

MAY 2010 • VOL. 71, NO. 3

THE ALABAMA LAWYER

2010 ASB ANNUAL MEETING

Baytowne Wharf, Sandestin Golf and Beach Resort

Registration form inside or register at www.alabar.org



**Having trouble
communicating
with your
commercial
malpractice
insurer?**

Call AIM: We're willing to talk!



**Attorneys Insurance Mutual
of Alabama, Inc.**

200 Inverness Parkway
Birmingham, Alabama 35242-4813

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

"A Mutual Insurance Company Organized by and for Alabama Attorneys"
www.AttysInsMut.com

Relax.

We can help you choose the health insurance coverage that's right for you

Learn more about the Aetna Advantage plans for Alabama State Bar Members, Employees, and Eligible Family Members

Choice: Aetna[®] has a wide range of affordable health insurance plans, including coverage for children only. Immunizations are covered 100 percent.

Access: Benefit from our national network of physicians, hospitals and dentists.

Locked-in rates: Your rates can be modified from the time in which you got your quote, however rates from the effective date are guaranteed not to increase for 12 months in most states.

Rx Home Delivery: This exclusive benefit, Available to Members, allows you to order prescriptions by phone or online in seconds.

Just a call away: Our Member Assistance Program (MAP) provides telephone access to licensed clinicians for consultation and referrals to community services 24 hours a day, 7 days a week.

Health Savings Account (HSA)
Compatible plans available:
You can pay for qualified medical expenses with tax-advantaged funds. Please consult your independent financial advisor before opening an HSA or making an investment selection.

No waiting period: No waiting period to access preventive health (routine physicals) or annual routine GYN exam coverage.


ALABAMA STATE BAR

Want to know more about health coverage for individuals?

For a free quote visit isi.norvax.com
or to apply call ISI Sales Direct at 1-888-ISI-1959



 **ISI ALABAMA**
— a division of —
INSURANCE SPECIALISTS, INC.
EST. 1959

[†]Aetna Advantage Plans for individuals, families and the self-employed are underwritten by Aetna Life Insurance Company directly and/or through an out-of-state blanket trust and Aetna Health Inc. (Aetna). In some states, individuals may qualify as a business group of one and may be eligible for guaranteed issue, small group health plans. Information subject to change. Plans may be subject to medical underwriting. Health insurance plans contain exclusions and limitations. Investment services are independently offered through JPMorgan Institutional Investors, Inc., a subsidiary of JPMorgan Chase Bank.

©2008 Aetna Inc.

We want you to know[®]

 **Aetna[®]**

www.aetna.com

Do you want to

Reduce email inbox clutter

Eliminate unwanted brochures

Keep your contact information current

Indicate which subject areas interest you most

Then create or update MyAccount at CLEalabama.com

MyAccount is your personal preferences manager for
CLE the way you want it when you want it!

OCTOBER

- 8 Auto Accident
- 15 Alabama Probate Law
- 22 Real Estate
- 21-24 Retreat to the Beach
- 28 Professionalism

NOVEMBER

- 5 Social Security Disability
- 12 Estate Planning
- 19 Bankruptcy

DECEMBER

- 3 Employment
- 9 Tort Law
- 16 Motion Practice
- 17 Trial Skills
- 20 Alabama Update

**Mark your calendar for
these upcoming seminars!**



IN THIS ISSUE

- 185** President-Elect Profile: James R. Pratt, III
- 192** Remembering Judge James, Honoring Judge Graffeo
- 196** Environmental Citizen Suits in Alabama—
A Look Back and a Glance Forward
By Michael D. Freeman and Thomas R. Head, III
- 206** A Primer on the New Electronic Discovery Provisions in the
Alabama Rules of Civil Procedure
By J. Paul Zimmerman
- 212** Navigating the Medicare Reporting Minefield—
A Practitioner's Guide to Settlement with a
Medicare Beneficiary
By Russell C. Buffkin and Annie J. Dike
- 220** Seeking a Recusal: Calling the Judge a Lizard
Won't Help Your Cause
By Robert P. MacKenzie, III and Lindsey Tomlinson Druhan
- 228** The VLP and the Scoundrel Relatives
By Pamela H. Bucy
- 230** ASB Law Day 2010



Pictured on the cover is The Village of Baytowne Wharf, a 28-acre picturesque pedestrian village made up of unique boutiques, fine and casual dining options and nightlife venues, and the site of this year's annual meeting, July 14-17. The Village, a part of the Sandestin Beach and Golf Resort, is architecturally inspired by New Orleans, Charleston and Nashville. Meeting highlights and registration information are included in this issue and at www.alabar.org. Photo courtesy of Sandestin Golf and Beach Resort / Photographer Allison Yui

DEPARTMENTS

- 181** President's Page
"And Justice for All"
- 187** Executive Director's
Report
*2010 Annual Meeting + Baytowne =
Enjoyment and Fun!*
- 189** Important Notices
Local Bar Award of Achievement
- 191** Memorials
- 193** Young Lawyers' Section
Fun in the Sun!
- 195** Bar Briefs
- 235** Opinions of the
General Counsel
*Absent Valid Attorney's Lien, the File
of the Client Belongs to the Client*
- 237** Legislative Wrap-Up
- 245** Disciplinary Notices
- 251** About Members,
Among Firms



Mixed Sources
Product group from well-managed forests, controlled sources and recycled wood or fibre
www.fsc.org Cert no. SW-COC-003392
© 1996 Forest Stewardship Council



CLE COURSE SEARCH

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, www.alabar.org/cle.



www.alabar.org/cle

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

ALABAMA STATE BAR STAFF

Executive DirectorKeith B. Norman
Executive AssistantDiane Locke
Network Administrator.....Wayne Hughes
Computer Programmers.....Dolan L. Trout
Larry Pratt
Scanning OperatorKristi Neal
Web AdministratorWillie Murphy
Assistant Executive DirectorEdward M. Patterson
Administrative AssistantsRita Gray
Marie Updike
Director of Regulatory ProgramsAngela Parks
CLE Administrative Assistant.....Carol Thornton
Regulatory Programs/PHV Assistant .Cathy Sue McCurry
Director of CommunicationsBrad Carr
Publications DirectorMargaret L. Murphy
Communications and Publications
Assistant.....Marcia N. Daniel
Membership Services DirectorMary Corbitt
Membership Administrative AssistantEmily Farrow
Director of AdmissionsDorothy D. Johnson
Admissions Administrative AssistantsSonia Douglas
Crystal Jones
BookkeeperGale Skinner
ASB Foundation Assistant.....Ann Rittenour
Graphic Arts DirectorMaggie Stuller
Graphic Arts AssistantRoderick Palmer
ReceptionistStephanie Oglesby
Director of Service Programs.....Laura A. Calloway
SP Administrative AssistantKristi Skipper
Volunteer Lawyers Program Director.....Linda Lund
VLP AssistantKatherine L. Church
Intake Specialists.....Deborah Dickey
L. Elise Massey
Lawyer Referral SecretaryRenee Avery
Alabama Lawyer Assistance Program
DirectorJeanne Marie Leslie (834-7576)
ALAP Administrative AssistantSandra Clements
ALAP Case Manager.....Shannon Knight
Alabama Law Foundation, Inc. DirectorTracy Daniel
ALF Administrative AssistantsSharon McGuire
Sue Jones
Alabama Center for Dispute Resolution
DirectorJudith M. Keegan (269-0409)
ADR AssistantPatsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

General CounselJ. Anthony McLain
Secretary to General CounselJulie Lee
Assistant General CounselRobert E. Lusk, Jr.
Assistant General CounselSamuel S. Partridge
Assistant General CounselJeremy W. McIntire
Complaints Intake Coordinator.....Kim Ellis
Disciplinary ClerkBonnie Mainor
Paralegals/InvestigatorsCheryl L. Rankin
Carol M. Wright
Client Security Fund CoordinatorLaurie Blazer
ReceptionistSherry Langley

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

davis direct
ready. print. go >>>
The Alabama Lawyer
PRINTING

Robert A. Huffaker, Montgomery.....Chair and Editor
rah@rsjg.com
Linda G. Flippo, BirminghamVice Chair and Associate Editor
lflippo@whitearnolddowd.com
Brad Carr, Montgomery.....Staff Liaison and Director of Communications
brad.carr@alabar.org
Margaret L. Murphy, Montgomery.....Staff Liaison and
Publications Director
margaret.murphy@alabar.org
Marcia N. Daniel.....Communications & Publications Assistant
marcia.daniel@alabar.org

Board of Editors

Gregory C. Buffalow, Mobile • Russell C. Buffkin, Mobile • Henry L. Cassidy, Jr., Fairhope • Greg C. Cook, Birmingham • Katharine A.W. Coxwell, Monroeville • J. Mark Debro, Huntsville • Patrick C. Finnegan, Mobile • N. Chris Glens, Birmingham • C. Paige Goldman, Birmingham • Wilson F. Green, Tuscaloosa • Trip Haston, III, Birmingham • Fred G. Helmsing, Jr., Mobile • Anne S. Hornsby, Tuscaloosa • Emily C. Marks, Montgomery • Reta A. McKannan, Huntsville • Timothy B. McCool, Carrollton • Derek F. Meek, Birmingham • William J. Moore, Jr., Enterprise • Richard D. Morrison, Montgomery • George R. Parker, Montgomery • Gabrielle E. Reeves, Mobile • Christopher N. Smith, Montgomery • John S. Steiner, Birmingham • Chad E. Stewart, Enterprise • James R. Turnipseed, Mobile • Aldos L. Vance, Birmingham • Mark T. Waggoner, Birmingham • Kevin Walding, Dothan • John R. Wallis Birmingham • Tari D. Williams, Tuscaloosa

Officers

Thomas J. Methwin, Montgomery.....President
Alyce M. Spruelli, Tuscaloosa.....President-elect
J. Mark White, Birmingham.....Immediate Past President
Phillip W. McCallum, Birmingham.....Vice President
Keith B. Norman, Montgomery.....Secretary
Robert N. Bailey, II, Huntsville.....Young Lawyers' Section President

Board of Commissioners

1st Circuit, Ronnie E. Keahey, Grove Hill • 2nd Circuit, Cleveland Poole, Greenville • 3rd Circuit, Christina D. Crow, Union Springs • 4th Circuit, J. Garrison Thompson, Selma • 5th Circuit, Randall S. Haynes, Alexander City • 6th Circuit, Place No. 1, R. Cooper Shattuck, Tuscaloosa • Place No. 2, Robert Hays Webb, Tuscaloosa • 7th Circuit, John M. Gruenewald, Anniston • 8th Circuit, Phil D. Mitchell, Decatur • 9th Circuit, W. N. Watson, Fort Payne • 10th Circuit, Place No. 1, Leslie R. Barineau, Birmingham • Place No. 2, S. Greg Burge, Birmingham • Place No. 3, George M. Neal, Jr., Birmingham • Place No. 4, Phillip W. McCallum, Birmingham • Place No. 5, Augusta S. Dowd, Birmingham • Place No. 6, Maibeth J. Porter, Birmingham • Place No. 7, Joseph A. Fawal, Birmingham • Place No. 8, Robert E. Moore, Birmingham • Place No. 9, James R. Pratt, III, Birmingham • Bessemer Cutoff, William A. Short, Jr., Bessemer • 11th Circuit, Albert J. Trousdale II, Florence • 12th Circuit, Richard W. Whittaker, Enterprise • 13th Circuit, Place No. 1, Henry A. Callaway, III, Mobile • Place No. 2, Walter H. Honeycutt, Mobile • Place No. 3, Billy C. Bedsole, Mobile • Place No. 4, Juan Ortega, Mobile • Place No. 5, Mary Margaret Bailey, Mobile • 14th Circuit, James R. Beard, Jasper • 15th Circuit, Place No. 1, Les Hayes III, Montgomery • Place No. 2, Les Pittman, Montgomery • Place No. 3, Donald R. Jones, Jr., Montgomery • Place No. 4, J. Cole Portis, Montgomery • Place No. 5, Sim Penton, Montgomery • Place No. 6, Lee H. Copeland, Montgomery • 16th Circuit, F. Michael Haney, Gadsden • 17th Circuit, K. Scott Stapp, Demopolis • 18th Circuit, Place No. 1, Ramona Morrison, Columbiana • Place No. 2, Julia C. Kimbrough, Birmingham • 19th Circuit, Brian D. Mann, Wetumpka • 20th Circuit, Hamp Baxley, Dothan • 21st Circuit, John L. Jernigan, III, Brewton • 22nd Circuit, John M. Peek, Andalusia • 23rd Circuit, Place No. 1, Harold Stephens, Huntsville • Place No. 2, L. Thomas Ryan, Jr., Huntsville • Place No. 3, Richard J.R. Raleigh, Jr., Huntsville • 24th Circuit, J. Dale Lawrence, Jr., Fayette • 25th Circuit, R. Wyatt Howell, Hamilton • 26th Circuit, Kenneth E. White, III, Phenix City • 27th Circuit, Jerry Wayne Baker, Jr., Albertville • 28th Circuit, Place No. 1, Allan R. Chason, Bay Minette • Place No. 2, Marion E. Wynne, Jr., Fairhope • 29th Circuit, Robert L. Rumsey, III, Sylacauga • 30th Circuit, Elizabeth S. Parsons, Pell City • 31st Circuit, John M. Kennemer, Tusculmbia • 32nd Circuit, Jason P. Knight, Cullman • 33rd Circuit, Henry F. Lee, III, Geneva • 34th Circuit, Eddie Beason, Russellville • 35th Circuit, J. Milton Coxwell, Jr., Monroeville • 36th Circuit, Christopher E. Malcom, Moulton • 37th Circuit, Robert T. Meadows, III, Opelika • 38th Circuit, Don Word, Scottsboro • 39th Circuit, Jere C. Trent, Athens • 40th Circuit, David F. Law, Rockford • 41st Circuit, Alexander M. Smith, Oneonta

