trust account and failed to disburse the remaining funds to the heirs of the estate. Later, Smith informed the bar that the funds owing to the heirs were used to pay Smith's legal fee for representing the administratrix in unrelated personal matters. However, Smith had earlier informed the bar that the legal work had been done pro bono and that she had received no compensation from the client for the representation. In addition, Smith failed to get the permission of the other heir to use her portion of the funds for her sister's legal work. As a result, Smith was also ordered to make full restitution to the clients. [ASB No. 2011-1304]

- Birmingham attorney **Keely Luann Wright** was interimly suspended from the practice of law in Alabama, effective October 17, 2011, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 17, 2011 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Wright had recently been arrested and charged with a serious crime as defined in Rule 8(c)(2), *Ala. R. Disc. P.* Wright submitted an affidavit voluntarily consenting to the interim suspension. [Rule 20(a), Pet. No. 2011-1671]

Public Reprimands

- Ozark attorney **Ray Thomas Kennington** received a public reprimand without general publication on November 4, 2011 for violation of rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct.*

Kennington was hired to represent a client in a slip-and-fall case. The client informed Kennington that three other people had had similar accidents at the same business and asked Kennington to obtain their records to use as

evidence. Kennington failed to do so, although he acknowledged that liability was a primary issue in the case.

Summary judgment was eventually entered in favor of the defendant. The client paid Kennington $650 to file an appeal. However, Kennington did not timely file notice of appeal. Further, Kennington did not notify the client that he had failed to timely appeal her case for more than nine months. When Kennington realized his mistake could not be cured, he refunded the $150 filing fee, but claimed that he forgot to refund the $500 balance. He eventually refunded the $500. [ASB No. 10-178]

- Birmingham attorney **Bradley Ryan Overton** was ordered to receive a public reprimand without general publication for violation of rules 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. In July 2010, Overton was hired by a client to pursue a reduction in child support payments, and was paid a flat fee of $1,500. After filing the petition to modify child support, Overton failed to adequately communicate with his client. The client subsequently filed a bar complaint on October 18, 2011, after Overton failed to make a refund of legal fees and return his file. On or about October 25, 2010, a letter was sent to Overton advising that the Office of General Counsel was in receipt of the complaint and requested that Overton submit a written response within 14 days of the date of the letter. Overton failed to submit a response. Several attempts were made to contact Overton regarding the complaint. On November 15, 2010, Overton contacted the Office of General Counsel and requested an extension to respond until November 19, 2010, which was granted. On November 19, 2010, Overton again contacted the Office of General Counsel and stated that he would mail his response the next day; however, no such response was received. In addition, Overton was ordered to refund the client $300 within 30 days of the order on conditional guilty plea. It was noted that Overton had previously refunded the client $600. [ASB No. 2010-1664] | AL

J. Anthony McLain

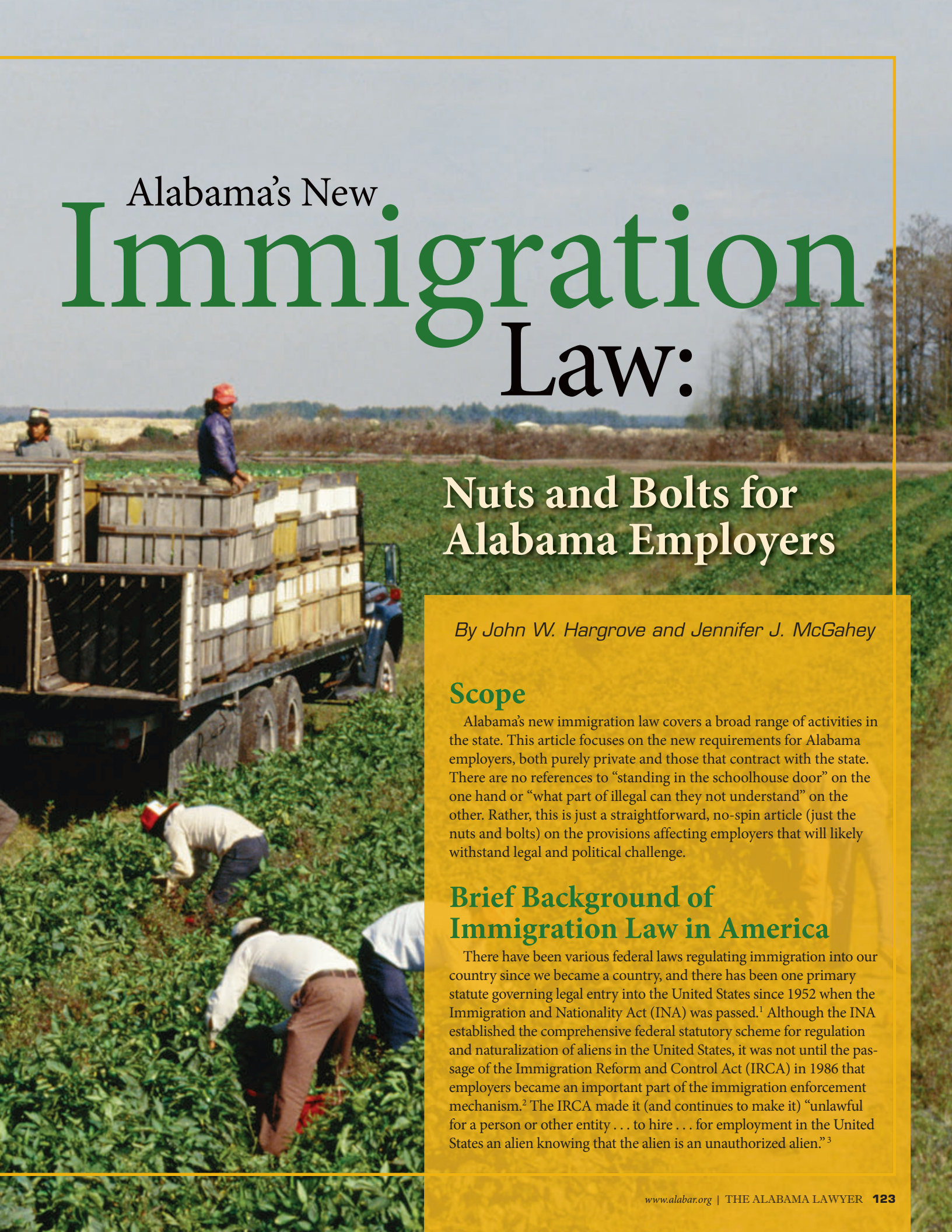
Internet, Advertising and Networking–Know the Rules

QUESTION:

Do the *Alabama Rules of Professional Conduct* apply to lawyer advertising on the Internet or private online services?

ANSWER:

The number of options available for disseminating lawyer advertising has grown rapidly and will continue to grow over time. However, the advertising and solicitation rules found within the *Rules of Professional Conduct* focus on content of advertising and not on the means used to advertise. It is the Disciplinary Commission's opinion that any information made available to the public about a lawyer or a lawyer's services on the Internet or private online services is subject to regulation under the rules on advertising and solicitation. It makes no difference whether it is done through a web page, a bulletin board or unsolicited electronic mail. Any advertising or promotional activity transmitted through the use of a computer is subject to regulation like any other form of lawyer advertising. [RO-1996-07] | AL



Alabama's New Immigration Law:

Nuts and Bolts for Alabama Employers

By John W. Hargrove and Jennifer J. McGahey

Scope

Alabama's new immigration law covers a broad range of activities in the state. This article focuses on the new requirements for Alabama employers, both purely private and those that contract with the state. There are no references to "standing in the schoolhouse door" on the one hand or "what part of illegal can they not understand" on the other. Rather, this is just a straightforward, no-spin article (just the nuts and bolts) on the provisions affecting employers that will likely withstand legal and political challenge.

Brief Background of Immigration Law in America

There have been various federal laws regulating immigration into our country since we became a country, and there has been one primary statute governing legal entry into the United States since 1952 when the Immigration and Nationality Act (INA) was passed.[1] Although the INA established the comprehensive federal statutory scheme for regulation and naturalization of aliens in the United States, it was not until the passage of the Immigration Reform and Control Act (IRCA) in 1986 that employers became an important part of the immigration enforcement mechanism.[2] The IRCA made it (and continues to make it) "unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing that the alien is an unauthorized alien."[3]

The IRCA requires employers to review new employees' "documentation," such as passports, resident alien cards, drivers' licenses, social security cards, and other approved documents and complete the now familiar I-9 form.[4] Thus, employers cannot retain workers known to be unauthorized under existing federal law.[5] Penalties can range from a few hundred to many thousands of dollars depending upon how many employees are involved and how many past violations have been committed by the employer.[6] A federal agency, now called Immigration and Customs Enforcement (ICE), which is an arm of the Department of Homeland Security, principally enforces the IRCA. ICE regularly conducts employer audits, levies fines and conducts sometimes well-publicized "raids" on employers suspected of immigration violations.[7]

Who is and who is not authorized to work in the United States is well-defined in the IRCA and has been for a long time.[8] Alabama's law, like other states, adopts these federal standards and in no way attempts to define who is legal or who is not legal to work in the state. The Alabama law does not create any new documentation or authorization requirements that an alien must have. All those definitions and documents referred to in the Alabama statute come from this large body of federal law.

No worker who is legal under federal law is illegal in Alabama. In other words, the illegal conduct–unlawfully becoming employed–is the same under both federal and state law. It is only the penalty scheme that is dramatically different.

H.B. 56 Overview

On June 9, 2011, Governor Robert Bentley signed the immigration bill, H.B. 56, known as the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (the Act) into law.[9] The Act imposes penalties in several areas pertaining to the presence, activities and, in particular, employment of illegal immigrants in the state of Alabama. Its provisions become effective at different times, but the main effective dates for employers were January 1, 2012 and then April 1, 2012. These dates will be discussed in section V of this article.

The Act is 71 typed pages and has 34 sections. It contains both civil provisions and criminal sanctions. As already widely publicized, conduct regulated includes eligibility for public benefits including medical and post-secondary education benefits[10]; harboring or transporting of or renting to unlawful aliens[11]; the carrying of alien registration documents and making them available to law enforcement officers during traffic stops and the like[12]; and entering into business transactions with the State of Alabama, such as purchasing any type of license or vehicle tag.[13] The Act requires voters to have proof of citizenship to vote[14]; requires public schools to determine the immigration status of children enrolling in schools[15]; requires law enforcement officers to detain those who cannot provide proof of legal status[16]; and requires those within state government to comply with the law and to do nothing to restrict the enforcement of it.[17] Criminal provisions are included for willful failure to complete or to carry an alien registration document[18]; for applying for work if unauthorized[19]; for concealing unauthorized aliens[20]; for dealing in false identification documents[21]; and for attempting to enter into any business transaction with the state.[22]

In addition to these broad provisions, there are several sections of the Act which apply only to employment. Those are contained principally in sections 9, 15, 16 and 17 and will be discussed below in more detail.