At-Large Board Members

1. Walter E. McGowan, Tuskegee • 2. Claude E. Hundley III, Huntsville • 3. Deborah Byrd Walker, Birmingham • 4. Merceria Ludgood, Mobile • 5. Alicia F. Bennett, Chelsea • 6. LaBarron N. Boone, Montgomery • 7. David K. Howard, Florence • 8. Kesa Johnston, Roanoke • 9. Kelly T. Lee, Elmore

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.

The Alabama Lawyer is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive The Alabama Lawyer as part of their annual dues payment; \$15 of this goes toward subscriptions for The Alabama Lawyer. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. The Alabama Lawyer reserves the right to reject any advertisement. Copyright 2010. The Alabama State Bar. All rights reserved.



The Mobile County Bar Association (MCBA) sponsored a Law Helpline May 12th, broadcast live on NBC affiliate WPML. This is an annual event for the MCBA during Law Day celebrations. In 2009, volunteer lawyers answered more than 1,600 calls and e-mails during this event.



THOMAS J. METHVIN

“And Justice for All”

Law Day USA was originated in 1958 by the American Bar Association (ABA) and is recognized nationally each year on May 1. The ABA developed the idea for a national Law Day in response to the events of the time, namely the Cold War. The Soviet Union held an annual May Day parade, during which time it would display its weapons of war. The ABA's idea was to contrast the United States' reliance on the rule of law with the Soviet Union's rule by force.

President Dwight D. Eisenhower signed a Proclamation on May 1, 1958 to designate the first Law Day USA. Each president since that time has supported Law Day with an official proclamation. Law Day has become a major part of state and local bar association activities.

Today, Law Day activities play an important role in the educational and outreach efforts of the Alabama State Bar (ASB). This is an opportunity for us to share how the law directly affects all of us, in a positive way. The theme for the ASB's Law Day 2010 celebration was “And Justice for All.”

We chose this theme in order to emphasize the importance of access to justice for the poor in civil cases. Access to justice is the number one priority of our state bar this year, since Alabama is dead last in funding for this. The average state spends \$4.1 million per year. Alabama spends \$300,000. As a result there are a lot of hurting people without legal representation. The underlying idea of Law Day is to make the law available and accessible to ordinary people. It is our obligation to make this possible.

PRESIDENT'S PAGE Continued from page 181

In keeping with this, we issued a challenge to all local bar associations to increase their participation in the Volunteer Lawyers Program (VLP) during Law Day and the days leading up to it. We provided the president of each local bar with a list of participation percentages in every circuit in Alabama. We gave them a goal to increase the percentage of their members who participate in the VLP as much as possible. Circuits that showed the greatest increase in participation will be recognized at the ASB Annual Meeting in July.

Currently, Mobile leads the way in VLP participation, with 62 percent of its regular members serving. Sadly, 20 out of the 41 judicial circuits have 25 percent or less participation in a VLP.

Even though Law Day is past, you can still participate! If you are not a member of a VLP, you can join at www.alabar.org, www.vlpmobile.org, www.vlpbirmingham.org or www.vlpmadisoncounty.com depending on where you practice.



The Mobile County Bar Association annually hosts a Naturalization Ceremony as part of its Law Day celebrations. Pictured are new U.S. citizens pledging their allegiance to America.



The ASB has traditionally celebrated Law Day by holding a poster and essay contest for students in kindergarten through 12th grade, and we were happy to do this again

Mary Jane Stover, left, is congratulated by Congressman Artur Davis, center, after being sworn in as a citizen of the United States. Looking on is her husband, Dr. Phil Stover.

Quality Paralegal Education



■ Our Mission

The Faulkner University Legal Studies Department seeks to provide a program that supports its students during their academic and professional careers. Upon graduation, students will be well equipped to begin or continue an exciting career as a paralegal.

■ What are typical paralegal responsibilities?

Paralegals work in many areas of law including litigation, real estate, corporate, probate and estate planning, intellectual property, family law, labor law, and bankruptcy. Paralegals perform tasks such as investigating facts, drafting legal documents, legal research, interviewing clients and witnesses, maintaining contact with clients, and the maintenance of legal files.

■ What can I not do as a paralegal?

A paralegal/legal assistant cannot give legal advice, represent a client in court, establish a fee, or accept a case on behalf of an attorney.

■ How do I choose a Legal Studies Program?

One way to ensure you receive a quality education is to choose a program with instruction specific to the skills required for the state. Secondly, it is important to choose a program with academic standards, such as those required by the American Bar Association.

Faulkner University's Legal Studies Program is approved by the American Bar Association. The Faulkner University Legal Studies program offers an ABA Approved curriculum exclusively at its Montgomery campus, with a strong reputation of academic excellence.

■ How can I get started?

Legal Study courses are offered at convenient times that cater to the needs of students of all ages. Our faculty is comprised of experienced practitioners with outstanding academic credentials. Contact Marci Johns, J.D., Director of Legal Studies today!

Phone: 800.879.9816
Ext. 7140
mjohns@faulkner.edu

5345 Atlanta Highway
Montgomery, AL 36109
www.faulkner.edu



this year. Entries are broken into classifications for judging. Entries are accepted from throughout the state, and winners and their families and teachers are invited to Montgomery for a special awards ceremony at The Heflin-Torbert Judicial Building. About 400 young people participate in the program each year. See pages 242-245 for pictures of the winning posters, a list of winners in all categories, names of all students participating and reprints of the two winning high school essays.

This year, we greatly expanded our Law Day activities statewide, with the goal of having the best Law Day celebration in the history of the ASB. Law Day activities were held in almost every judicial circuit, under the direction of local bar associations. Our activities this year were designed to help those in need, to promote volunteer lawyer service, to raise public awareness of pro bono work, and create positive public relations for lawyers. We held law "help-line" programs on local television and/or radio stations, free legal clinics and a variety of contests and events at local schools.

Many local bars created unique programs to recognize Law Day. For example, the **Mobile Bar Association** held a naturalization ceremony for America's newest citizens, featuring a swearing-in, guest speakers and other celebrations. What a great introduction to the American legal system! In **Escambia County**, high school seniors participate in a program that allows them to be involved in an actual trial. In Tuscaloosa, a new "Pillars of the Bar" luncheon honors two members of the **Tuscaloosa County Bar Association** who have demonstrated outstanding service to the legal profession and pro bono service.

These are just a few of the many outstanding events bringing Law Day to the next level in Alabama. I'm looking forward to seeing this program continue to grow. It is my hope that Law Day will inspire young people to practice law, and encourage attorneys to share their time and talents with those less fortunate through the VLP. I also hope that through Law Day activities, the public has a better understanding of what lawyers do, and the services we render.

The ASB Law Day Committee coordinated all the activities in our 41 judicial circuits. **Ashley Swink** and **Holly**


Alves, both graduates of the **ASB Leadership Forum**, were selected to head the committee. They chose 12 other Leadership Forum graduates to serve on the committee. Each committee member visited one or two judicial circuits to determine what programs were already in place, or to identify where programs were needed.

Law Day Committee members were **M. Hamp Baxley, Ryan G. Brake, Valerie K. Chittom, Christy D. Crow, Anne L. Durward, Adrian D. Johnson, Tara W. Lockett, Jonathan M. Lusk, David E. Rains, Emily H. Raley, Brian P. Strength** and **William B. Wahlheim, Jr.** The committee also includes Young Lawyers' Section President Liaison **Robert N. Bailey, II**, Local Bar Coordinator **Charles R. Godwin**, and ASB staff liaisons **Brad Carr** and **Marcia Daniel**. Our bar owes them all a debt of gratitude for the great work they did in helping us celebrate and promote Law Day and "Justice for All." ▲▼▲

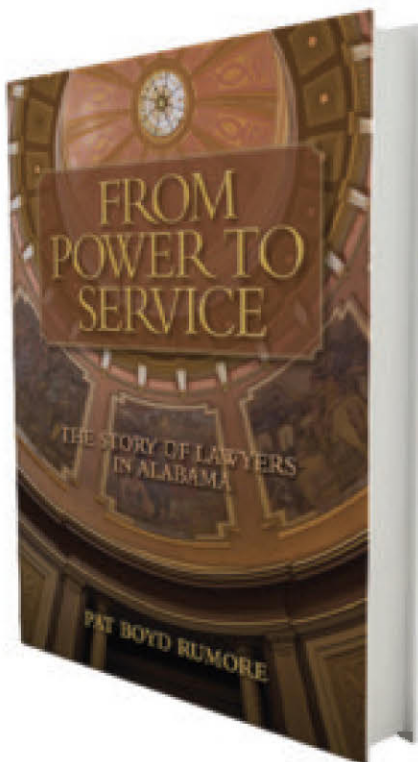
**Attending the
Annual Meeting
is a great way to get
your CLE's completed
for the year.**

**Don't wait
until the
last minute!**





When it comes to a
history of the profession,
we wrote the book.



From Power to Service: The Story of Lawyers in Alabama

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

The story of lawyers in the developing history of Alabama opens in Mississippi Territory days with the appointment by President Thomas Jefferson of the first territorial judge in St. Stephens, the earliest settlement in what would become Alabama, and continues to present day Alabama, where the profession has grown to more than 16,000 members.

In these pages you will read about the people who pioneered Alabama's legal profession. The history of the profession in this state comes alive as Pat Rumore tells the Bar's story in the words of those who shaped it. It's a story of lawyers who ended radical reconstruction and founded the state bar. It's a story of federal jurists who helped to end the segregated "southern way of life" by their decisions brought by some of this state's great civil liberties lawyers. It's also a story about women in the profession and how their achievements have paved the way for a new generation of lawyers.

Publication of this book is co-sponsored by the History and Archives Committee of the Alabama State Bar and the Alabama Bench and Bar Historical Society. Proceeds from the sale of this book go to the Alabama Law Foundation and the Bench and Bar Historical Society.

The cost is \$40 per copy.

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

Shipping and handling charges will be waived for the first 250 orders and those orders will also be eligible to receive a signed first edition of the book.

Pursuant to the Alabama State Bar's Rules Governing the Election of President-Elect, the following biographical sketch is provided of James R. Pratt, III. Pratt was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2010-11 term and he will assume the presidency in July 2011.