Before moving to a specific discussion of those provisions and a consideration of whether Alabama employers likely will face long-term compliance issues under them, however, it is important to reemphasize that the Act adopts the federal definition of authorized and unauthorized workers.[23] No worker who is legal under federal law is illegal in Alabama. In other words, the illegal conduct–unlawfully becoming employed–is the same under both federal and state law. It is only the penalty scheme that is dramatically different. With this general overview of the Act in mind, it is helpful to visit Arizona's recent state immigration law and the federal court challenges to it before turning to Alabama's employment provisions in particular.

Arizona and the United States Supreme Court

The Act follows the lead of Arizona in addressing illegal immigration at the state level. Proponents have called it "Arizona with a twist." Although the Act is more penal than Arizona's, and it unquestionably is one of the most stringent in the country as it relates to the ban on employment of undocumented workers, the statute's adoption of Arizona's fundamental approach warrants a quick discussion of Arizona's law and how it fared in the U. S. Supreme Court.

In the years following the passage of the INA in 1952, states began to pass statutes prohibiting employment of illegal aliens. California was one of the first in 1971.[24] Connecticut, Massachusetts, New Hampshire and Vermont followed suit, in addition to several others.[25] Those state statutes largely survived federal challenge because even though regulating immigration unquestionably is a federal power, states possess broad police powers to regulate the employment relationship and protect the state's workers. Child labor laws, minimum wage laws, health and safety laws, and workers' compensation statutes are examples. Although states could not expand the definition of an unauthorized worker or require additional burdens on otherwise lawfully present aliens, state employment statutes were upheld by the Supreme Court as early as 1976.[26]

Arizona's statute, the Legal Arizona Workers' Act of 2007, obviously was passed much later than these initial statutes and well after the IRCA was passed at the federal level in 1986.[27] Like Alabama's

statute, the Arizona law prohibits the employment of illegal aliens as determined by federal law.[28] It permits the state to revoke business licenses for violating this mandate, and it requires the use of the federal E-Verify system discussed below in more detail.[29]

Various business and civil rights groups filed a pre-enforcement suit to prohibit implementation of the new Arizona law on the grounds that the statute was completely preempted by the INA, a statute which had been substantially amended by the IRCA and other amendments since earlier state statutes had been upheld in the federal courts. The case worked its way through the district court and the Ninth Circuit Court of Appeals and eventually was ruled upon by the Supreme Court last year in *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011). *Whiting* upheld Arizona's law.[30] In particular, the Supreme Court held that because the IRCA explicitly allows states to use licensing and similar laws to enforce employer immigration compliance, and because Arizona's definition and use of "licensing" came directly from federal law, the Arizona statute could not be held to be contrary to the federal scheme.[31] The *Whiting* Court further held that Arizona's requirement of the use of E-Verify was no more unconstitutional than the federal government's requirement that companies wishing to contract with the federal government use E-Verify.[32] Alabama's new law followed on the heels of the *Whiting* decision.

Compliance Issues for Alabama's Private Employers

Basic Requirements

Section 15 of the Act is the broadest employment provision in the new law in the sense that it covers every employer in the state. It specifically prohibits employers from knowingly employing unauthorized aliens in Alabama. It becomes effective April 1, 2012, and unlike some of the other provisions in the Act, it has not been challenged in court.[33]

Section 15(a) contains the prohibition against knowingly employing illegal aliens. It specifically adopts the federal definition of "knowingly employing" or "continuing to employ" an illegal alien.[34] This, of course, is what was upheld in Arizona's law in *Whiting* previously discussed.

Section 15(b) of the Act requires the use of the federal web-based E-Verify system.[35] E-Verify is important for Alabama's employers because it becomes a "safe harbor" or an "affirmative defense" to a claim that an employer knowingly hired or employed an illegal alien. A more detailed discussion of what E-Verify is and how it works follows the discussion of the enforcement scheme in the next section.

Enforcement Scheme

Unlike the federal system of a series of graduated monetary penalties, the enforcement scheme under the Act is quick and deadly. The power to enforce the Act lies with local district attorneys and the attorney general. Any resident of the state, such as rejected job applicants, disgruntled employees, competitors or anyone else, can petition the attorney general for an enforcement action.[36]

Upon the first violation, a judge must order the termination of the illegal employment, order suspension of the business licenses and permits for 10 days for the location where the infraction occurred and subject the business to a three-year probationary period with report-filing requirements. A second violation results in the revocation of all licenses and permits held by the employer specific to the business location where the unauthorized alien performed work. The third violation results in a permanent suspension of all business licenses and permits of the employer in the entire state. This is the "strike three and you are out" rule.[37]

E-Verify in Particular

E-Verify is a web-based program started by the federal government many years ago and first was available for use in just a few states.[38] It now is available throughout the country, but its use is purely voluntary under federal law except for employers who contract with the federal government. It will be mandatory for all Alabama employers this year.

E-Verify is intended to go hand-in-hand with an employer's practice of completing I-9 forms for its new employees. E-Verify is initiated by an employer accessing the government portal on the web and executing a memorandum of understanding (MOU) about the use of the site. Once that is done, an employer may start a case simply by entering the information from the I-9, such as a new hire's name and Social Security number. In many instances, positive verification can be received in just a few seconds. In other cases there are delays, such as when a person's name has changed or, in fact, when a name given does not match the Social Security number or other information supplied. The site and the MOU explain the procedures to follow to allow the employee to try to clear up the problem and avoid the possibility of an incorrect conclusion of lack of legal authorization to work. After a period of only 10 days or so, if one of these so-called "Tentative Non-confirmations" cannot be resolved, an employer can treat a worker as not verified.

What to Do with Unauthorized Aliens

If a new hire ultimately cannot be verified after all the E-Verify procedures are exhausted, then that person becomes a "Final Non-confirmation" and must be removed from the company's payroll. There is no other option at that point.[39]

Other Requirements

Sections 16 and 17 of the Act also contain provisions applicable to Alabama's private employers.[40] Both of those provisions are enjoined at this time pending a final resolution in the Eleventh Circuit; however, if they are upheld, Alabama employers will need to know about them. Section 16 declares that any compensation paid to an illegal alien cannot be allowed as a deductible business expense for any state tax purpose. Section 17 creates a private employment cause of action, similar to Alabama's workers' compensation retaliation provision and age discrimination act, in favor of an authorized worker not hired or retained by an employer who knowingly hires or retains an illegal alien in that legal person's place. Unlike Alabama's other employment causes of action, attorneys' fees can be recovered by a prevailing plaintiff.

If a new hire ultimately cannot be verified after all the E-Verify procedures are exhausted, then that person becomes a "Final Non-confirmation" and must be removed from the company's payroll.

Compliance Issues For Alabama State Contractors

Basic Requirements

Like all private employers, those companies wishing to contract with the State of Alabama must follow all of the just-mentioned requirements of Section 15. In addition, as a condition for the receipt of any state contract, grant or incentive, the employer must follow Section 9 of the Act and provide a sworn affidavit that it has not knowingly hired, employed or continued to employ an unauthorized alien.[41] It must further provide in the affidavit that it is enrolled in the E-Verify program. Finally, state contractors must obtain affidavits from their subcontractors stating that they, too, meet these Section 9 requirements.[42] These provisions for state contractors became effective January 1, 2012.

Enforcement Scheme

Upon the first violation of the above requirements, a state contractor is deemed in breach of the state contract, and it may be terminated after notice and an opportunity to be heard. Upon application of the state-funded contracting entity, an action may be brought to suspend the licenses and permits of the employer for a period not to exceed 60 days according to the procedures in Section 15. A second violation for a state contractor can result in the permanent revocation of all business licenses and permits of the employer within the state.[43] The same penalty scheme applies to subcontractors for violations of this Section 9.[44] Again, however, it is a complete defense for contractors and subcontractors if they enroll in and properly verify their hires through the E-Verify program.[45]

Affidavits

Many employers around the state already have received numerous requests for affidavits from state-funded entities such as counties, school boards and state offices. Alabama's Secretary of State has issued rules regarding the content of such affidavits.[46] Most of the forms are similar and track the language of the Act and require a company to have an in-house employee familiar with the law, require attestation of compliance with the law and require certification of compliance with E-Verify. In some cases, state contractors simply have drafted and provided form affidavits of their own and required similar affidavits from their subcontractors.

Recurring Questions

Who do we E-Verify?

A common question for employers relates to who must be verified through E-Verify under the Act. The Act does not directly address this issue, but it clearly states that federal E-Verify procedures must be followed.[47] E-Verify prohibits the use of the system to pre-screen applicants or to use it for existing employees (unless they become assigned to a federal contract). Thus, the use of E-Verify is limited to those new employees hired after the effective dates in the Act–January 1 for state contractors and April 1 for everyone else.

What about independent contractors?

The Act states that contractors are not responsible for the violations of truly independent contractors.[48] Those are independent companies with their own business, "front office" and human resource function. The exception to this rule is for employers who intentionally attempt to utilize illegal labor through a separate company known to staff without following the provisions of Alabama's new law.[49] In addition, as already mentioned, Section 9 provides a safe harbor for those state contractors who obtain the required affidavits from their subcontractors.[50]

From whom should I obtain affidavits?

Questions also arise from whom a contractor should require affidavits. Should the affidavits be obtained from any subcontractor, supplier or vendor who provides goods and services to the contractor, or should the affidavits be limited only to those whose goods and services actually become part of the state project? The Act is not clear on this. Certainly the safe route to take is to obtain affidavits from all possible subcontractors and vendors. For many large contractors, however, this could be quite an effort. Consequently, some companies have taken the approach

that they will obtain affidavits only from those subcontractors whose goods or services will be billed to the state project.

What about operations outside of Alabama?

Many companies have asked whether they must enroll their employees outside the state into E-Verify and otherwise follow the Act for non-Alabama operations. Again, this is a tough question not clearly answered in the Act. If a small business location or a small group of employees work in close proximity to Alabama and purely serve Alabama operations, treating them as everyone else in the state under the Act probably makes sense. However, large diversified companies who have operations and subcontractors to those operations all across the country have made the decision that since those employees live and work in other states, they must be treated according to those other states' employment and immigration laws rather than Alabama's. This, likely, is the correct approach.

Challenges and Future Developments

Legal Challenges

As reported fairly widely, challenges to the Act were brought in federal court in Birmingham by the United States Department of Justice, civil rights groups and several church denominations. Judge Sharon Blackburn temporarily enjoined many of the Act's provisions, and a couple more were temporarily enjoined by the Eleventh Circuit on appeal. This article attempts to clarify what was enjoined and what was not in the endnotes to Section III. As stated, however, no challenges were brought against sections 9 and 15, and even if there had been, the U. S. Supreme Court already has upheld almost identical provisions in Arizona's law. While it remains to be seen whether sections 16 and 17, relating to payroll tax deductions for compensation paid to illegal aliens and to the new cause of action in favor of authorized workers, will become law, there is little doubt that sections 9 and 15 now are the law in Alabama.

Possible Legislative Developments

As this article was being written, possible political compromises and amendments to the Act were being discussed. The leadership in the Alabama Legislature has changed somewhat since the passage of the Act, and the new leadership appears to be receptive to tweaking the new law. Certainly the business community would like to see less severe penalties for violations of sections 9 and 15, and they would like to see some sort of "statute of limitations" as to how close together violations must be to count as additional steps in the enforcement scheme. The civil rights community would like to see an easing of penalties for providing aid and comfort to those who may or may not be legally authorized to work in the state. Again, however, there seems to be little discussion of repealing the law or making any substantive changes to the employment provisions in particular. Thus, it appears that strict compliance with the nation's immigration laws is here to stay in Alabama along with the requirements of E-Verify and sworn affidavits for state contractors. | AL

While it remains to be seen whether sections 16 and 17, relating to payroll tax deductions for compensation paid to illegal aliens and to the new cause of action in favor of authorized workers, will become law, there is little doubt that sections 9 and 15 now are the law in Alabama.

Endnotes

1. 66 Stat. 163, *as amended,* 8 U.S.C. §§ 1101-1189 (2006).
2. 100 Stat. 3359, 8 U.S.C. §§ 1324a-1324b.
3. *Id.*, 8 U.S.C. § 1324a(a)(1)(4).
4. *Id.*, § 1324a(b); *www.uscis.gov/files/form/i-9.pdf.*
5. *Id.*, § 1324a(a)(2).
6. *Id.*, § 1324a(e).
7. *www.ice.gov.*
8. *See* 8 U.S.C. § 1324a(h).
9. Acts of Alabama 2011-535; *Ala. Code* §§ 31-13-1-30 (2011).
10. *Id.*, §§ 31-13-7, 8 [Section 8 regarding post-secondary school enrollment temporarily enjoined].
11. *Id.*, § 31-13-13 [Section 13 temporarily enjoined].
12. *Id.*, § 31-13-10, 12 [Section 10 regarding carrying registration documents temporarily enjoined].
13. *Id.*, § 31-13-30.
14. *Id.*, § 31-13-29.
15. *Id.*, § 31-13-28 [Section 28 temporarily enjoined].
16. *Id.*, § 31-13-18.
17. *Id.*, § 31-13-5.
18. *Id.*, § 31-13-10 [Section 10 temporarily enjoined].
19. *Id.*, § 31-13-11 [Section 11 temporarily enjoined].
20. *Id.*, § 31-13-13 [Section 13 temporarily enjoined].
21. *Id.*, § 31-13-14.

22. *Id.*, § 31-13-30.
23. *Id.*, § 31-13-3(16).
24. 1971 Cal. Stats. 1442, § 1(a).
25. Conn. Gen. Stat. § 31-51k (1973); 1976 Mass. Acts p. 641; N.H.Rev.Stat.Ann. § 275-A:4-a (1986 Cum. Supp); 1977 Vt. Laws p. 320.
26. *DeCanas v. Bica,* 424 U.S. 351, 353, 96 S. Ct. 933, 939-40 (1976).
27. Ariz.Rev.Stat.Ann. §§ 23-211-216 (West. Supp. 2010).
28. *Id.*, § 23-211.
29. *Id.*, §§ 23-212(F), 23-214(A).
30. 131 S.Ct. at 1987.
31. *Id.* at 1984-85.
32. *Id.* at 1985-86.
33. *Ala. Code*, § 31-13-15.
34. *Id.*, § 31-13-15(a).
35. *Id.*, § 31-13-15(b).
36. *Id.*, § 31-13-15(k).
37. *Id.*, § 31-13-15(e)-(f).
38. *www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.*
39. *www.uscis.gov/USCIS/E-Verify/Customer%20Support/Employer%20MOU%20(September%202009).pdf,* Art. II.C.6.
40. *Ala. Code* §§ 31-13-16, 17.
41. *Id.*, § 31-13-9(a).
42. *Id.*, § 31-13-9(c).
43. *Id.*, § 31-13-9(e).
44. *Id.*, § 31-13-9(f).
45. *Id.*, § 31-13-9(b), (g).
46. *www.sos.state.al.us/downloads/procedures/ImmigrationAct-ER.doc.*
47. *Ala. Code* § 31-13-15(b).
48. *Id.*, §§ 31-13-9(d),15(l).
49. *Id.*, § 31-13-9(d).
50. *Id.*, § 31-13-9(b), (g).

The Alabama Open Meetings Law:

A Basic History and Its Effect on an Alabama Municipal Board

By Samuel A. Rumore, Jr.

The Alabama Sunshine Law

American democracy is predicated on citizens' awareness of and participation in political decisions. The founding fathers established principles to protect political dialogue, even to the degree that criticizing the government is tolerated. Such political discussions are necessary for us to have government by the people. For political discussions to be productive, however, the citizen must be informed. That is the basis for the Alabama Open Meetings Law, which is Alabama's version of the so-called "sunshine laws."

All states have laws providing for open public meetings.[1] Alabama enacted its law in 1915, and was one of the first states in the country to have a sunshine law. Such laws are called "sunshine laws" because public meetings should be conducted out in the open where the sun can figuratively shine on the proceedings.[3] John J. Watkins, in his book, *Mass Media and The Law*, quoted James Madison who said: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own governors must arm themselves with the power which knowledge gives."[4]

The 1915 Alabama "Sunshine Law," which was re-codified into the *Alabama codes* of 1923, 1940 and 1975, broadly stated that no executive or secret session shall be held by any public board, commission or municipal council, or any other body disbursing public funds or which is delegated with any legislative or judicial function. This was a prohibition with only one stated exception. A closed or secret meeting could take place when the character or good name of a person was involved. This law was criminal in nature and provided for a fine against any board member who attended a secret or executive session in violation of the law.[5]

Over the years, several significant cases involving the "Sunshine Law" reached the Alabama Supreme Court. One of these was the 1979 case of *Miglionico v. Birmingham News Company.*[6] In this case, Nina Miglionico was serving as president of the Birmingham City Council. In her capacity as president, she excluded members of the press from meetings where the council interviewed candidates for appointment to the Birmingham Board of Education, an appointed office at that time, and to a vacant position on the

Birmingham City Council. In its opinion, the Alabama Supreme Court confirmed that the public could be excluded from meetings only when the character or good name of an individual was discussed, but they could not be excluded for anything else. In other words, the court took a very limited view of the exception and it required the interviews to take place in public.

Chief Justice Torbert dissented from part of the decision, stating that the process of interviewing prospective appointees necessarily involved "character and good name." His concerns were that past employment, past performance and reasons why a candidate changed jobs reveal information about a person's character. He also stated that military service, credit reports and police records shed light on an applicant's character, too. He maintained that the legislature intended interview sessions to be conducted in closed meetings.

Another example of how the "Sunshine Law," appearing to be black and white on its face, could contain shades of gray as well, was the 1993 case of *Dunn v. Alabama State University Board of Trustees*.[7] In this case, the Alabama State University Board of Trustees disagreed with the governor over his nomination of two trustees to the board. A suit was filed. The governor and his candidates counter-sued, stating that the board had violated the "Sunshine Law" by meeting in closed session with its attorney to discuss the pending litigation. The governor's position was that the only exception to the open meeting requirement involved discussions about a person's good character. The board's position was that the law must protect the attorney-client privilege of confidentiality. They stated that it was impossible for a public body to discuss confidential matters with an attorney in a public meeting. The issue to be decided was whether an implied exception to the "Sunshine Law" existed to preserve attorney-client privilege.[8]

The Alabama Supreme Court carved out a limited exception to the "Sunshine Law" requirements. It held that public bodies could meet in closed sessions with their attorneys to discuss *pending* litigation, but nothing else. The exception did not apply to *potential* litigation, *threatened* litigation or *litigation that might arise* due to some future board action. Other discussions had to be in public. Any decisions by the board based on the closed discussions had to be made in public in a re-opened meeting.

Another significant case occurred in 2003 involving the Auburn University Board of Trustees.[9] In the case of *Auburn University v. Advertiser Co.*, the *Montgomery Advertiser* and seven other newspapers took issue with the Auburn Board of Trustees for closing meetings when the discussion of awarding honorary degrees and naming campus buildings took place. Here, the Alabama Supreme Court ruled that such meetings concerning honorary degrees and the naming of buildings inherently involved the discussion of good character of those individuals being considered. The court also took the opportunity in this case to expand the attorney-client privilege so that no public meeting was necessary when discussing *imminently likely* litigation. However, once again, the court insisted on public meetings when the discussions turned to actions that the board would take.[10]

In 2004, the Alabama "Sunshine Law," which had remained basically unchanged for nearly 90 years, was significantly amended.[11] This specific change in the law was a direct result of the terrorist attacks of September 11, 2001. The amended law allowed closed meetings of public bodies to discuss critical state infrastructure and its security. The point of the secrecy was to avoid public disclosures that could reasonably be expected to be detrimental to public safety or welfare.

Finally, in 2005, the Alabama Legislature repealed the old "Sunshine Law" and replaced it with a new "Open Meetings Law" codified as sections 36-25A-1 through 11. The new law is no longer a criminal statute but provides for injunctive relief, declaratory judgments and civil penalties. The new law has many technical provisions that incorporate and clarify the previous decisions of the Alabama Supreme Court on the issue of open public meetings. However, the basic philosophy of the law is found in the first section which states: "It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings."[12]

The Birmingham Public Library Board of Trustees

> "It is the policy of this state that the deliberative process of governmental bodies shall be **open to the public** during meetings."