James R. Pratt, III

James R. ("Jim") Pratt was born and raised in Birmingham. In 1968, after graduating from high school, he was offered and accepted a full athletic scholarship to Auburn University where he ran track. While at Auburn, he was elected as a member of Sigma Tau Delta, the National English Honor Society, and Omicron Delta Kappa, a National Leadership Honor Society.

Upon graduation, Jim was nominated for and received, by order of the President of the United States, a regular Army commission. He served three years as an armor officer with the 9th Infantry Division.

In 1975, Jim returned to Birmingham where he attended Cumberland School of Law, and began practicing law in 1978. He practices with Hare Wynn Newell & Newton LLP.

Over the years, Jim has been very active in both the Birmingham Bar Association and the Alabama State Bar, serving as a member of the Executive Committee for the BBA and on numerous committees, and is currently in his second term as a Bar Commissioner for the Alabama State Bar. He has also served two terms on the state bar's Disciplinary Commission. He is an Atticus Finch member of the Alabama Bar Foundation, a Fellow of the American Bar Foundation and a member of the American Law Institute.

Jim is a past president of the Alabama Trial Lawyers Association, and a past chair of the Products Liability Section of the Association of Trial Lawyers of America, as well as a past member of the Executive Committee of the American Trial Lawyers.

He has been selected for membership in the Inner Circle of Advocates (a group limited to 100 attorneys nationwide), is a member of the American Board of Trial Advocates, and a Fellow of the International Academy of Trial Lawyers and the International Society of Barristers.

Jim is an AV-rated lawyer by Martindale-Hubbell, has been selected for inclusion in the "Best Lawyers in America" since 1991, designated by Super Lawyers as one of the top lawyers in Alabama, and chosen by Law Dragon as one of the top 500 plaintiffs lawyers in America.

He has been active in civic and educational endeavors, previously serving as an adjunct faculty member with the rank of associate scholar at the University of Alabama at Birmingham's Injury Control Center, member of the Advisory Board for the Biomedical Engineering Department at the University of Alabama at Birmingham and as a faculty member for continuing legal education programs at the University of Alabama School of Law, Cumberland School of Law, Birmingham Bar Association, Alabama Trial Lawyers Association, American Trial Lawyers Association, and National College of Advocacy, which awarded him their highest distinction of Diplomat. He is also a graduate of Leadership Birmingham, as well as Leadership Alabama.

He is married to Marcia Pratt, who is an attorney at Maynard Cooper & Gale, and they have four children. Their oldest son, Andy, is a member of the Alabama State Bar currently practicing in New York City. ▲▼▲



JAMES R. PRATT, III

EXPERIENCE SOMETHING NEW.



The 2010 Alabama State Bar Annual Meeting

JULY 14-17, 2010

Baytowne Wharf
Sandestin Golf and Beach Resort

Early highlights include:

- Family night pizza party and movie on the Grand Lawn
- Island theme party (Thursday)
- Children's activities:
 - Build-a-Bear Workshop
 - Learn to sail class
 - Pottery painting
 - Arcade games
 - Kidzone day camp
 - Children's evening out
 - Caricatures by Deano
- Spouse's program /optional activities:
 - Fashion Show
 - Wine Tasting (hosted by the Carneros Della Notte , Napa Valley)
 - Lunch and sightseeing cruise aboard the Solaris
- Grand Prize Giveaway – 4 days/3 nights in Las Vegas, baby!
- Registrants will have a variety of affordable luxury accommodations from which to choose (studio, 1-2-3 bedroom suites, villas, high rise condos)




ALABAMA
STATE BAR

 **Sandestin**
Golf and Beach Resort
www.sandestin.com



The Village of Baytowne Wharf



KEITH B. NORMAN

2010 Annual Meeting + Baytowne = Enjoyment and Fun!

You will get to experience something new at this year's annual meeting—the Village of Baytowne Wharf! Baytowne is a part of the Sandestin Resort in Destin that borders Choctawhatchee Bay. For those who have not visited it before, Baytowne is a self-contained village that offers many amenities and pleasures. For example, there are 24 restaurants and eateries and 14 bars and pubs in the village. From barbecue to ice cream sundaes to New Orleans po'boys to fresh seafood to French cuisine, there are food and dining options to suit every taste. In addition, there are 51 retail stores in the Village of Baytowne Wharf and Market Shops at Sandestin, to provide a truly enjoyable shopping experience that is close by. With daily entertainment, planned events and activities of all types, Baytowne offers excitement and fun for the entire family.

Bar members attending this year's annual meeting will be able to select their own style of accommodations: one-, two-, three- or four-bedroom condominiums are available at favorable rates and convenient to village events and activities. Guests who use the resort's online reservation system, accessible from the bar's Web site, can take advantage of many complimentary amenities and services, including free resort-wide tram service, free boogie board rental, free tennis court time, free canoe rental, free bicycle rental, and housekeeping service for condominiums. Guests wanting to enjoy the beaches and Gulf can use the free tram service to make the short trip from the village. In fact, you never have to get in your car while you are at Baytowne to make the most of the many entertainment and dining options available. Even those wanting to play golf can choose from one of the

EXECUTIVE DIRECTOR'S REPORT Continued from page 187



Aerial view of golf course

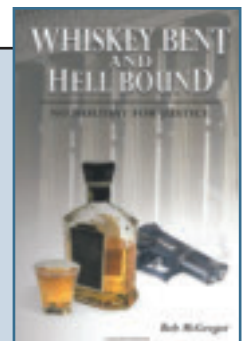
resort's two championship courses—Burnt Pines or Raven—and travel by tram to these spectacular and challenging courses.

If what I have already described has not been enough to convince you to attend the 2010 annual meeting at Baytowne, then think about attending because of this year's outstanding speakers, programs and social events. This year's family activities will compliment the resort-sponsored events and provide families with fun-filled days and evenings throughout the entire meeting. In addition, an outstanding slate of speakers will provide members with a year's worth of CLE credit. Included in this year's line-up of speakers are noted criminal defense lawyer Bobby Lee Cook, who will share his experiences from his many years of private practice; Egil "Bud" Krogh, a former deputy counsel in

the Nixon White House who was disbarred and served a prison term as a White House conspirator, who will describe the lessons he learned by failing to do what was right; and Hon. J. Thomas Marten, U.S. District Court of Kansas, who will present an amusing and entertaining program. Finally, as is always the case, there will be an impressive array of social activities which, this year, will be designed to take full advantage of our unique meeting setting at Baytowne.

All this and much, much more await those attending the 2010 annual meeting at the Village of Baytowne Wharf. Visit www.alabar.org, for more information and to reserve your accommodations. Come enjoy and have fun! See you at Baytowne in July. ▲▼▲

Readers have asked how to purchase a copy of ASB member Bob McGregor's book, *Whiskey Bent and Hell Bound: No Holiday for Justice*. (McGregor was the subject of the March "Executive Director's Report" by Keith Norman.) The book is available at Amazon.com and BarnesandNoble.com.



Editor's note: Bob McGregor died March 31 from liver cancer.



Accounting, Economics & Appraisal Group, LLC

Certified Public Accountants
 Certified Computer Examiner
 Accredited in Business Valuation
 Certified Fraud Examiners



Les Alexander, Managing Principal	205-488-1150
Denise Dauphin, Principal	205-488-1130
Bill Long, Principal	205-488-1138

Accounting & Computer Forensics, Business & Asset Valuation, Economic & Demographic Studies, Enterprise Risk Management & Fraud Investigations

Accounting, Economics & Appraisal Group, LLC, a Certified Public Accountancy Firm
 Two North 20th Street, Suite 1400, Birmingham, Alabama 35203
 Telephone (205) 488-1100 - Facsimile (205) 455-1101 - www.aeagroup.com

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented July 17 during the Alabama State Bar's 2010 Annual Meeting, at the Village at Baytowne Wharf, Sandestin Golf & Beach Resort, in Destin.

Local bars 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 enhancement to the bar's image in the community.

To be considered for this award, local bars must complete and submit an award application by June 1, 2010. Applications may be obtained at www.alabar.org or by contacting Rita Gray at (334) 517-2162. ▲▼▲

NOTICE

Amendment of Rules 28(d)(8), 32(a), and 52, *Alabama Rules of Appellate Procedure*, and Adoption of Rule 56, *Alabama Rules of Appellate Procedure*

The Alabama Supreme Court has amended rules 28(d)(8), 32(a) and 52, *Alabama Rules of Appellate Procedure*, and adopted Rule 56, *Alabama Rules of Appellate Procedure*. The amendment and adoption of these rules are effective June 1, 2010. The order amending rules 28(d)(8), 32(a) and 52 and adopting Rule 56 appears in an advance sheet of *Southern Reporter* dated on or about March 18, 2010. The newly adopted Rule 56 is entitled "Redaction of Personal Data Identifiers in Documents Filed with the Appellate Courts" and provides that the person or entity filing an electronic or paper document with the appellate courts redact from the document certain personal identifiers listed in the rule. It also provides that if the document contains information that cannot be adequately redacted the front cover of the document should so indicate. The amendment to Rule 52 provides that in cases where there is a need for anonymity the cover of the document being filed must so indicate. The amendments to rules 28(d) and 32(a) provide the means by which to indicate to the appellate court that the document contains such information. The text of these rules can be found at <http://judicial.alabama.gov/rules/rules.cfm>.

—Bilee Cauley, reporter of decisions, Alabama Appellate Courts



Zero Travel Time. Zero Hassles. Unlimited Possibilities.

Why travel when you can save time and money, for yourself and your clients, while staying close to home? The Alabama State Bar offers a state-of-the-art videoconferencing facility for client meetings, depositions and settlement conferences. For more information or to schedule the facility, contact Kristi Skipper at (334) 517-2242 or kristi.skipper@alabar.org. First hour free for first time users.



415 Dexter Avenue • Montgomery, Alabama 36104
(334) 269-1515 • Fax (334) 261-6310 • (800) 354-6154

**Adams, Samuel Lamar**

Dothan
Admitted: 1971
Died: January 31, 2010

Bland, Julian

Cullman
Admitted: 1941
Died: December 11, 2009

Bowron, Harold Alfred, III

Birmingham
Admitted: 1986
Died: December 24, 2009

Braswell, Walter Eugene

Birmingham
Admitted: 1979
Died: January 3, 2010

Colvin, Gerald DeWitt

Irondale
Admitted: 1950
Died: January 27, 2010

Crowder, Charles Rogers

Birmingham
Admitted: 1962
Died: January 15, 2010

Guyton, Jackson Wilson

Birmingham
Admitted: 1958
Died: September 24, 2009

Hopper, Edward Lee

Huntsville
Admitted: 1951
Died: January 13, 2010

Lacy, Alexander Shelton

Birmingham
Admitted: 1949
Died: February 4, 2010

Law, Charles Michael

Montgomery
Admitted: 1977
Died: January 27, 2010

Macon, Joe A., Hon.

Wetumpka
Admitted: 1940
Died: January 15, 2010

Morgan, Joe Wilson, III

Birmingham
Admitted: 1995
Died: February 21, 2010

Rountree, John Asa, III

Birmingham
Admitted: 1954
Died: February 11, 2010

Sawyer, John Scott

Mobile
Admitted: 2002
Died: January 22, 2010

Weatherford, Atwell Dean

Dothan
Admitted: 1965
Died: December 17, 2009

Remembering Judge James, Honoring Judge Graffeo



Judge James



Judge Graffeo

The Young Lawyers' Section of the Birmingham Bar Association awarded **Jefferson County Circuit Judge Michael G. Graffeo** the distinguished Judge Drayton James Award on February 19, 2010. This annual award is given in honor of deceased **Judge Drayton James** who was known for his support, guidance and friendship to young lawyers, with the recipient to be a judge who displays these characteristics. The vote of the entire Young Lawyers' Section determines the recipient.

Judge Graffeo was elected to the bench in November 2006. He was born and raised in Birmingham, and grew up in the Ensley community. His passion for mentoring and helping young lawyers comes as a result of his background. His grandparents were all Italian immigrants, and his father was an auto mechanic and union member, having worked at U.S. Steel and other companies. Judge Graffeo commented, "I had no professionals in my family, and I was the first in my family to become an attorney. I was very lucky as a young lawyer to meet two well-known attorneys who were leaders in the bar. They took me under their wings, and I shadowed them." These early friendships allowed Judge Graffeo to have mentors, meet judges and develop his law practice. "I have always considered it my duty to 'pay it forward' as I was helped along the way by these attorneys." His receipt of the Judge Drayton James Award evidences his success in this endeavor.