To illustrate how the present "Open Meetings Law" works, I will use the Birmingham Public Library Board of Trustees as the model for a public board, and then I will show how that board applies the law to its proceedings.

The first question to consider is whether the board is subject to the "Open Meetings Law." That answer is found in Section 36-25A-2(4) of the law which defines the term "Governmental Body" and which states that all boards composed of a majority of members who are appointed by municipalities are subject to the law. The members of the Birmingham Library Board are appointed by the Birmingham City Council and so the board is subject to the law.

The next statutory requirement is found in Section 36-25A-3 of the law involving notice of meetings. There are three categories of notice: seven-day notice, one-day notice and one-hour notice. These notice requirements are statutory minimums and must be followed. Notice of all regularly scheduled meetings must be given at least seven days in advance of the meeting. The board can also convene a called meeting by giving a 24-hour advanced notice. An emergency meeting will also comply with the "Open Meetings Law" with a minimum of a one-hour notice in the event of an emergency situation that requires immediate action to avoid physical injury to persons or damage to property or to accept the resignation of a public official or employee.

How must the notice be given? The Birmingham Library Board complies with the law by posting notices of meetings at the Birmingham City Hall. There is also a bulletin board near the parking lot entrance to the main library building. Notices with the agenda of a meeting are also posted there. Furthermore, a public board may use other means of direct notification. This could be by phone, fax, e-mail or regular mail. The notice must give the time, location, nature and purpose of the meeting. The board can set reasonable requirements for registered parties to receive direct notice and it can establish the cost of such notice, if any.

Section 36-25A-4 of the law requires that minutes be taken at each meeting setting forth the date, time, place, members present or absent, and any actions taken at the meeting. Such minutes are considered a public record and must be made available to the public as soon as possible. To comply with this provision, the Birmingham Library Board has a staff member present at each meeting with a recording device which is used to prepare complete and accurate minutes for the public.

Section 36-25A-5 of the law requires that all votes of the body be taken during the open or public portion of a meeting. No votes can be taken in an executive session unless provided by law. There are no secret ballot votes at any meeting. For example, the Birmingham Library Board elects officers each year. The vote for officers is taken by a show of hands and not a secret paper ballot.

Section 35-25A-6 of the law allows electronic recording of board proceedings by any person in attendance at a meeting, whether through audio, video, photographic or other means, so long as the recording does not disrupt the meeting.

The longest and most detailed section of the law addresses the issue of executive sessions and is found in Section 36-25A-7. The law carves out nine specific exceptions to the general policy which advocates open meetings. Several exceptions require the intervention of an outside party to assure the legitimacy of the board action to go into an executive session. The nine exceptions are:

1. A board may discuss the general reputation, character, physical condition, professional competence, or mental health of individuals or, subject to limitations, the job performance of certain public employees in a closed session.

2. A board may discuss formal complaints or charges against an individual, a public

…if a policy decision is made by that body concerning **filters on computers, limited access to certain books, the banning of certain materials entirely or any other policy matter,** then the public has the right to hear the governmental discussion and to be heard about it.

employee, a student at a public school or college or an entity subject to the board's regulation at a closed session.

3. A board may discuss with its attorney in a closed session the legal ramifications of a legal option for pending litigation as well as controversies not currently being litigated. This exception conforms to the holding in the 2003 Auburn Board of Trustees case, *Auburn University v. Advertiser Co.*, 867 So.2d 293 (Ala. 2003). However, prior to voting to convene an executive session, the board must receive a written or oral declaration reflected in the minutes from a licensed Alabama attorney that this exception is applicable to the planned discussion.

4. A board may discuss security plans and measures in a closed session. This was the provision added to the old "Sunshine Law" in 2004 after the 9/11 attacks.

5. A board may discuss criminal investigations or the identity of an undercover agent or informer in a closed session. However, prior to entry into the executive session, the board must receive from a law enforcement official with authority to arrest, or the district attorney or an assistant district attorney, or the attorney general or an assistant attorney general, either an oral or written declaration that certain discussions would imperil effective law enforcement if disclosed outside of an executive session. This opinion must be entered into the board's minutes.

6. A board may discuss negotiations to buy, sell or lease real property at a closed session. However, the board cannot go into an executive session if any member who has a personal interest in the transaction will attend the executive session or if condemnation proceedings have already been filed.

7. A board may discuss in a closed session preliminary negotiations involving matters of trade or commerce in which the body is in competition with private interests or other governmental entities. However, as in exceptions 3 and 5, the body will need either an oral or written declaration that is reflected in the minutes of the meeting. The certifying person must be involved in the negotiations and must affirm that such open discussions would have a detrimental effect on the competitive position of the body in the negotiations.

8. A board may discuss strategies in preparing for negotiations between the governmental body and a group of public employees in a closed session. Again, before entering the executive session, this exception requires the declaration, either orally or in writing, from a person representing the interests of the body, that open discussions would have a detrimental effect on their negotiating position. And this declaration must also be recorded into the minutes of the meeting.

9. A board may discuss and rule upon the evidence in a public or contested case hearing in executive session. In this way the body would be acting in a quasi-judicial capacity. However, the position of the board taken in such an executive session must be approved by a vote taken in an open meeting or the board can issue a written decision which can be reviewed by a hearing officer or a court that is able to conduct an appeal of the matter.

These nine exceptions to the policy of open meetings reflect the complexity of

modern society and they show how even the most high minded of general intentions may sometimes need to give way to specific fact situations. The drafters of the law also added a tenth exception that is found in Section 36-25A-1(a) of the law. Here it states that meetings must be open except for the executive sessions provided in Section 7 of the law *or as otherwise expressly provided by other federal or state statutes*. The "Open Meetings Law" does not list the other reasons provided by law for a closed meeting nor does it set forth the procedures for closing a meeting. But this exception is part of the law and there is no clear mechanism for informing the public in this situation that there will be a closed meeting and why it is closed.[13] Perhaps this provision will be tested in a future court proceeding.

Conclusion

In summary, the public has a basic right to know of the deliberations and debate that take place in reaching governmental decisions. Using the example of the Birmingham Public Library Board, if a policy decision is made by that body concerning filters on computers, limited access to certain books, the banning of certain materials entirely or any other policy matter, then the public has the right to hear the governmental discussion and to be heard about it. At the Birmingham Library Board meetings, each monthly agenda has an entry for public voices and public comments. Any citizen can come before the board and be heard.

Public officials must be responsive to the public. Likewise, the public must be involved in the actions of their public officials. That creates a tension between the public and public officials. As President Grover Cleveland stated in his First Inaugural Address: "Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness. Thus is the people's will impressed upon the whole framework of our civil polity–municipal, State, Federal; and this is the price of our liberty and the inspiration of our faith in the Republic."[14]

It is hoped the Alabama Open Meetings Law helps the public and public officials to carry out the admonition of this leader from the past. It should be carefully followed to guarantee the flow of information that will ensure the public's right to know and to promote the ability of the public to influence the decisions of public officials. | AL

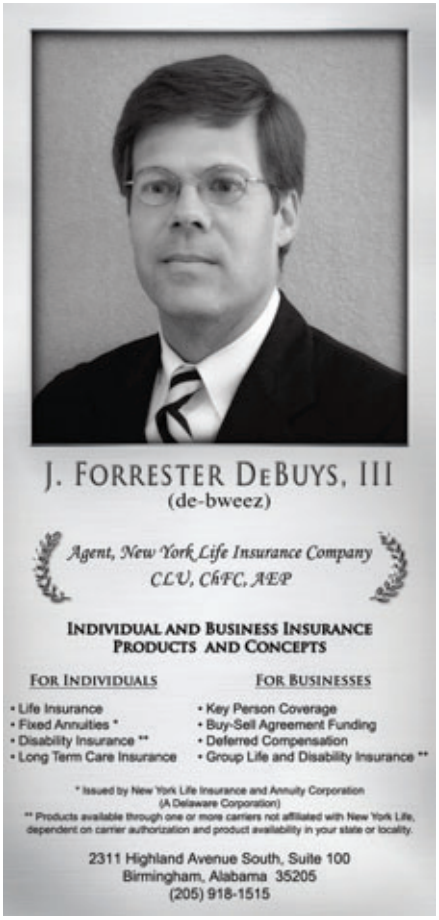
Endnotes

1. Pember, Don R., *Mass Media Law, 6th Ed.*, 302-305
2. Alabama Legislative Acts 1915, No. 278, p. 314
3. Daniel, Gerald A. Jr., 9 *T. G. Jones Law Review* 55
4. Watkins, John J., *The Mass Media and the Law*, 213
5. *Alabama Code* 1975, Section 13A-14-2, Westlaw, 2003 Version of the *Code*
6. *Miglionico v. Birmingham News Co.*, 378 So. 2nd 677 (Ala. 1979)
7. *Dunn v. Alabama State University Board of Trustees*, 628 So. 2nd 519 (Ala. 1993)
8. Deering, Christopher W., 28 *Cumberland Law Review* 377
9. *Auburn University v. Advertiser Co.*, 867 So. 2nd 293 (Ala. 2003)
10. Alabama Case Law Survey, 55 *Alabama Law Review* 466-468
11. *Alabama Code* 1975, Section 13A-14-2, Westlaw, 2004 Version of the *Code*
12. *Alabama Code* of 1975, Section 36-25A-1
13. *The Alabama Open Meetings Act, A Manual for Alabama Public Officials*, Prepared by the Alabama Press Association and the Alabama Attorney General, p. 28
14. *Inaugural Addresses of the Presidents of the United States*, Grover Cleveland, First Inaugural, United States Government Printing Office

Additional Sources

Alabama League of Municipalities website, *www.alalm.org,* "Out of the Sunshine and Into the Open: Understanding the New Open Meeting Law"

"The New Open Meeting Law," report obtained from the Alabama League of Municipalities, Ken Smith, deputy director/chief counsel, and Perry Roquemore, executive director



Responding to a Bar Complaint

By Robert P. MacKenzie, III

A good reputation is the most important asset a lawyer can have. When a complaint is made to the Alabama State Bar (bar), that reputation is subject to challenge. Whether the complaint is based upon some statutory provision, i.e., *Ala. Code* § 34-3-1, *et seq*., the *Alabama Rules of Professional Conduct* (*ARPC*) or *Alabama Rules of Disciplinary Procedure* (*ARDP*), an investigation will follow. This can lead not only to embarrassment and stress, but also legal fees, suspension and, in some cases, disbarment or even imprisonment. Fortunately, most lawyers enjoy a practice away from such experiences. When a complaint is filed and an investigation begins, however, the consequences are real. Every attorney needs to understand how to respond and should consider the following nine points.

1 Respond

An investigation may be initiated for any reason and upon a complaint by any person, not just a client, or by the bar's own motion. (*ARDP* 3(c); 4(b)(1)). The complaint may even be filed anonymously. *Ex parte Alabama State Bar*, 3 So. 3d 178 (Ala. 2008). No matter how frivolous a complaint may be perceived, a response must be made in a timely and appropriate fashion. To ignore an inquiry by the bar is simply to invite more problems. In fact, the failure to respond is, in and of itself, a ground for discipline. (*ARDP* 2(e); *ARPC* 8.1(b)).

Often, a complaint is filed without the attorney's knowledge. While lawyers should be mindful and absolutely respectful of the bar's authority, due process provides you with certain rights. *Ex parte Case*, 925 So. 2d 956 (Ala. 2005). The requirements of due process include adequate notice and a reasonable opportunity to respond. *Ala. Code* § 34-3-83.

Practically speaking, this means you should first ask for a copy of any written complaint or petition. You should have an understanding of the scope of the complaint. Second, you should allow yourself a reasonable opportunity to respond to the bar's inquiry. This may mean consulting another lawyer. In communicating with the bar representatives, it is important to convey that your decision to seek a lawyer's advice is not a refusal to respond, but only an effort to protect your rights. Be mindful that seeking such legal counsel does not allow an open-ended time to

respond. Thus, if the bar requests information by a time certain, you should reply. Failure to timely comply may lead to the bar's exercising its right to obtain an emergency court order in its favor. (*ARDP* 20). It is imperative to understand that the complaint is not going to be dismissed based upon your inaction.

Equally important to the timing of your response is the manner. There is no need to "kill the messenger." *Asam v. Alabama State Bar*, 675 So. 2d 866 (Ala. 1996). Experience shows that the bar's request for information is not reflective of some prejudgment already formed against the lawyer. Rather, the investigation is driven to secure information to fairly evaluate the complaint. Usually, an investigation will precede an emergency suspension or the filing of formal charges. The chance to convey your position to the bar is critical to resolving the problem at the beginning. The investigation may lead the Disciplinary Commission to recommend no formal charges be filed. (*ARDP* 12(c)(1)). At all times, you should demonstrate a willingness to cooperate and resolve the complaint. Incivility and arrogance simply have no place in a response to a bar problem. Remember, the same individuals who investigate the complaint will ultimately have a tremendous influence over the resolution.

Do Not Underestimate the Bar's Authority

The authority of the bar is prescribed by the Alabama Legislature, the *ARPC* and the *ARDP*. Though subject to appeal, those powers are enormous. *Ala. Code* § 34-3-80. The bar's jurisdiction over a lawyer extends to misconduct outside the attorney-client relationship. (*ARDP* 1(a)). As such, it is not defense to a charge of misconduct that the act was somehow separate and distinct from the provision of legal services. *Ala. Code* § 34-3-86; § 34-3-87.

In addressing an attorney's exposure, *ARPC* 8.4 broadly defines professional misconduct to include "dishonesty, fraud, deceit, or misrepresentation, . . . or any other conduct that adversely reflects on his fitness to practice law." Committee Comments to *ARPC* 8.4 cite specific examples of abuse of offices outside the practice of law such as acting as a trustee, executor, administrator, guardian, agent, officer, or manager. These examples are not exclusive. Questions have arisen in certain cases where the complaint is directed toward a collateral entity such as a title company which is owned or managed by the attorney. While this entity may be separate from the law firm, it is the attorney's conduct which is at issue. *Alabama State Bar v. Quinn*, 926 So. 2d 1018 (Ala. 2005). As such, any act of wrongdoing by a person admitted to the practice of law in Alabama will subject that individual to the bar's jurisdiction. (*ARDP* 12(a)).

The broad scope of the bar's jurisdiction is matched by its specific powers. On its own initiative, the bar can commence an investigation, request records, issue subpoenas, administer oaths, and compel the attendance of witnesses. (*Ala. Code* § 34-3-82; *ARDP* 17). At its discretion, the bar can move to temporarily suspend the license of an attorney without notice to the attorney, or before a hearing is held on the merits. (*ARDP* 20)(a)(2)). If warranted, the bar may issue a reprimand or monetary sanction, or suspend or disbar a lawyer from the practice of law. (*ARDP* 8). In those rare instances where a disbarred lawyer continues to unlawfully practice, the punishment may be a prison term up to six months. *Ala. Code* § 34-3-1.

Control over the investigation remains with the bar. The bar may proceed with its inquiry even if the complainant refuses to cooperate, or there has been restitution made by the lawyer. (*ARDP* 13). The bar is not precluded from performing an investigation or finding wrongdoing even when a local bar association's grievance committee[1] has failed to investigate or refused to take any action. (*ARDP* 7(b); *Alabama State Bar v. Caffey*, 938 So. 2d 942 (Ala. 2006). Further, under the circumstances of a lawyer's surrendering his or her license, the bar is not required to terminate its investigation. (*ARDP* 1(c)).

Consult another Lawyer

By no means is every investigation intended as a disruption of the attorney's practice. Nevertheless, it is wise to contact another attorney regarding the bar's investigation, even if the contact is a brief telephone call for a second opinion. Because the bar has its own counsel and will be guided by sound legal advice, you too should proceed with advice of counsel.

In consulting with your attorney, the focus of the investigation can be confirmed. An attorney can assist in formulating a written response to the bar that is limited to the proper inquiry. Further, your attorney will oversee the production of documents and any interviews or depositions given to the bar by you and your staff. As needed, your attorney may converse with the bar's counsel or hearing officer to address any legal issues including pretrial negotiations. (*ARDP* 4.2(b)(3)). Should there be a resolution prior to a hearing on the merits, you will want an attorney's advice before entering into any consent order. Moreover, there are specific procedural and substantive provisions to be satisfied, such as filing deadlines and reporting requirements. (*ARDP* 20, 26). These need to be fully complied with so as not to waive a defense or create a new problem. (*ARDP*(2)(d)).

Consideration must also be given to those cases where there is a potential criminal implication. As an example, complaints arising out of the misappropriation of client funds may not stop with the bar investigation. *Ex parte Bryant*, 682 So.2d 39 (Ala. 1996). Prudence dictates that a lawyer must recognize any exposure to criminal charges, and seek guidance. *Ex parte Price,* 715 So.2d 856 (*Ala. Crim. App.* 1997). Notably, the fact there may be an ongoing criminal investigation will not automatically stay a bar investigation. (*ARDP* 14).

Know the Rules

The rules that govern the practice of law are codified in the *Alabama Code*, § 34-3-1, *et seq*, as well as the *ARPC* and the

ARDP. A lawyer is presumed to know the rules, such that a lack of knowledge is not a valid excuse for any violation. *Ala. Code* § 34-3-20. The rules and statutory provisions are detailed, and a requirement may be overlooked absent careful study. As an example, there are specific provisions that govern client funds (*ARPC* 1.15; *ARDP* 11), fees (*ARPC* 1.5), continuing education (*ARDP* 10), conflicts (*ARPC* 1.7, 1.8, 1.9, 1.10), and advertising (*ARPC* 7.2). These are rules designed to prevent complaints.

There are separate rules which govern a lawyer's duty once a complaint has been filed. For instance, it is necessary for an attorney to notify members of his or her law firm. (*ARDP* 12(a)(3)). Moreso, a disbarment or suspension carries with it specific obligations to inform all clients and to protect the clients' interest. (*ARDP* 20, 26). These requirements place an affirmative duty upon the attorney to advise the bar of the attorney's full compliance. (*ARDP* 26(d)).

Helpful to understanding a lawyer's duty is the bar's website, *www.alabar.org*. The site offers information on the practicality of running a law firm, client relations, marketing and rule compliance. There is even a comprehensive manual, *Trust Accounting for Alabama Lawyers*. Given the obligation of a lawyer to know the rules, and availability of various resources to access the rules, defending a violation on the grounds of ignorance is unconvincing.

5 Integrity of the Client's File

Paramount to defending any complaint is the obligation to maintain the integrity of the client's file and all other records, whether it is before the bar or one for legal malpractice. The file will serve as the basis for your defense. If well maintained, the file should constitute the strength of your defense, not the weakness. Under no circumstances should the file be altered in response to an investigation, or for any reason for that matter. The temptation to add some lengthy, self-serving narrative must be avoided. Instead, the file should be maintained and a copy produced to the bar in its original form. Altering the file simply creates more problems. Any attempt to create "new documents," such as e-mails to a client so to refute a claim of failure to communicate, will be quickly recognized during the investigation. Further, should a civil suit be filed, an altered file may be grounds for your professional liability carrier to deny coverage.

Specific and careful attention needs to be given to financial records. There is no more of a serious charge than the mismanagement of a client's funds. *Bonner v. Disciplinary Board of the*

Alabama State Bar, 401 So. 2d 734 (Ala. 1981). "Creative" accounting simply has no place in a law firm. A lawyer has an absolute duty to maintain trust and operating accounts in an orderly fashion. If a mistake does occur, the mistake must be timely corrected. You should contact the bar and explain what happened and why. The failure to maintain accurate financial records has substantial consequences. The bar has traditionally had a "zero tolerance" in those cases where client funds have been knowingly misappropriated. For such wrongdoing, the question is not if the lawyer will be suspended or disbarred, but how long the suspension or disbarment will be enforced. *Alabama Standards for Imposing Lawyer Discipline* (*ASILD* 4.1).

6 Notify Your Professional Liability Carrier

Policies issued for professional liability may carry an endorsement which provides coverage for responding to a bar complaint. The coverage may be limited to the cost of defense and not include payment for any fines. Even if the policy is limited or does not include coverage, notification of your insurance carrier is recommended. While a bar complaint is not discoverable in a suit for legal malpractice, the underlying conduct may lead to such a suit. *Ala. Code* § 6-5-578. If so, your insurance carrier needs to understand when the complaint was made and what the complaint was. Your carrier may need to take immediate steps to protect your interest in anticipation that a civil action will follow. To prevent the mistake from reoccurring, the insurance carrier may have risk management services available. These programs or materials are generally provided at no cost.