Judge Graffeo has been married for 24 years to Jane, a neonatal nurse who works with critically ill newborns. He is the father of three children: 21-year-old twins, Sarah and Blair, who are both graduating from college this spring, and a 19-year-old son, Matt, who is a freshman at the University of Alabama. Blair is

following in his footsteps, as she has been admitted to the University of Alabama School of Law, where Judge Graffeo obtained his law degree. He commenced his law practice in 1979 and served on the Birmingham City Council in the late '80s. His passion for helping young lawyers is well known. Some of the larger law firms bring their summer law clerks to Judge Graffeo's courtroom for brainstorming sessions about the practice of law, professionalism and involvement in bar and community activities. He takes on summer interns from Cumberland Law School to allow them the opportunity to see our judicial system at work.

When a senior partner appears in court to argue a motion and brings a young associate with him or her, Judge Graffeo has been known to turn to the young associate at the conclusion of the senior attorney's argument to inquire as to what the young attorney may want to add. Judge Graffeo says, "I know they probably wrote the brief and argument, and it is a good way to start them out in court."

Judge Graffeo is well known for having an open-door policy for young attorneys who want advice on the profession generally and is quick to say that there is no wrong question to ask. When Judge Graffeo was a young attorney, there were a number of judges who were known for being gruff and intimidating. Having seen that approach in action, he tries to handle things differently. He is well aware that some members of the public have a bad image of attorneys, but he believes that "being an attorney is being part of the greatest profession. You have an opportunity to impact society. These young attorneys are the future of our profession, and we have a duty to get them more engaged in the bar and in the community and not just in billing hours." He is truly well deserving of this award. ▲▲▲



ROBERT N. BAILEY, II
rnb@lanierford.com

Fun in the Sun!

Summer is finally here, and you know what that means? That's right, it's time to make the annual trek to Destin for the **YLS Sandestin** seminar on Friday, May 14 and Saturday, May 15, 2010. Our Sandestin seminar is the largest attended event that the YLS organizes each year, usually attracting between 100 and 125 attendees. This year, we hope to increase that number as we have an outstanding lineup of speakers who are experts on a number of topics, including mediation, deposition basics, bankruptcy, collecting judgments, construction law, family law, technology, and ethics.

The Sandestin seminar offers something for everyone, providing six hours of CLE credit with at least one ethics hour. By spending a weekend enjoying the emerald blue waters of the Gulf, you can knock out half of your CLE requirement for the year and obtain your mandatory ethics hour. In addition to enjoying the beach and obtaining CLE credits, this year's Sandestin seminar will have a variety of networking events, including a golf tournament, beach parties, a silent auction and a cocktail reception. The Sandestin seminar is made possible by the hard work of **Brandon Hughey, Katie Hammett, Clay Lanham, Larkin Peters, David Cain, Brad Hicks, Chip Tait, Brian Murphy, and Shay Lawson.**

As I write this, your YLS is on the cusp of doing some very exciting things with respect to serving our bar. When this article goes to press, we will have completed both of our **Minority Pre-Law** conferences, which expose the high school leaders of tomorrow to our profession, and we will also have conducted our first ever YLS **Phone-a-Thon** to increase participation in the Volunteer Lawyers Program. I will have a full write-up of these events in my next article, so stay tuned.

If you have any questions about our Sandestin seminar or anything else about your YLS, please contact me at rnb@LanierFord.com. See you at the beach!





Thomas J. Methvin, president

Thomas J. Methvin: These members did it!



Robert N. Bailey: Have you?



Douglas McElvy: What'd they do?

These members and more than 11,996 more have created their own I-Profile.



Alicia Bennett: What's an I-Profile?

It's an information profile for every state bar member. This profile will tell us your preferred format for receiving communications and other member related information from the bar. For example, do you want to receive member benefit information electronically, but continue receiving a printed version of The Alabama Lawyer by mail? You choose the format that suits you best for receiving different types of information.

Thus far, the I-Profile has proven to be a valuable tool that can streamline your communications from the state bar, reduce our print and postage costs, and thereby help us serve you more efficiently.



Alyce Spruelk: What do I need to do?

In order to complete your I-Profile form you will need to go the ASB Web site (www.alabar.org) but please note the following information:

- 1 Click on the hyperlink that says: "Click here to create User ID and password."
- 2 You will then be directed to a page where you will be asked to complete a form requesting certain information.
- 3 And then you will be directed to the I-Profile form which you complete.

That's it. Three steps.

Now, you can say
"I did it, too!"



Apolinsky



Stephens

- Sirote & Permutt attorneys **Harold Apolinsky** and **Craig Stephens**, along with financial planner Stewart Welch, recently co-authored and published the third edition of *J.K. Lasser's New Rules for Estate and Tax Planning*. The book offers advice and strategies for planning estates under today's tax rules, and covers issues such as retirement planning, how new legislation will impact inheritances and trusts and the dos and don'ts of gifting.



HAROLD APOLINSKY

CRAIG STEPHENS

The PHV Application Process Is Paperless

(and Painless!)

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

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

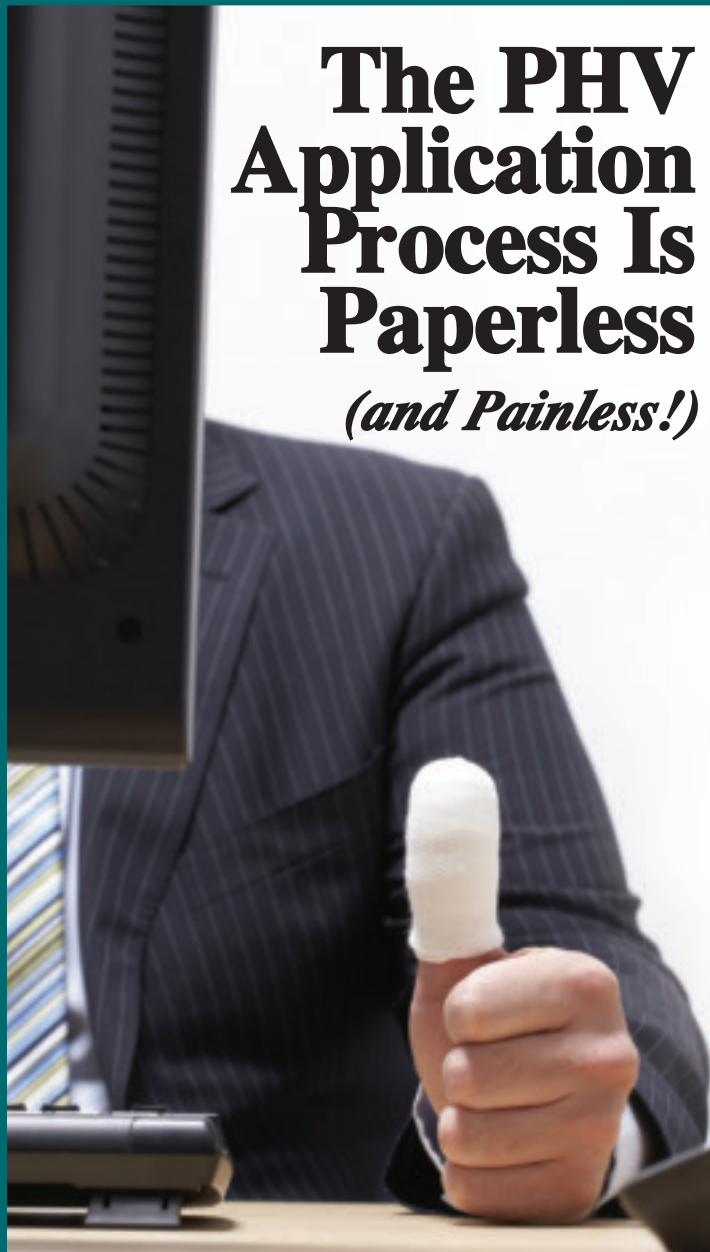
- If all of the information on the application is correct, the motion will be docketed and sent electronically to the judge assigned to the case for ruling.
- If the information in the application is incorrect or incomplete, a deficiency notice will be e-mailed to the filer (local counsel).

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

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

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

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



Environmental Citizen Suits in Alabama—
**A Look Back and a
Glance Forward**



By Michael D. Freeman and Thomas R. Head, III

I. Introduction

The last couple of years have seen changes in the legal landscape governing environmental citizen suits in Alabama and elsewhere. Landmark judicial opinions and recent legislation have resulted in noteworthy changes to the circumstances under which citizens may sue and their attorneys recover a fee. While these changes add clarity to some contested issues, other unsettled issues remain, both for the individuals and groups filing such lawsuits and for the businesses, boards and agencies that defend them.

Consider some common scenarios. Suppose you get a call from a client who just received a letter from the Alabama Department of Environmental Management (ADEM) notifying them of water discharge permit violations (at least according to the ADEM). The client wants advice. Now suppose you represent a farmer who believes the company next door has violated the terms of one of its permits and polluted his irrigation source. The advice you give both these clients should entail different considerations than it did a couple of years ago and knowing these considerations is important to you and your client.

II. Citizen Suits and Their Limits

Most federal environmental statutes authorize private citizens and interest groups to sue individuals and companies in federal court for violating those laws. These statutes clearly contemplate that state and federal agencies shall have primary enforcement authority. Citizen enforcement simply serves as a “back-up.” If your client is a potential defendant, conventional wisdom holds that you are better off facing a government enforcement action than being sued in federal court by a citizen plaintiff. The reasons vary depending on the circumstances, but major drivers behind the preference for administrative enforcement action include: (1) avoiding having to defend two actions (governmental enforcement action may bar citizen suits in some cases), (2) avoiding a citizen suit in federal court which can be expensive and difficult to win, especially in situations where the regulated entity is required to self-report violations to regulatory agencies, and (3) avoiding exposure to attorney’s fees incurred by the citizen’s counsel in prosecuting the federal court action.

Although statistics are hard to come by, far and away most citizen suits are brought under the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA). While there are some differences, the typical citizen suit provision authorizes “any person” to sue an alleged violator (or the governmental agency responsible for regulating the alleged violator), and contains the following features: (1) a requirement that the plaintiff give notice to the alleged violator, the EPA and the State in which the alleged violation occurred *before* filing suit, (2) a provision authorizing attorney’s fees to prevailing parties and (3) a prohibition on bringing a citizen suit if the EPA or the State is already addressing the alleged violation.

Pre-lawsuit Notice

The CAA was the first environmental law to authorize citizen suits, and served as the model for the notice provisions that were included in later environmental statutes, such as the CWA and RCRA. The citizen suit provision in the CAA states that “any person” can bring an action “against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation under this chapter . . .” 42 U.S.C. § 7604(a). But the CAA further provides that “[n]o action may be commenced prior to 60 days after the plaintiff has given notice of the violation (1) to the Administrator [of the U.S. Environmental Protection Agency], (2) to the State in which the violation occurs, and (3) to any alleged violator of the standard . . .”. The only exception to this 60-day notice requirement is when “hazardous” pollutants are implicated. *See* 42 U.S.C. § 7404(b), 33 U.S.C. § 1365(b), and 42 U.S.C. § 6972(c). The CAA, CWA and RCRA each allow suit to be brought immediately after notice is given when “hazardous” pollutants are involved.

EPA regulations generally detail what the “60-day notice letter” must include. For example, before a CWA citizen suit can be brought, a notice letter must be sent that includes:

- (1) sufficient information to permit the recipient to identify the specific standard, limitation or order alleged to have been violated,
- (2) the activity alleged to constitute a violation,
- (3) the person or persons responsible for the alleged violation,
- (4) the location of the alleged violation,
- (5) the date or dates of such violation,

- (6) the full name, address and telephone number of the person giving notice, and
- (7) the name, address and telephone number of the legal counsel, if any, representing the person giving the notice.

While the Eleventh Circuit held in 1991 that the 60-day notice requirement is a mandatory condition precedent to the filing of a citizen suit under the CWA, it was not until a decade later that a federal court in Alabama considered what constitutes “sufficient” notice. In *Atwell v. KW Plastics Recycling Division*, the district court applied a “strict interpretation of all aspects of environmental statute notice requirements.” 173 F. Supp. 2d 1213 (M.D. Ala. 2001). Citing to the Supreme Court’s decision in *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237 (1989), the court found that the CWA notice provision embodied a legislative intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits. Requiring strict compliance, the court reasoned, serves this purpose in two important ways: (1) notice allows government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits, and (2) notice gives the alleged violator an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. The court explained that while the language of the regulation clearly requires something less than a thoroughly detailed account of every possible allegation, this does not relieve the plaintiff of the duty to provide as much information as possible—meaning

that a plaintiff must provide enough information to allow both the alleged violator and the appropriate regulatory agencies to identify the pertinent aspects of the alleged violations without undertaking an extensive investigation of their own.

The United States District Court for the Northern District of Georgia questioned *Atwell’s* strict interpretation of citizen suit notice requirements in *Carney v. Gordon County*, 2006 U.S. Dist. LEXIS 82634 (N.D. Ga. 2006). Observing that “much of the argument about the kind and form of notice mandated by the statute and regulations is a semantical [sic] debate, and a court’s use of particular language does not necessarily reflect the practical effect of that language,” the court in *Carney* simply required the notice to be “sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.” *Id.* at *16.

More recently, the Eleventh Circuit construed the CAA’s notice provision in affirming the dismissal of a citizen suit for failing to comply with statutory notice requirements. In *National Parks and Conservation Ass’n v. Tennessee Valley Auth.*, 502 F.3d 1316 (11th Cir. 2007), the notice letter alleged, when read literally, that TVA’s Colbert Plant had violated all of the requirements of Subpart Da of the federal New Source Performance Standards every day since 1983. In reviewing the notice letter, the Eleventh Circuit observed that notice requirements are construed strictly to give alleged violators the opportunity to correct any problems before a lawsuit is filed. Noting that Subpart Da sets emissions standards for a variety of pollutants, the court held the notice letter failed to identify the specific standards alleged to have been violated.

“Treasure!”
We can help you read the map.

We’ve been helping law firm managers read treasure maps for over 25 years. Let us help you in your quest for

- keeping and growing your client base
- knowing the profitability of your clients and practice groups
- a partner compensation plan that’s fair and supports your firm’s objectives
- better firm operational and administrative efficiencies
- an effective firm governance and management structure
- staying ahead of your competitors

VANN
LEGAL MARKET
CONSULTING

1.251.621.9040
www.vannlmc.com

“Experienced business help for law firms.”

As a practical matter, regardless of whether the standard is “strict compliance,” “substantial compliance,” or “loose compliance” with the notice provision at issue, the important thing for lawyers to know is that notice is required, the contents of the notice are prescribed by regulation, and the more specific the notice, the more likely it is to survive a motion to dismiss.

Attorney Fees

Under the “American Rule,” parties to litigation ordinarily are responsible for their own attorney’s fees. However, exceptions to this rule exist, most notably statutory provisions that permit or require courts to order one party to pay the fees and costs of another. Both the CWA and RCRA authorize courts to award attorney fees to “any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” See 33 U.S.C. 1365(d) and 42 U.S.C. § 6972(e) (emphasis added). Such provisions are commonly called “prevailing party” provisions. Other fee-shifting statutes allow courts to award attorney fees to “any party, whenever the court determines such award is appropriate.” These so-called “whenever . . . appropriate” provisions are found in the citizen suit provisions of the CAA and the Endangered Species Act (ESA), among others. Despite the “whenever . . . appropriate” language, fee claimants under these statutes must still “prevail” to some degree to recover fees. See, e.g., *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983) (“absent some degree of success on the merits by the claimant, it is not ‘appropriate’ for a federal court to award attorney fees [under the CAA].”). “Trivial success on the merits, or purely procedural victories, would [not] justify an award of fees under statutes setting out the ‘when appropriate’ standard.” *Id.* at 688 n.9.

Historically, most federal circuits accepted the “catalyst theory” as a valid method for determining whether to award attorney’s fees. Under the catalyst theory, courts award attorney’s fees to citizens whose lawsuits prompt or “catalyze” a defendant’s voluntary change in conduct, even if the litigation does not result in a judgment. However, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001), the Supreme Court held that the catalyst theory was not a permissible basis for the award of attorney’s fees under the “prevailing party” provisions found in the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990, because a defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary “judicial imprimatur.” The court noted that the term “prevailing party” is a “legal term of art” that means “one who has been awarded some relief by the court.” *Id.* at 602.

The distinction between the two types of fee-shifting provisions—“prevailing party” vs. “whenever . . . appropriate”—was highlighted by the Eleventh Circuit in *Loggerhead Turtle v. Volusia County*, 307 F.3d 1313 (11th Cir. 2002). There the Eleventh Circuit held that *Buckhannon* did not invalidate the use of the catalyst test as a basis for awarding attorney’s fees under

Historically, most federal circuits accepted the “catalyst theory” as a valid method for determining whether to award attorney’s fees.

Expedited Process Serving, LLC
“We Serve You by Serving Others”
888-830-5407

NO MILEAGE FEE!!!

STATUS AVAILABLE VIA WEBSITE

SERVING YOU THROUGHOUT ALABAMA AND BEYOND

AUTOMATED UPDATES EMAILED
FOR EACH ACTION ON YOUR CASE

MEMBER NATIONAL ASSOCIATION OF
PROFESSIONAL PROCESS SERVERS

Main Office

35903 Highway 280 Sylacauga AL 35150
Phone: 205-995-9633 Fax: 205-995-9733

Satellite Locations

Tuscaloosa, Birmingham, Troy & Florence

Locations Opening Soon

Montgomery, Huntsville, Mobile

the ESA (a “whenever . . . appropriate” statute). In *Loggerhead*, a suit was brought under the ESA against Volusia County for failing to protect endangered sea turtles. After years of litigation, the county finally adopted more stringent regulations protecting the turtles and resolving the case. Based on the catalyst theory, the district court awarded the plaintiff’s attorney fees, finding that the lawsuit was the primary impetus for the county’s adoption of more stringent regulations. On appeal, the county argued that *Buckhannon*’s invalidation of the catalyst theory applied equally to fee claims under the ESA, which uses the “whenever . . . appropriate” language. The Eleventh Circuit disagreed, finding clear evidence that Congress intended that a plaintiff whose suit furthers the goals of a “whenever . . . appropriate” statute be entitled to recover attorney’s fees, and that policy considerations also favored the use of the catalyst theory under “whenever . . . appropriate” statutes. Accordingly, the Eleventh Circuit held as a matter of law that the Supreme Court’s decision in *Buckhannon* does not prohibit use of the catalyst test as a basis for awarding attorney’s fees under the “whenever . . . appropriate” fee-shifting provision of the ESA.

For lawyers, the distinction between “prevailing party” and “whenever appropriate” provisions is important because defendants often take voluntary actions to correct alleged violations

Federal courts lack jurisdiction—and thus citizen suits are barred—when the EPA or the State has “commenced” and is “diligently prosecuting” enforcement proceedings.

after lawsuits are filed but before they are decided. Under statutes like the CAA and ESA that use “whenever appropriate” language, the catalyst test should apply (at least within the Eleventh Circuit). If the lawsuit was the catalyst for the voluntary action, attorney fees are appropriate. Comparatively, under the statutes like the CWA and RCRA that employ “prevailing party” language, the Supreme Court’s *Buckhannon* decision likely controls and unless there is an adjudication of liability, recovery of attorneys fees for plaintiffs is far from certain.

One final note on attorneys’ fees. Although most of the case law focuses on recovery of fees by the plaintiffs, prevailing defendants may be able to recover attorneys’ fees in some cases. The bar in such cases is much higher, however, and courts have held that prevailing defendants may recover fees only if the underlying action was frivolous, unreasonable, groundless or vexatious. *See Env’tl. Conserv. Org. v. City of Dallas*, No. 3-03-2951, *Slip Op.* at 2 (Nov. 20, 2007).

Diligent Prosecution

Federal courts lack jurisdiction—and thus citizen suits are barred—when the EPA or the State has “commenced” and is “diligently prosecuting” enforcement proceedings. Under many environmental statutes, like the CAA and RCRA, the state enforcement proceeding must be in “a court”—in other words, a civil or criminal judicial proceeding. *See* 42 U.S.C. § 7404 and 42 U.S.C. § 6972. However, under the CWA citizen suits are also barred by state administrative actions to enforce “a state law comparable” to the CWA. *See* 33 U.S.C. §§ 1365 and 1319. This so-called “diligent prosecution” bar has become a hotly contested issue and has been the subject of recent judicial and legislative interest in Alabama.

The McAbee Case

In 2001, Kim McAbee—a landowner whose property abutted a creek near the City of Fort Payne’s waste-treatment plant—sued the city in federal court for violations of its National Pollutant Discharge Elimination System (NPDES) permit in federal court. By the time McAbee sued, the ADEM had already issued an administrative enforcement order fining the city \$11,200 and

requiring it to publish general information about the violations. In addition, according to the city, the compliance cost associated with the administrative consent order, which included renovating the waste-treatment plant, totaled more than \$13 million. The city argued to the district court that McAbee’s suit was barred because the ADEM had already commenced an administrative enforcement action against it. The district court, disagreed, holding that McAbee’s citizen suit was not barred by the state’s enforcement action because Alabama’s water pollution control law was not “comparable” to the federal CWA.


On appeal, the Eleventh Circuit contemplated “whether courts should (1) insist that each class of state-law provisions be roughly comparable to its corresponding class of federal provisions or (2) perform a balancing test that compares the overall effect of a state statutory regime against the overall effect of the federal CWA.” *See McAbee v. City of Fort Payne*, 318 F.3d 1248, 1254 (11th Cir. 2003). The court rejected the second option, which it characterized as a “loose” and “nebulous” standard that would result in arbitrary comparability determinations as judges attempted to “weigh incommensurable values.” *Id.* at 1255. Instead, the court adopted the “rough comparability standard,” which it reasoned would provide more certainty by simply requiring that “each class of state-law provisions must be roughly comparable to the corresponding class of federal provisions.” *Id.* at 1255-56. In other words, the “rough comparability standard” requires a court to compare each class of state law provisions (i.e., penalty-assessment provisions, public participation provisions and judicial review provisions) to its federal analogue.

Analyzing the Alabama Water Pollution Control Act (AWCPA) and the Alabama Environmental Management Act (AEMA), the Eleventh Circuit reasoned that, even though Alabama’s penalty provisions were comparable to the CWA, the state’s public participation provisions fell short of the federal standards. The court pointed to two specific reasons for this conclusion. First, Alabama’s regulatory scheme only required public notice after the issuance of a final enforcement order. The CWA, on the other hand, requires public notice before the enforcement agency issues a final penalty order, giving the public an opportunity to comment on the proposed order. Second, the AEMA only gave aggrieved parties 15 days after the publication of newspaper notice to request a hearing with the ADEM to contest a penalty assessment. According to the Eleventh Circuit, this brief amount of time made requests for a hearing nearly impossible. In contrast, the CWA allows 30 days after the issuance of an order for interested persons to request a hearing with the EPA. As a result of the discrepancies between the AEMA and CWA public participation provisions, the Eleventh Circuit held that the plaintiff’s citizen suit was not barred by the ADEM’s administrative enforcement action.

2003 AEMA Amendments

After the Eleventh Circuit’s decision in *McAbee*, citizens were no longer precluded by the CWA from filing suit for alleged NPDES permit violations in Alabama even where the ADEM

**PROFESSIONAL RESEARCH & WRITING
SERVICE FOR ALABAMA LAWYERS**



- 13-Year Licensed Alabama Attorney
- All Civil, Family and Domestic Relations Law
Pleadings, Discovery, Briefs, Appeals
- No Client Contact - Reasonable Rates

Email: donnabeaulieu@gmail.com Tel.: (205) 585-4491

had already commenced an administrative enforcement action against the permittee for those same violations. As a result, the only viable mechanisms available to preclude duplicative citizen suits was for the state to issue appealable unilateral orders or file civil judicial actions, which eviscerated the efficiency benefits of administrative enforcement.