The failure to provide timely notice may be a ground for the insurance carrier to later deny coverage should there be civil action. Lawyers should also be mindful that notifying their carrier may lead to a rate increase or even the policy's being nonrenewed or canceled. The risk of remaining silent, however, is greater. There are certainly going to be expenses and these can quickly mount with meetings and hearings before the bar. If there is coverage for the complaint, you should take advantage of the policy for which you have paid premiums. Further, most policies require notification.

7 Expect an Investment of Time and Money

Responding to a bar complaint is stressful and often expensive–in terms of lost time, money and even your license. Given the serious nature and consequences of an investigation, you should expect to devote the necessary resources. Prepare for any meetings with the bar and its investigators as if you are preparing your own client for a deposition or trial. While lost time is frustrating, a lost reputation can never be fully regained.

In addition to loss of income, you may be subject to specific costs associated with the bar's investigation and finding. Under certain circumstances, you may be ordered to participate in a course of legal study or submit to a behavioral examination. *Nichols v. Alabama State Bar*, 981 So. 2d 398 (Ala. 2007; *ARDP* 21(b)(4-11)). As these courses may last several days or more, the cost could exceed several thousand dollars. (*ARDP* 21(b)(c)). As part of an investigation, you may be responsible for paying a court reporter, witness fees and the travel and incidental expenses for a disciplinary board panel. (*ARDP* 33). Your costs may include the publication in a local newspaper of some adverse finding. (*ARDP* 33). In the case of an attorney seeking reinstatement, the costs are to be paid in advance. (*ARDP* 28(e)). Should the bar ultimately prevail, an administrative fee of $750 may be awarded to the bar. (*ARDP* 33(d)(9);(e)).

8 Respond

Not every bar investigation will lead to a full hearing before a disciplinary board, much less an appeal to the Alabama Supreme Court. (*ARDP* 12). Such a course of action is unusual both in terms of time and expense. If, however, an appeal were to occur, the defense cost could be substantial, and the matter may take months, if not a year or more, to conclude. During this time, your practice could be subjected to some interim suspension or other limitation imposed by the bar. This could include a trustee's being appointed to monitor your practice so to protect the interest of the clients as well as the lawyer. (*ARDP* 29). Given this potential, you should first consider a careful review of all options, including a negotiated agreement with the bar. These options can be discussed with the bar representative outside the formalities of a hearing. This may mean taking affirmative steps such as limiting the scope of your practice, supervision from other practitioners or participation in some ongoing practice management program.

If a reasonable resolution cannot be reached, you should be prepared to defend yourself with conviction. The statute of limitations requires the filing of formal charges within six years from the accrual of the offense. (*ARDP* 31). There is a one-year savings provision for fraud. (*ARDP* 31). Further, the statute may be tolled if there has been a continuing violation. *FLC v. Alabama State Bar*, 38 So.3d 698 (Ala. 2009). An answer is to be filed within 28 days after service of the complaint. The burden of proof is that of clear and convincing evidence, and it is upon the bar. (*ARDP* 19(a)). This same standard of proof is the attorney's burden in any application for reinstatement. (*ARDP* 28(c)). You will be allowed to depose witnesses, obtain documents and present witnesses at the trial. (*ARDP* 12(e)(3)). This would include retaining experts on your behalf.

The discovery and hearing will be conducted before a disciplinary board and in accordance with the *Alabama Rules of Evidence*. (*ARDP* 19(b)). The makeup of the disciplinary board will be five members, including three who are bar commissioners, one layperson and the disciplinary hearing officer. (*ARDP* 4(a)(1). The ruling by the disciplinary board is subject to review by the Alabama Supreme Court. The standard of review is

whether the disciplinary board's ruling was "clearly erroneous." *Alabama State Bar v. R.G.P., Jr.*, 988 So.2d 1005 (Ala. 2008).

When preparing a defense, there should be caution to those who believe long, drawn-out discovery, "papering" the bar or asking for multiple continuances will lead to a dismissal. Though such unencouraged tactics may work in some civil cases, do not test the resolve of the bar in this manner. *Alabama State Bar v. McBrayer*, 20 So. 3d 100 (Ala. 2009). For those who have made a mistake, the better course to follow is to be up front, contrite and willing to take proper steps to correct any problem. If, however, you are not liable, be prepared to move forward with your defense in a deliberate and civil manner.

An attorney is simply naïve to believe that the bar is "bluffing" or does not have the resources to uncover misconduct.

9 Be Proactive

The best way to avoid an investigation is to know the rules. It is understood that lawyers are not always going to prevail, and clients or third parties will become dissatisfied. A complaint, however, is often the product of unrealistic expectations and a lack of good communication. A timely response to a concern and a proposed plan of action will go a long way to avoiding a complaint. On the other hand, indifference and a failure to respond may leave a dissatisfied client or any other party with no recourse. Close attention by you and your staff is necessary to those individuals who express or show dissatisfaction. If a problem is recognized, address the issue in a timely and thoughtful manner. It is much easier to resolve any problem face to face at the time the complaint is first recognized. To ignore anyone's concern is simply to invite that person to contact the bar.

In addition to understanding the rules, the bar itself is a good source for help. Lawyers are encouraged to contact the bar if there is a question about compliance with the rules. While the bar cannot give an opinion on a question of law, it can provide an opinion on an ethical issue. In fact, *ARDP* 18 provides immunity to a lawyer who seeks the bar's advice for a matter which later becomes the subject of a complaint. *ARDP* 18 states as follows:

> **Conduct not subject to disciplinary action:**
> If, before engaging in a particular course of conduct, a lawyer makes a full and fair disclosure, in writing, to the General Counsel, and receives therefrom a written opinion, concurred in by the Disciplinary Commission, that the proposed conduct is permissible, such conduct shall not be subject to disciplinary action.

Any lawyer seeking an opinion, however, must make sure that all facts and circumstances are adequately disclosed. Otherwise, the opinion may be deemed defective as not being based upon sufficient information.

If, for whatever reason, a problem does occur, be the first to acknowledge. Advise the bar of the issue before the bar finds out on its own. In so notifying the bar, have a plan of action ready to correct the problem. Seek the bar's input and approval of your plan. While being proactive will not cause the problem to just vanish, these positive steps will help your cause. In determining the scope of misconduct and appropriate punishment, the bar will consider both aggravating and mitigating factors. (*ASILD* 9). *Alabama State Bar v. Hallett*, 26 So. 3d 1127 (Ala. 2009). Among the considerations is an attorney's recognition and willingness to correct a problem. To the contrary, inaction is your worst enemy. *Tipler v. Alabama State Bar*, 866 So. 2d 1126 (Ala. 2003). An attorney is simply naïve to believe that the bar is "bluffing" or does not have the resources to uncover misconduct.

In summary, the State of Alabama has prescribed rules which must be followed in connection with the privilege of practicing our profession. Lawyers are not perfect. Clients and others will complain despite the lawyer's best efforts. When a complaint is filed, the bar has an obligation to investigate. It is the lawyer's duty and is in his or her best interest to properly respond to any investigation. By careful and thoughtful deliberation, a complaint can be addressed and resolved. If there is merit to the complaint then the wise course is to acknowledge the problem and be willing to work with the bar. Should the complaint not be valid then you should prepare a defense to protect your right to practice. Understanding these nine basic rules will assist in a fair resolution. | AL

Endnote

1. As of 2012, the following local bars are authorized to investigate grievances and report their findings to the Alabama State Bar: Birmingham, Montgomery, Huntsville/Madison, Mobile, Baldwin, Tuscaloosa, Houston, and Talladega.

Lawyer Depression Is Contagious!

By Michael D. Yapko, Ph.D.

Can you catch a depressed mood the way you catch a cold?

Not exactly . . . but similar. Can other people really be a source of the rising rate of depression in the United States? The scientific evidence suggests the answer is yes. Our social lives play a huge role in how we think and feel. After all, none of us are immune to the influence of others, for better or worse. How we react to others, and vice-versa, even has a measurable biological impact on our brain chemistry, as our newest brain research shows us. The evidence is rapidly mounting that depression is about much more than just an individual's "bad chemistry." Thinking of depression as a brain disease is proving to be too one-dimensional a perspective.

For attorneys, appreciating the social connection to depression is vital if the person is to be viewed–and responded to–realistically. Why are attorneys depressed? Go beyond biology as the cause and consider that law is a profession that:

- Often requires engaging in stressful, conflictual relationships;
- Often adds pressure through important and inflexible deadlines;
- Often is devalued by the general public and even may be misunderstood by friends and family;
- Often brings you into contact with some of the worst aspects of human nature;
- Encourages hazardous self-sacrifice for "the cause";
- Encourages deceiving others, as well as one's own moral compass, in the push for maximizing billable hours;
- Demands full commitment to making efforts to achieve things one has no control over;
- Encourages rumination, a poor coping mechanism;
- Can sometimes be almost as costly in winning as in losing, increasing uncertainty about what's best; and
- Can be as emotionally high and low as professional sports ("the thrill of victory, the agony of defeat").

The social aspects of depression have been ignored too long in favor of biological explanations. It would be more helpful

to come to terms with the reality that no amount of medication will make potentially depressing situations, like the stressful aspect of practicing law, go away.

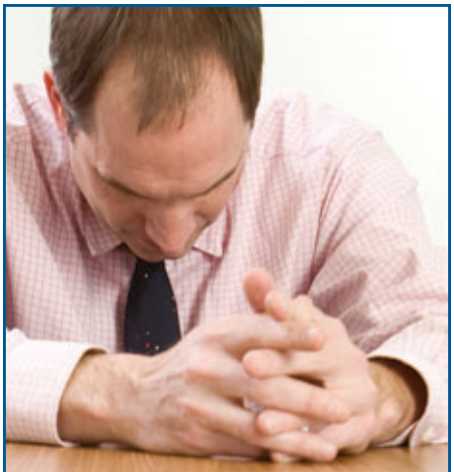
The rising rate of depression is not unique to either Americans or lawyers, lending further support to the growing recognition of depression being spread across borders through social means. Through the studies of cultures, families and the social lives of depressed people, we have learned a great deal about the social transmission of depression. Negative people can bring us down and good relationships involving an enduring commitment can bring us up. We have also learned how children model their parents in unexpected ways that increase their vulnerability to depression. Thus, in a purely social sense, depression is contagious.