In an attempt to correct the deficiencies identified by the Eleventh Circuit, the Alabama Legislature amended the AEMA in June 2003. Foremost among its purposes was to grant more meaningful public participation. For instance, the amendments required public notice of proposed administrative orders, instead of the post-issuance notice under the old provision. And not only is public notice required “the old-fashioned way” through newspapers, but the amendments also require public notice to be made available on the ADEM website and to be mailed to any person who signs up on a public notice mailing list maintained by the ADEM. The 2003 amendments also provide the public with the opportunity to comment on proposed orders and for persons who commented to request a hearing with the ADEM before a final order is issued.

Before the issuance of a final order, persons subject to the order and aggrieved persons who submitted written comments on the proposed order are also, upon request, entitled to a hearing before the Alabama Environmental Management Commission (the Commission). Aggrieved parties who participate in the hearing may then seek judicial review of the Commission’s decision in state court. The pre- and post-issuance hearing opportunities

provided by the amendments closely reflect the hearing opportunities in the CWA and are designed to satisfy the “rough comparability” standard adopted by the Eleventh Circuit.

For lawyers in this area, the practical affect of *McAbee* and 2003 amendments to the AEMA is this: *If* the ADEM has commenced and is diligently prosecuting and administrative action against a potential defendant, a later filed citizen suit may be barred. But then again, as discussed below, maybe not.

III. *Black Warrior Riverkeeper v. Cherokee Mining, LLC*

The 2003 legislation was challenged in 2007 when an environmental group, the Black Warrior Riverkeeper (BWR) sued a coal mining operation for alleged water discharge permit violations. In *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, the defendant, Cherokee Mining, was notified by the ADEM in September 2006 and again in April 2007 that one of its mines was violating its NPDES permit and that these violations constituted violations of the CWA and corresponding provisions of Alabama law. *See* Case No. 08-10810 (N.D. Ala.) *reh’ing denied*, January 12, 2009. The ADEM conducted an on-site inspection of the mine in March 2007 and issued a warning letter that was received by



Services Offered to Attorneys:

- **Alacourt.com:** <http://www.alacourt.com>
 - A look up only application for case information and to view electronic case file images.
 - Advantages: Allows attorneys to look up case information without physically going to the Circuit Clerk’s office to obtain copies of case filings.
- **AlaFile:** <http://efile.alacourt.gov> and <https://alafile.alacourt.gov>
 - This is a program attorneys can register for to electronically file documents to the court system and is available in all Civil Divisions.
 - Advantages: Allows attorneys to file case information and motions for civil cases instead of paper filing documents with the Circuit Clerk’s office.
- **Just One Look:** <https://pa.alacourt.com/Default.aspx>
 - This is an application which allows attorneys to monitor and track case filings and details.
 - Advantages: It allows attorneys to monitor and be notified of changes to their cases.

300 Dexter Avenue ◊ Montgomery, AL 36104 ◊ 866-954-9411, option 1, then option 4 ◊ applicationsupport@alacourt.gov

Despite the fact that all requirements for the CWA citizen suit bar were satisfied, the district court held that an exception unique to the CWA allowed BWR's citizen suit to proceed despite the state prosecution.

Cherokee on March 12, 2007. BWR sent a 60-day notice letter to Cherokee a couple of months later in May 2007 stating its intent to sue Cherokee. On July 20, 2007, Cherokee received notice from the ADEM that it was commencing administrative enforcement proceedings against Cherokee regarding the violations and proposing a consent order addressing the violations. On July 27, 2007, 72 days after it gave notice of its intent to sue, BWR filed suit in federal court pursuant to the CWA's citizen suit provisions. Cherokee thereafter executed an administrative consent order with the ADEM in August 2007, and after the required public notice and comment period, the ADEM signed the consent order in September 2007.

Cherokee then moved to dismiss BWR's citizen suit, arguing that the court lacked jurisdiction because the ADEM had commenced and was diligently prosecuting a parallel state administrative enforcement proceedings. BWR argued that the ADEM's enforcement action did not bar its citizen suit because, in its view, the ADEM had not commenced and was not diligently prosecuting an enforcement action against Cherokee at the time it filed suit and because Alabama law was not sufficiently comparable to the CWA. In support of its position that Alabama law is not comparable, BWR pointed to a 2007 Alabama Court of Civil Appeals decision that limited who can request a hearing after the ADEM has issued a final order. In *Alabama Department of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So. 2d 369 (Ala. Civ. App. May 11, 2007), the court found that, under Alabama law, pre-order participation in the ADEM actions is open to the general public but that only "aggrieved" persons may seek a hearing before the Commission after the ADEM has issued a final order. In other words, although anyone may comment to the ADEM and/or request a hearing on a proposed order, after the ADEM has officially executed an order, only members of the public who submitted a comment on the proposed order and who are "injured or threatened with injury" may seek a hearing before the Commission. BWR argued that because the CWA allows members of the general public, "even those who have not suffered a threatened or actual injury in fact," to participate in the enforcement process, the 2003 amendments (as interpreted by the court of civil appeals) were "not comparable" to the CWA for the purpose of the citizen suit bar.

The federal district court disagreed with BWR, holding that: "Although this recent opinion [from the Court of Civil Appeals] does somewhat limit the newly expanded public participation aspect of Alabama's statutory scheme, it does not diminish the broad rights of the general public to participate in and comment on the ADEM's actions before the ADEM issues an order, which was the Eleventh Circuit's primary concern in *McAbee*. Therefore, it appears that the Alabama law meets the Eleventh Circuit's 'rough comparability' standard, which is admittedly 'not stringent'." *Slip Op.* at 6-8, citing *McAbee*, 318 F.3d at 1257. The district court found that the ADEM had "commenced" and was "diligently prosecuting" an administrative action against Cherokee at the time

BWR filed its citizen suit. Observing that neither the Eleventh Circuit nor the CWA has defined what actions constitute "commencement," the court concluded that the issuance of an administrative consent order satisfies this requirement.

The district court also found that the ADEM's enforcement against Cherokee was "diligent." "While the CWA does not define what constitutes 'diligent prosecution,' it appears that the ADEM's following of its own procedures fulfills that requirement. In this case, in accordance with the relevant state statute, the ADEM offered to have an informal conference with CM, proposed a consent order and invited CM to sign on to it, held a 30-day public comment period after CM executed the consent order, and then executed the consent order after the public comment period, making the consent order official and its requirements applicable to CM. Because these actions are in accordance with Alabama law governing the procedures of an administrative enforcement action, it would appear that the ADEM is diligently prosecuting this action." *Slip Op.* at 5-6.

Twist in Cherokee Mining

Because the ADEM had "commenced" and was "diligently prosecuting" an action under state law "comparable" to the CWA before BWR filed suit against Cherokee, the district court held the bar against citizen suits applied. However, there was an interesting twist in *Cherokee Mining*—one which arguably undermines the general rule that state administrative proceedings bar citizen enforcement in federal court.

Despite the fact that all requirements for the CWA citizen suit bar were satisfied, the district court held that an exception unique to the CWA allowed BWR's citizen suit to proceed despite the state prosecution. Specifically, the court agreed with BWR that the CWA contains an exception to the citizen suit bar when the plaintiff sends the required 60-day notice of its intent to sue before an agency commences an enforcement action and then files suit within 120 days of providing notice. The CWA states, in pertinent part:

The limitations [on citizen suits] contained in subparagraph (A)... shall not apply with respect to any violation for which... (ii) notice of an alleged violation... has been given in accordance with [the requirements for citizen suits found in § 1365]... prior to commencement of an action *under this subsection* and [a citizen suit]... with respect to such alleged violation is filed before the 120th day after the date on which notice is given.

33 U.S.C. § 1319(g)(6)(B)(ii) (*emphasis added*). Cherokee argued that this exception to the CWA's jurisdictional bar did not apply because the exception requires that the 60-day notice of a citizen suit be given "prior to commencement of an action *under this*

subsection.” Arguing that “this subsection” refers to CWA § 309(g), Cherokee took the position that the exception only applies in instances where the administrative enforcement action in question has been undertaken by the EPA rather than by a state agency, because only the EPA can commence actions according to the procedures and rules found in CWA § 309(g). The court disagreed and found “it would be an inappropriate reading of the statute to apply the exception only to bar cases in which the federal government is instituting enforcement proceedings because the bar itself refers to both state and federal actions.” *Slip Op.* at 10. Even though the court recognized that the “bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action,” the court observed that “Congress has, wisely or wrongly, carved out an exception for citizen suits where the plaintiff has given sufficient notice and where regulatory agencies did not initiate action prior to the plaintiff’s issuance of notice.” *Slip Op.* at 12-13.

Since BWR gave its 60-day notice of its intent to sue in May 2007, and followed up by filing suit in July 27, 2007 (within 120 days time limit found in the CWA), the court ruled that BWR’s citizen suit was not barred despite the fact that the ADEM had commenced and was diligently prosecuting an administrative enforcement action at the time suit was filed. The practical effect of this holding was that, as long as a citizen gives a 60-day notice of its intent to sue under the CWA before commencement of an administrative enforcement action and then files the suit within 120 days after giving that notice, the citizen suit is not barred—even if the ADEM commences an administrative enforcement action after receiving notice of the citizen’s intent to sue and before suit is filed.

While a couple of other district courts had held similarly, at least one court has disagreed, finding that the 120-day exception only applies in instances where the administrative enforcement action in question has been undertaken by the EPA. Compare *Alahama Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368 (M.D. Ga. 2001) (holding that citizen suit was not barred where plaintiffs filed suit within 120 days of giving notice despite the fact the State had initiated enforcement proceedings before the complaint was filed) and *Sierra Club v. Hyundai Am. Inc.*, 23 F. Supp. 2d 1177 (D. Or. 1997) (same), with *Cal. Sportfishing Prot. Alliance v. City of West Sacramento*, 905 F. Supp. 792, 802 (E.D. Cal. 1995).

In light of this split in authority, Cherokee appealed this aspect of the district court’s decision to the Eleventh Circuit. The Eleventh Circuit affirmed, finding Cherokee’s interpretation to be “an extremely cramped and narrow reading of the ordinary and plain meaning of the relevant language.” *Black Warrior Riverkeeper v. Cherokee Mining, LLC.*, 548 F.3d 986, 991 (11th Cir. 2008). The court concluded that the plain and ordinary meaning of the 120-day exemption made the citizen suit bar inapplicable since BWR gave its notice of intent to sue before the ADEM commenced its administrative action and BWR filed its suit within 120 days of its notice.

Effect of *Cherokee Mining* on the ADEM Consent Orders

The Eleventh Circuit’s decision in *Cherokee Mining* impacts every NPDES permit holder in Alabama and has the potential to



Two EXPERTLY
FITTED Suits \$865

Two tropical-weight wool suits from Graham & Gunn. Made in the USA with outstanding quality and ideal for year round wear. Choose from seven patterns of solids and stripes. Save \$125 and ask about our 90-day no interest account.

Nothing compares to the look and feel of quality clothing and nothing compares to the style and affordability of the Locker Room’s Suit Package.

THE SUIT FITS
Wear it. Wear both.

THE LOCKER ROOM
TLRCLOTHIERS.COM

1717 CARTER HILL ROAD MON-SAT 9AM-6PM 334.262.1788

impair the efficient enforcement of water pollution control laws by greatly complicating the ability of permit holders to achieve timely resolution of alleged violations. Thousands of individuals and businesses hold NPDES permits in Alabama. Most quickly correct problems and resolve alleged violations through consent orders with the ADEM (and pay civil penalties without protest when appropriate) in large part because of the protection such a resolution provides against duplicative citizen suits. Prior to the Eleventh Circuit's decision, it was the conventional wisdom that the CWA citizen suit bar would prevent a duplicative citizen suit, so long as an adequate consent order was executed and any violations ceased. This enabled the ADEM to resolve many situations through negotiated consent orders. The loophole created by the Eleventh Circuit's decision removes some of the incentive for cooperative administrative settlement as it exposes permit holders to citizen suits in those situations where the citizen plaintiff sends a 60-day notice letter before the ADEM issues an administrative consent order. This result makes little sense and could be an impediment to efficient environmental compliance efforts.

The Eleventh Circuit's decision had environmental groups, permit holders and lawyers abuzz. Would-be plaintiffs liked the decision, as it was the first circuit court to hold that a CWA citizen suit may proceed despite an ongoing state enforcement action. With the bar on citizen suits diluted by the Eleventh Circuit's decision, permit holders in Alabama faced limited options for achieving full resolution of alleged violations. Instead of consenting to administrative penalty orders, some permit holders were forced to contest the violations so that the ADEM would sue them in state court, such that the *other* citizen suit bar in the CWA (33 U.S.C. § 1365(b)(1)(B)) would become operative.

However, there is more to the *Cherokee Mining* story. On remand to the District Court, BWR's case was dismissed on mootness grounds. *See Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 637 F. Supp. 2d 983 (N.D. Ala. 2009). Specifically, the court dismissed as moot all claims for injunctive relief and civil penalties because the ADEM's issuance of the September 2007 final consent order satisfactorily addressed BWR's alleged violations and resolved the underlying "case or controversy." In dismissing the claims, the court applied a test under which BWR's claims for relief were moot unless BWR proved that there was a "realistic prospect that the violations alleged in its complaint will continue notwithstanding" the consent order. *Id.* at 988 (citing *Env'tl. Conserv. Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008), *cert. denied* __ U.S. __, 129 S.Ct. 418, 172 L.Ed.2d 288 (2008)). The court further stated that BWR could not meet this burden simply by criticizing the consent order as somehow inadequate, but would have to provide some clear basis to infer that Cherokee would continue to engage in the conduct that led to the alleged violations.

Notwithstanding the district court's mootness decision, the door is still open (at least in the Eleventh Circuit) for citizen plaintiffs to file a CWA citizen suit despite the ADEM enforcement action (assuming the plaintiff gives proper notice and files suit within 120 days of the notice). However, depending on the circumstances doing so may prove fruitless for the plaintiff and a poor investment of time and resources for their counsel. As the district court in *Cherokee Mining* noted, "If there is a lesson to be learned from this case, it is that a citizen who admittedly has

a right to file a citizen suit seeking to remedy a perceived water violation, although knowing, as a matter of law, that the ADEM has concurrent jurisdiction over the issue, is taking the risk that he will be headed off at the pass by subsequent appropriate the ADEM enforcement action." 637 F. Supp. 2d at 983.

So, what advice do you give your client post-*Cherokee Mining*? Depending on the circumstances, if you represent a potential defendant you may need to recommend promptly negotiating an administrative consent order with the ADEM (commence an enforcement action) so as to beat the anticipated 60-day notice letter by a citizen. Or, if your client got beat on the draw and already received a 60-day notice letter, you may need to contest any proposed consent order from the ADEM and take your chances with the ADEM suing your client in state court. These, of course, are awkward recommendations to make to any client, but at the end of the day they may be the best advice you can give. If you represent a potential plaintiff, you will need to provide notice of your intent to sue as soon as possible (with as much detail as possible), scrutinize any response by the ADEM and then weigh the risks of filing suit and having your claims mooted by a subsequent state enforcement action. Ultimately, this will depend on whether the plaintiff can prove that there is a realistic prospect the violations alleged in its complaint will continue notwithstanding state enforcement.

The question of recovery of attorneys' fees is also something to consider after *Cherokee Mining*. Although the district court in that case did not rule on the continued viability of the "catalyst theory," it requested counsel for BWR and Cherokee to file additional briefs on the matter. Ultimately, the district court never addressed whether BWR counsel were entitled to attorneys' fees because it found that BWR's application for such fees was untimely. However, in the same case on which the *Cherokee Mining* court relied for its mootness finding, a Fifth Circuit panel held that attorneys' fees were not recoverable by the plaintiffs. *See Env'tl. Conserv. Org. v. City of Dallas*, 307 Fed. Appx. 781 (5th Cir. 2008). ▲▼▲



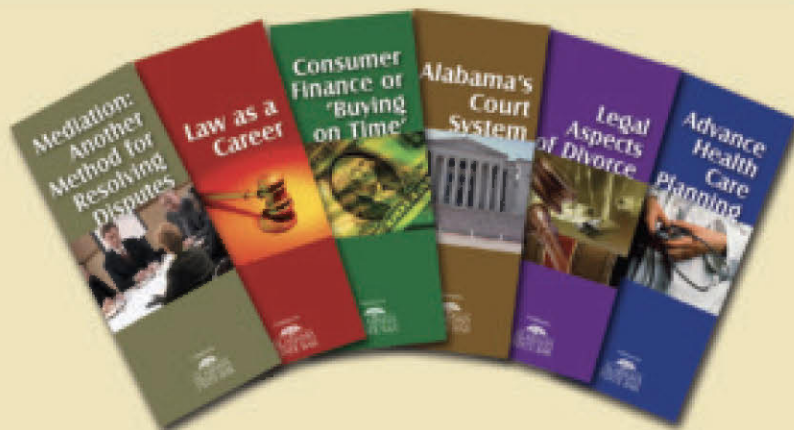
Michael D. Freeman is a partner with Balch & Bingham LLP. He chairs the firm's environmental litigation practice group and the American Bar Association's Committee on Environmental Litigation and Toxic Torts, with his practice focusing on litigation and administrative proceedings involving federal and state environmental laws and toxic tort lawsuits arising out of alleged releases of and exposures to various pollutants.



Thomas R. Head, III is a partner in Balch & Bingham's environmental and natural resources section and a member of the firm's environmental litigation practice group. He has represented both plaintiffs and defendants in bringing and defending citizen suits under a variety of environmental laws.

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.



BROCHURES

<i>Law As A Career</i> Information on the opportunities and challenges of a law career today.	8½" x 11"	\$10.00 per 100	Qty _____	\$ _____
<i>Lawyers and Legal Fees</i> A summary of basic legal procedures and common legal questions of the general public.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Abogados Y Honorarios Legales</i> Un resumen de procedimientos legales básicos y preguntas legales comunes del gran público.	5½" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Last Will & Testament</i> Aspects of estate planning and the importance of having a will.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Legal Aspects of Divorce</i> Offers options and choices involved in divorce.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Consumer Finance/"Buying On Time"</i> Outlines important considerations and provides advice on financial matters.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Mediation/Resolving Disputes</i> An overview of the mediation process in question-and-answer form.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Arbitration Agreements</i> Answers questions about arbitration from the consumer's perspective.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Advance Health Care Directives</i> Complete, easy to understand information about health directives in Alabama.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Alabama's Court System</i> An overview of Alabama's Unified Judicial System.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Notary Public & Lawyers/Notarios Y Abogados</i> Clarifies the difference between notary publics and lawyers in the USA. Clarifica la diferencia entre Notario público y abogados en los Estados Unidos.	3¼" x 8½"	\$10.00 per 100	Qty _____	\$ _____
<i>Acrylic Stand</i> Individual stand imprinted with attorney, firm or bar association name for use at distribution points.	4¼" x 8"	\$ 7.00 each	Qty _____	\$ _____
* NOTE: Only pamphlets measuring 3¼" x 8½" will fit in stands.			Shipping & Handling	\$ <u>5.00</u>
			TOTAL	\$ _____

Name to imprint on stand: _____

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

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



A Primer on the New Electronic Discovery Provisions in the *Alabama Rules of Civil Procedure*

by J. Paul Zimmerman

Effective February 1, 2010, the *Alabama Rules of Civil Procedure* were amended to provide for and accommodate electronic discovery practice. The revisions are modeled on the *Federal Rules of Civil Procedure*, placing Alabama in the majority of the roughly 24 states (as of this writing) that have followed the federal regimen in adopting such rules. The revisions affect *Ala. R. Civ. P.* 16, 26, 33, 34, 37 and 45, and a link to the revised rules and committee comments can be found at www.judicial.state.al.us.cfm. The fact that these revisions are based upon the federal model should come as no surprise in light of Alabama's handful of electronic discovery cases such as *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090 (Ala. 2007).

Whether you view these revisions as a door being held open for you or the breach of a door you have wanted held shut, these changes will affect nearly all civil practitioners, even those who never turn on a computer or intend to seek electronically stored information ("ESI") during discovery. *See, e.g.*, *Ala. R. Civ. P.* 45. This article is intended to summarize the changes in the rules, largely through reference to the committee comments, and will point out the significant variations from the federal rules. Though Rule 26 contains the heart of the electronic discovery provisions, this article will introduce the changes in the order in which they are likely to be encountered during litigation.

Preservation of Electronically Stored Information

The advent of electronic discovery did not create the concept of spoliation, which existed under the common law. *See May v. Moore*, 424 So. 2d 596, 603 (Ala. 1982). However, preserving ESI is more complicated than simply advising the client not to shred or dispose of documents pertinent to the lawsuit. The primary distinction between ESI and information stored in hardcopy is the fragility of ESI—metadata can be destroyed or altered by simply turning on a computer or opening a document for viewing. *See Cont'l Group, Inc. v. KW Prop. Mgmt., LLC*, 622 F. Supp. 2d 1357, 1373 (S.D. Fla. 2009) (discussing an employee's inadvertent alteration of metadata by accessing computer files after being on notice of impending litigation). Therefore, while many principles regarding electronic discovery are not significantly different from the age-old paper discovery, the consequences of failing to meet the burden to preserve evidence can be substantial.

The rules do not demand perfect steps to preserve digital evidence. Only reasonable steps are required, as seen by the "safe harbor" of *Alabama Rules of Civil Procedure* 37(g): "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for

When formulating requests for ESI, a party may specify the form in which it is to be produced, whether on paper, in static images (such as PDF), in native format (e.g., an Excel spreadsheet), etc.

failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” In other words, if information is lost pursuant to the party’s regular document maintenance and destruction process, such a loss is generally not sanctionable if the loss of evidence is in good faith. Examples of sanctionable and non-sanctionable loss of data, respectively, can be seen in *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D. N.Y. 2004) and *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390 (S.D. Fla. Nov. 18, 2009). However, once litigation is anticipated, a party must generally disrupt its regular document destruction routine to receive the protection of the safe harbor provision of *Ala. R. Civ. P. 37(g)*. See Committee Comments to Adoption of *Ala. R. Civ. P. 37(g)*.

Although Rule 37(g) is identical to its federal counterpart, it may end up being interpreted quite differently. The committee comments contain a statement that strays from traditional spoliation jurisprudence. “Good faith requires that a party not exploit the routine operation of its computer system. For example, a party may not adopt a short record-retention period with no legitimate business purpose in order to thwart discovery of harmful information by having its computer system overwrite the information.” Committee Comments to Adoption of Rule 37(g) (emphasis added). This is a stark statement—essentially, this comment indicates that parties can be sanctioned for a document destruction routine that is deemed not to preserve evidence for a sufficient duration of time. This comment is consistent with an unusual case in Utah that interprets *Federal Rule of Civil Procedure 37(g)* as implicitly including a reasonableness standard in the “good faith operation of an electronic information system” before Rule 37(g) provides any safe harbor protection. See *Phillip M. Adams & Assoc., LLC v. Dell*, 2009 WL 910801 (D. Utah Mar. 30, 2009) (refusing to extend safe harbor protections to a party that destroyed documents pursuant to its “unreasonable” document destruction regimen six years before litigation was filed). Against that backdrop, the import of this comment and its effect on the interpretation of *Alabama Rule of Civil Procedure 37(g)* are unknown.