The World Health Organization (WHO) is the international watchdog of health issues around the world. Recently, the WHO declared depression the fourth greatest cause of human suffering and disability in the world, behind heart disease, cancer and traffic accidents. The WHO statement tells us how prevalent and serious depression is right now. Even more troubling, though, is the WHO prediction that by the year 2020 depression will have risen to become the second greatest cause of human disability and suffering. It is a safe prediction for the WHO to make, for we already have a half-century worth of data showing that depression has steadily been on the rise for decades.

By focusing on biology alone, as we have done when we talk about chemical imbalances in the brain or calling depression a "disease," the social dimension has been all but ignored. This allows the social conditions that cause and exacerbate depression in many people's lives to go unaddressed. Drugs alone cannot address the social factors that underlie depression, a likely reason that drug treatment by itself (without additional skill-building) has the highest rate of relapse of any form of intervention. Just as there will never be a pill that can cure our other social issues such as poverty or racism, there will never be a pill that will cure the depression that is associated with challenging life conditions. This is not to say biology doesn't matter; it clearly does. To focus on biology, though, to the exclusion of life's circumstances, especially the social ones, that lead people in general, and attorneys in particular, into depression, misses a vital target of intervention. Too often, well-intentioned doctors write a prescription for an anti-depressant medication but go no further into treatment. The evidence is growing that this practice is, to put it mildly, less than ideal.

The new understandings about the prominence of social forces in depression require that we, as mental health professionals, change some of what we do as we try to educate people about depression. The familiar phrasing that suggests "depression is a serious medical illness requiring medication" is an educational approach that clearly doesn't work very well. Most attorneys who are depressed don't seek help. For some, it's because of the stigma of seeking help for an emotional disorder, but for others it's because they simply don't think of themselves as "diseased." They may feel stressed, unhappy, overwhelmed, trapped, or hopeless but they don't consider themselves "depressed." In fact, most attorneys who suffer from depression still manage to function despite their condition. They show up for work, they give their clients reasonably good legal advice, they get their briefs filed on time and they participate in family events. But, they are struggling to get through each day. They are what many clinicians refer to as the "walking wounded."

We can do better than suggest to people they're diseased and need drug care. We can do more than continue to push the one-dimensional biological explanation at people for their depression. We can help them understand that depression is caused by many contributing factors of which some are indeed biological, while others are rooted in individual psychology (such as temperament and styles of coping with stress) and social psychology (such as the quality of relationships and culturally acquired views). Striving to convince people they're diseased doesn't empower them to actively change their lives in meaningful ways. We can teach better relationship skills, better problem-solving skills, better decision-making skills and better ways to cope with an increasingly complex world. We can teach attorneys-to-be, while still in law school, how to develop realistic perceptions of life as a lawyer so they won't get so disillusioned they flee the practice of law so soon after graduating. These are just some of the skills that have not only been shown to reduce depression, but even to prevent it. | AL



ALABAMA LAWYER ASSISTANCE PROGRAM

Are you having difficulty concentrating at work? Are you consumed with feelings of sadness and unworthiness? Do you find it too overwhelming to return phone messages, answer e-mail or open mail regardless of the negative consequences? Are you drinking more than usual or relying on medication? Chances are you may be suffering from depression and many of your colleagues may also be suffering as well. The practice of law is an incredibly stressful profession, which can often leave attorneys feeling totally consumed by its demands and result in depression.

The **Alabama Lawyer Assistance Program** is available to confidentially provide help to law students, attorneys and judges suffering from addiction and/or other mental health issues such as depression, so you or someone you know can find the help they need. Avoiding getting help or remaining a silent bystander will not make depression or addiction go away; it must be treated as soon as possible.

A True Team Effort

Othni J. Lathram

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

On January 1, 2012, I became the first new director of the Alabama Law Institute since 1975. It is an honor and a privilege which I do not take lightly. During the past 37 years, the Institute has operated under the direction of **Bob McCurley.** The story is that Bob came to the Institute with the understanding he would work here for one year, and never got away. As lawyers and citizens of Alabama, we are all better off because of his service.

Since 1975, the Institute has spearheaded 88 major code revision projects, published more than 225 books and conducted 93 conferences, orientations and training sessions for public officials. That is quite a legacy and one which we will strive to uphold as we move forward.

This work was accomplished through the tireless efforts of the Institute's legal staff, including **Associate Director Penny Davis**, who I am extremely fortunate to retain the counsel of in her 33rd year with the Institute, and **Assistant Director Teresa Norman,** who is in her sixth year. We also have had the great fortune to have a tremendously competent and loyal staff, including **Linda Wilson,** who retired this past October after 38 years of service; **Nancy Foster,** who retired in December after 14 years of service; and **Jill Colburn,** who is in her fifth year.

While it is easy to point to the excellent work of the Institute staff, it is important to realize that none of what I have stated above would have been possible without the great support the Institute receives from the Alabama Legislature and practicing attorneys from every corner of the state.

In fiscal year 2011 alone, members of our great bar donated more than 4,000 hours of their time serving on Institute committees, studying and drafting proposed updates to the *Code of Alabama*. These lawyers took time away from their practices to work on these projects to make the laws of Alabama better. When they do this work, they do it not solely on behalf of their clients, themselves or their firms, but, rather, for the benefit of all Alabamians.

Over the years, the work product of these committees has been overwhelmingly embraced by the Alabama Legislature who passes Institute bills with the understanding that they are the result of extensive research and study by the best and brightest lawyers in our state.

While I run the risk of providing redundant information to the loyal readers of this portion of *The Alabama Lawyer*, I think it is important that I begin my tenure by including a summary of the services the Alabama Law Institute provides. These services, while many and varied, can be aggregated into three categories: *Code* Revision, Legislative Services and Education of Public Officials.

Code Revision

The Institute was created in 1967 as the legislative agency charged to clarify and simplify the laws of Alabama, to revise laws that are out of date and to fill in gaps in the law where there exists legal confusion. This core purpose is accomplished through the generosity of hundreds of lawyers who volunteer their time to serve on drafting committees with the Institute.

The Institute's drafting efforts keep Alabama current or ahead of the rest of the country in business laws, family laws, criminal laws and other important matters which do not otherwise rise to level of being high-profile or agenda items.

During the 2012 Regular Session, the Institute will introduce five bills: The Alabama Uniform Foreign Deposition and Discovery Act, the Alabama Uniform Foreign-Country Judgment Recognition Act, amendments to the Alabama Uniform Principal and Income Act, amendments to U.C.C. Article 9, and amendments to the Alabama Condominium Act.

Legislative Services

For more than 30 years, the Institute has provided legal counsel to the House and Senate Judiciary committees. Over that same period, the Institute has provided legal counsel to other committees as requested. During the 2012 legislative session, the Institute is coordinating legal counsel for nine house and senate committees.

In 1977, the Institute began the Capitol Intern Program, which exposes gifted young people to state government. Since then, it has grown into a much more extensive program, with interns helping staff legislative committees and providing other support services in a cost-effective manner during the legislative session. During the 2012 legislative session, there will be 17 interns working in the house and senate.

Beginning this year, the Institute will be employing law clerks on a part-time basis during the legislative session. These upper-level law students will provide legal research ability, under the supervision of Institute lawyers, to legislative committees which do not have a legal analyst.

The Institute also provides legislators with teaching tools to better educate their constituents about how laws are made. These include a video, comic book, brochure and personalized power point presentation on the legislative process.

Public Official Training

As mandated by its enabling statute, the Institute serves as the conduit for legal training for public officials throughout the state. The Institute regularly publishes handbooks for sheriffs, county commissioners, probate judges and tax assessors/collectors. The Institute also publishes a number of other books, including *Alabama Legislation, The Election Handbook, The Alabama Government Manual* and *The Legislative Process*.

By rule of the Alabama Supreme Court, the Institute is charged with the continuing education of probate judges. Conferences are conducted twice yearly for judges and their clerks. In addition, seminars and training are held for sheriffs, circuit clerks and local officials.

The Institute works closely with prosecutors throughout the state keeping them up to date on legislative reforms in the criminal code, including publishing the *Indictment and Warrant Manual* and *Alabama Criminal Jury Charges*.

And, each year, the Institute plays a major role in keeping Alabama lawyers informed of new laws by conducting a legislative update at education conferences.

The role the Alabama Law Institute plays in Alabama has grown tremendously over the years. This is a reflection of not only the great leadership the Institute has had, but also the dedication of lawyers with a drive to improve the state in which they practice and live. I hope and trust that as I undertake to humbly and earnestly oversee the Institute I can continue to count on each of these lawyers to continue that path of service and dedication. | AL

Please e-mail announcements to Marcia Daniel,
marcia.daniel@alabar.org

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

About Members
This section announces the opening of new solo firms.

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

About Members

Joshua Paul Jones announces the opening **Joshua Paul Jones, Attorney at Law LLC** at One Perimeter Park S., Ste. 100N, Birmingham 35243.

Kyla G. Kelim announces the opening of **Aging in Alabama** at 68 N. Bancroft St., Fairhope 36532. Phone (251) 281-8120.

Kendall Krajicek announces the opening of the **Law Office of Kendall K. Krajicek**. The mailing address is P.O. Box 37, Gretna, NE 68028. Phone (402) 332-4546.

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

F. Keith Meigs announces the opening of **Frederick K. Meigs PC** at 121 Jefferson St., N., Huntsville 35801. Phone (256) 533-2020.

Jim T. Norman, III announces the formation of the **Law Offices of Jim T. Norman, III** at 200 S. Memorial Dr., Prattville 36067. Phone (334) 365-9955.

Rodney S. Parker announces the opening of **Rodney S. Parker, Attorney at Law** at 300 Vestavia Pkwy., Ste. 2300, Birmingham 35216. Phone (205) 795-1231.

Among Firms

Adams & Reese LLP announces that **Daniel Newton** and **Russell Rutherford** have joined as associates.

The Florida **Office of Attorney General** announces that **Andrew H. McElroy, III** has joined the Medicaid Fraud Control Unit of the Complex Civil Control Bureau.

Bart, Meyer & Company announces that **Amy R. Henderson** has become a partner.

Carr Allison announces that **Daniel P. Avery** has become a shareholder.

David M. Cowan announces the opening of **Law Offices of David M. Cowan LLC** at 2020 Canyon Rd., Ste. 150, Vestavia Hills 35216. Phone (205) 460-1212. **M. Dykes Barber, Jr.** has become an associate.

Crew & Howell announces that **Alyson Hood Rains** has become an associate.

Joseph R. Fuller and **Amy M. Hampton** announce the opening of **Fuller Hampton LLC** at 422 Church St., Alexander City 35010, and that **Michelle L. Perez** has joined as an associate.

Huie, Fernambucq & Stewart LLP announces that **John Isaac Southerland** and **Eris Bryan Paul** have been named partners.

Lee & McIntosh PC announces a name change to **Lee, Livingston, Lee & Nichols PC**.

Ted L. Mann and **Robert Potter** announce the formation of **Mann & Potter PC** and that **Jerry T. Crowell, III** is now associated with the firm.

Maynard, Cooper & Gale PC announces that **Thomas J. Butler** has joined as a shareholder, and **Mitchell D. Greggs** and **Jordan Lenger** have joined as associates.

McCallum, Methvin & Terrell PC announces that **Rodney E. Miller** has become a shareholder.

Philip E. Miles and **Jonathan M. Welch** announce the opening of **Law Office of Philip E. Miles LLC** at 515 S. 4th St., Gadsden 35901. Phone (256) 543-9777.

O'Bannon & O'Bannon LLC announces that **L. Michael Carr** has joined as an associate.

Parkman, Adams & White LLC announces that **Justin M. Taylor** has joined as an associate.

Pittman, Dutton & Hellums PC announces that **Jon Mann** has joined as an associate.

The Rose Law Firm LLC announces that **Tara L. Whitaker** has joined as an associate.

Schwartz Zweben LLP announces a name change to **Schwartz, Roller & Zwilling LLP** and that **Michael Chester** has joined as an associate.

Shinbaum, McLeod & Campbell announces a name change to **Shinbaum & Campbell**.

Sirote & Permutt announces that **Colin Dean** is now associated with the firm.

Amy Myers and **Klari Tedrow** announce the formation of **Tedrow & Myers Immigration Law Group** at 4 Office Park Circle, Ste. 214, Birmingham 35223. Phone (205) 871-8084.

Thornton, Carpenter, O'Brien, Lazenby & Lawrence announces that **Matthew T. West** has become associated with the firm. | AL

Positions Available

Real Estate Lawyer

A busy real estate office needs Birmingham and Huntsville lawyers with at least three years' real estate/title experience. Full-time position. Successful candidate has the ability to review titles and perform lender closings and explain closing documents to buyers. Call (334) 244-2983.

Insurance Defense Lawyer

A small insurance defense firm in Mobile is looking for an attorney with two to five years' experience. Applicant must be self-motivated and able to work independently. Salary is commensurate with experience. E-mail cover letter and résumé to *joy@slhpc.com* or fax to (251) 431-9368, attention: Joy.

Contract Lawyer

Law firm needs experienced lawyer with excellent research, writing and organizational skills on a contract basis for immediate trial preparation. Knowledge of Trial Director would be helpful but is not required. Send résumé and writing sample to *legalresume7@gmail.com*.

Positions Wanted

Tennessee Valley

Cumberland School of Law graduate (2008) with a certificate in trial advocacy, admitted to the bar that year, recently relocated to the Florence area seeking position. Call (205) 532-1590.

Fluent in Korean

Korean-speaking Alabama attorney seeking employment. Prior to entering law school, five-year work experience at Kia Motors. Solid understanding of cross-cultural legal issues. Various internships in immigration law firms. Interested in employment law and immigration law. Admitted September 2011. Call (334) 590-6384.

For Rent

Birmingham–Downtown

Downtown Birmingham, "A"-rated office space available in a shared suite. Phone, wired and wireless Internet, utilities included. Panoramic views of UAB, Vulcan and Red Mountain. Executive-sized office and spacious conference room. Eat-in kitchen. 24-hour security. $975 mo. Staff office available for additional consideration. Call (205) 989-1919.

Birmingham–Southside

Available office space at 401 37th Street, South, Birmingham, 35222. Two-year leases starting at $750 per month. Lease includes utilities. Three suites available. Call (205) 222-8656.

Birmingham–Southside

Fully restored AAA-class offices: One to three offices available month to month or term. Can be provided furnished. Access to conference room, copier, reception area. Call Ben at (205) 613-7171.

For Sale

Alabama Law Library

Available: reported cases from 1910 to 2005 (556 volumes), $5 per volume; six 8 1/2 ft. bookcases, $150 each. Numerous treatises and other bookcases available. Call (334) 220-0425. | AL

Looking for a job or to fill a job?

Time is money and we've saved you both!

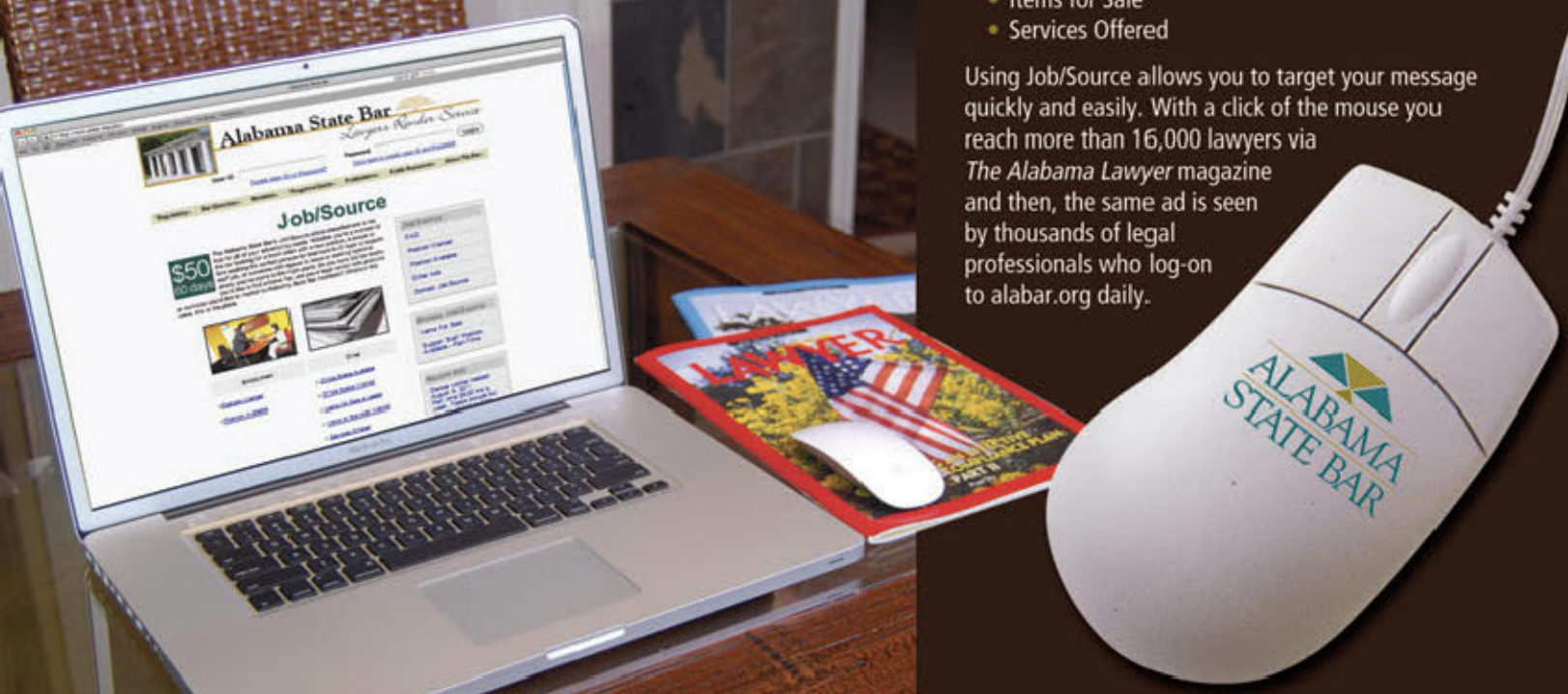
Announcing ASB Job/Source
The place for all your advertising needs

Job/Source allows you to pay once and have a classified ad posted directly online as well as appear in the print issue of *The Alabama Lawyer* magazine. It's two for the price of one! And, if you are an ASB member looking for a job, your posting is free, otherwise the cost is $50 for 50 words for 60 days.

Does your law firm have a position available for a lawyer or support staff? Want to get rid of some office furniture or have space available for lease or rent? Are you an expert witness? Here are the classified ad categories:

- Lawyer Position Available
- Office Space (Available or Wanted)
- Goods or Services Wanted
- Support Staff Position Available
- Items for Sale
- Services Offered

Using Job/Source allows you to target your message quickly and easily. With a click of the mouse you reach more than 16,000 lawyers via *The Alabama Lawyer* magazine and then, the same ad is seen by thousands of legal professionals who log-on to alabar.org daily.



If you can use one of these, then you can place an ad on the ASB website and in *The Alabama Lawyer* magazine for $50.

To get all the details, go to www.alabar.org/jobs

Why spend a fortune advertising for qualified candidates or job hunting when you can use Job/Source?

Bad News...

You're Going To Have to Start Buying Your Own Peanuts.

Because with professional grade videoconferencing from Freedom Court Reporting, you can spend a lot less time in airplanes.

Retain Valuable Time and Avoid Traveling
Receive advantages of a face-to-face deposition without actually being there.

Gain a Competitive Advantage
Evaluate a deponent's mannerisms in real-time, although you may be thousands of miles away.

Boost Team Collaboration Off-site trial teams and clients can view detailed results of legal documentation and easily discuss thoughts and strategies via private group chat.

Get More Out of Every Deposition Ability to pause streaming text, zoom in/out on transcribed data, searchable indexed list of words, manual scroll through transcript, and capability to jump to page/line makes your deposition instantly accessible and more beneficial to you.

Connect Via Any Device With new cloud-conferencing capability, you can join up to 28 parties using PCs, Macs, iPhones, and traditional VC units interchangeably.

Call 1-877-373-3660 to schedule a free demonstration of Freedom's newest videoconferencing capabilities.

For years, law firms throughout Alabama have trusted Freedom Court Reporting for traditional legal support services. As technology advances, Freedom is dedicated to providing our clients with every available tool.

FREEDOM
FREEDOMREPORTING.COM
Feel the Freedom Difference

www.freedomreporting.com
Toll Free: 1-877-373-3660
Local: 205-397-2397
Fax: 205-252-6392

Video conference sites in Birmingham, Dothan, Huntsville, Mobile, Montgomery, Tuscaloosa, and beyond.

Periodical Postage
Paid
Montgomery, AL