The Rule 26(f) Conference

Perhaps the most obvious difference between the Alabama revisions and the federal rules is the continued view that any parties’ planning meeting is ordinarily voluntary in Alabama, rather than required as under the federal rules. See *Ala. R. Civ. P. 26(f)*. Clearly, most cases in state court do not involve electronic discovery. While the mandatory parties’ planning meeting under FRCP 26(f) *must* consider and, if needed, address electronic discovery, the revisions to the Alabama rules simply *encourage* the parties to engage in such discussions. Realizing that the majority of lawsuits filed in state court will never involve electronic discovery, the rules committee opted not to burden the majority of cases with the exercise if it is not needed. However, Rule 26(f) allows the court to order a planning conference to address, inter alia, electronic discovery if the court anticipates issues regarding electronic discovery in the case. If ordered, the conference is obviously mandatory. The Committee Comments to Rule 26(f) suggest discussion topics for the parties’ planning meeting, including the computer systems that will be encountered, the parties’ respective search capabilities, the discovery plan, the types and time period of information to be sought, and the form of production. See also the U.S. Dist. Ct. for the Dist. of Maryland’s “Suggested Protocol for Discovery of Electronically Stored Information.” www.mdd.uscourts.gov/news/news/ESIProtocol.pdf. The rules also specifically point out that the discussion should consider the business interruption experienced by the parties resulting from litigation and electronic discovery.

Requesting Electronically Stored Information

As with traditional requests for production, requests for ESI fall within Rule 34. When formulating requests for ESI, a party may specify the form in which it is to be produced, whether on paper, in static images (such as PDF), in native format (e.g., an Excel spreadsheet), etc. The

amendment to Rule 34 recognizes that, under some circumstances, inspection or testing of the responding party's data may be needed, either by way of testing search results or running test queries in a database. *See* Committee Comments to Amendment to Rule 34. In such circumstances, the court should address privacy and confidentiality concerns given the intrusiveness of allowing an opposing party such invasive access.

It is highly recommended that attorneys specify the form of production sought in Rule 34 requests. Failure to specify the form of production allows the responding party to determine the form of production as long as the form selected can be justified as reasonable under the circumstances or is in the form in which the information is ordinarily stored by the producing party. A party that fails to specify the form of production sought will generally not be successful in compelling the responding party to later produce the same discovery in a different form unless the requesting party can show that the form of production chosen by the responding party was unreasonable. *See Aguilar v. Immigration & Customs Enforcement*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008). Moreover, the comments clearly provide that “[w]hether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced only in one form.” Committee Comments to Amendment to Rule 34.

Ala. R. Civ. P. 33(c), regarding interrogatories, has also been amended to allow parties to respond to interrogatories by simply directing the requesting party to ESI being produced. *Ala. R. Civ. P.* 33(c). However, the comments warn that any burden imposed on the requesting party to obtain the answer from the ESI produced must not be “substantially greater” than the burden would be on the responding party to simply answer the interrogatory. Rather than expressly adopting the comments to FRCP 33, the comments to *Ala. R. Civ. P.* 33(c) merely call the federal comments “instructive” and note that they “provide practical guidance.” Having stopped short of adopting the federal comments to the rule’s counterpart in FRCP 33(d), the federal case law regarding electronic discovery may be less persuasive than in the case of other rules.

Responding to Requests for Electronically Stored Information

The provisions for responding to requests for ESI are perhaps the most complicated of the amendments. Upon receiving a Rule 34 request, the responding party should make two determinations. First, is the information sought reasonably accessible or not reasonably accessible? Second, in what form does the party propose to respond to the request? Rule 34 and its comments contemplate some measure of cooperation between the requesting party and the responding party in formulating acceptable answers to these questions.

Rule 34(b) requires the responding party to produce responsive, non-protected ESI that is “reasonably accessible.” Whether ESI is reasonably accessible is often subject to debate, and depends upon a myriad of factors that are case specific and are changing as search and retrieval technologies improve. For example, information on back-up tapes may not be reasonably accessible to a small company, but such media may be reasonably accessible to a larger operation that has indexing and search capabilities for its back-up tapes.

The responding party is not responsible, at least initially, for producing ESI

that is “not reasonably accessible.” Such information often includes back-up tapes and legacy systems (information on computers that are no longer used and may rely upon obsolete software or software that no one at the company remembers how to use). Under ordinary circumstances, the responding party does not need to produce such ESI, but must, subject to Rule 11, identify the information as being not reasonably accessible due to undue burden or cost. The party declaring the ESI to be not reasonably accessible bears the burden of showing that producing the data would be unduly burdensome and costly. A determination of whether the ESI is reasonably accessible can be sought by either party.

If the court agrees that the ESI is not reasonably accessible, then it need not be produced “unless the requesting party shows good cause for compelling the discovery, considering the factors set forth in” Rule 26(b)(2)(B). Among the most important factors for the court to consider in determining whether to compel the production of ESI that is not reasonably accessible is “that the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” *Ala. R. Civ. P.* 26(b)(2)(B). Under the federal rules, issues regarding the compelled production of not reasonably accessible ESI are increasingly determined by a

Restaurant Expert Witness™

Analysis, Consultation, Opinions & Reports for
Restaurant, Bar & Food Service-Related Matters Since 1987

Disagreements happen and, when they do, all parties involved need professional, reputable industry experts to review the matter and assist by providing industry experience, insight, guidance, testimony and reports that will aid in resolving the matter efficiently and effectively.

Our clients have -

- ✓ Franchisor Disputes & Claims
- ✓ Investor or Landlord Disputes
- ✓ Building or Equipment Matters
- ✓ Employment or Termination Issues
- ✓ Injuries, Illness or Contaminations
- ✓ Creditor or Funding Matters
- ✓ Forensic Analysis

Call 800-300-5764 or visit RestaurantExpertWitness.com
FREE - No Obligation - Confidential Consultation

Our expert witness services clients are primarily those who have been wronged by restaurants or bars including franchisees, employees, customers, vendors, predators, and investors; however, we do serve restaurant owners, companies & franchisors, as well.
RestaurantExpertWitness.com • RestaurantConsultantsOfAmerica.com • WE DO NOT CHARGE FOR TRAVEL

© 2018 - REC, Inc.

The reality of electronic discovery is that in many cases, the attorneys cannot lay eyes upon every single document produced.

proportionality analysis. Another resolution of such disputes is to shift to the requesting party some amount of the burden of production of ESI that is not reasonably accessible. *See, e.g., Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (applying factors set out in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)).

Inadvertent Disclosure of Privileged Material

The volume of information that must be cultivated and reviewed presents increasingly greater challenges within the time table of litigation. The reality of electronic discovery is that in many cases, the attorneys cannot lay eyes upon every single document produced.

Rule 26(b)(6)(B) addresses the inadvertent disclosure of privileged materials, and sets out the duties of both the producing party and the receiving party. Rule 26(b)(6)(B) differs from its federal counterpart, FRCP 26(b)(5)(B), in that the Alabama rule specifically provides that either the producing party or the receiving party may disclose the disputed material to the court to seek a determination of the claim that it is protected, whereas the federal rule only provides for disclosure to the court by the receiving party. The comments to Rule 26(b)(6)(B) adopt the comments to FRCP 26(b)(5)(B), with two additional statements. First, a party's notice of inadvertent production of privileged information must include "the factual and legal basis

for the claim [of privilege and that disclosure was inadvertent]." Second, "the parties are reminded that" a reasonable belief, subject to Rule 11, is required for the assertion of privilege.

The Committee Comments to the Amendment to Rule 16 explain that agreements regarding the waiver (or, more precisely, nonwaiver) of privilege through inadvertent production contemplated by the rules are quickpeeks and clawback agreements. Though rarely used (for predictable reasons), a quick-peek agreement provides for the parties to simply provide, without prior privilege review, a certain type or defined block of documents for the requesting party to review before crafting its Rule 34 requests. A clawback agreement, which has grown much more popular, provides for a regimen by which a party can recover inadvertently produced documents which the producing party claims are privileged. Quickpeeks and clawbacks can apply to paper discovery as well as electronic discovery. These agreements can be incorporated into the court's scheduling order (which is generally recommended). *See Ala.R.Civ.P. 16(b)(6)*. If a party seeks the court's assistance in resolving a dispute regarding privileged documents, any agreement of the parties that was incorporated into an order pursuant to Rule 16 is generally controlling rather than the procedure found in Rule 26(b)(6)(B). *See* Committee Comments to the Amendment to Rule 16. The comments, vis a vis their adoption of the comments to the federal counterpart to *ARCP* 26(b)(6)(B), point out that the rule is procedural and provides no substantive guidance as to whether a waiver of privilege has occurred.



Is your firm fully protecting all of its sensitive information?
Does your firm have an information destruction and management policy?
Does your firm need a more efficient and cost-effective records management program?

We provide on-site document and media destruction, records management and storage, and media rotation.

Please call 1-877-60-Shred (74733) to speak with a representative.

*Mention this ad to receive \$20 off your 1st automatic destruction service, a 20% discount for one time destruction service or your 1st month records storage free (up to \$95)

Non-party Subpoenas

Rule 45, regarding subpoenas to non-parties, has also been revised. The rule now contemplates a party's request to a non-party for ESI, as well as a non-party's response to a subpoena that implicates ESI (whether or not requested or specified by the requesting party, which is why attorneys not intending to implicate the new electronic discovery rules may do so inadvertently). Rule 45(a)(1)(D) states that "[a] subpoena may specify the form or forms in which [ESI] is to be produced." Furthermore, Rule 45 is amended throughout to provide for "copying, testing, or sampling" of the non-party's information, requests often associated with ESI. Rule 45(c), containing the provisions regarding the protection of non-parties, contains the same references to "testing and sampling" as the rest of Rule 45, but also allows a non-party responding to a subpoena to object to the form of production specified by the requesting party. *See* Rule 45(c)(2)(B).

The duties of the responding party, set out in Rule 45(d), are similar to a party's duties in responding to a request for ESI with regard to the form of production. That is, if the requesting party does not specify the form of production for ESI, then the responding party must produce the information "in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable." Rule 45(d)(3). Furthermore, Rule 45(d)(4) also states that "[a] person responding to a subpoena need not produce the same electronically stored information in more than one form," just as is provided by Rule 34(b)(ii).

The regimen for addressing a non-party's production of not reasonably accessible ESI is similar to the process among parties: the responding non-party has the burden of showing, on a motion to compel or to quash, "that the information is not reasonably accessible because of undue burden or cost." Rule 45(d)(5). If the non-party demonstrates that the ESI is not reasonably accessible, then the responding non-party is ordinarily protected from producing the information unless good cause for ordering the production is demonstrated by the producing party, "considering the limitations of

Rule 26(b)(2)(B)." *Id.* "The court may specify conditions regarding the production of the discovery," and such conditions certainly can include cost shifting of the expense of production to the requesting party. A non-party's inadvertent production of privileged information is addressed in the same manner as provided in Rule 26(f) regarding the inadvertent production of privileged information by a party. The Committee Comments to Amendment to Rule 45 contain Form 51K, which updates the suggested form for a civil subpoena to alert the responding non-party to their duties and protections regarding the production of ESI.

Conclusion

These changes to the *Alabama Rules of Civil Procedure* are based largely, though not entirely, on the corresponding provisions of the *Federal Rules of Civil Procedure*. However, there are some notable differences. The committee comments are of tremendous benefit, and their review is strongly encouraged, beginning with the comments to Rule 26, which serves as the foundation for all other rule changes, as indicated by the fact that the committee comments to several other rules refer to it as the starting point for applying the revised rules. The more developed federal jurisprudence will be persuasive authority for interpreting most (though probably not all) of the state electronic discovery provisions, and will provide the logical starting point for the resolution of disputes regarding electronic discovery. ▲▼▲



J. Paul Zimmerman practices with the Birmingham firm of *Christian & Small LLP*. He is a member of the firm's electronic discovery committee, and his practice includes business and complex litigation, as well as trade secret matters. Zimmerman thanks **Chris Berdy** and **Abbott Jones**, also with *Christian & Small LLP*, for their assistance with this article.

**CHILD SUPPORT
CALCULATION
SOFTWARE**

For Alabama

Alabama Support Master™

Uses 2009 Guidelines
Prepares and prints forms
CS-41, CS-42, and CS-43

Includes Interest and Arrearage
Calculator

Since 1989
Professional Software
Corporation

POB 716 Mount Vernon, IN 47620
812-833-3781

mhawley@bamberger.com

www.SupportMasterSoftware.com

FREE DEMO

Construction Expert

- Over 15 years of Construction Experience
- Licensed General Contractor – LA, AL & FL
- Louisiana Licensed Real Estate Appraiser
- Construction Defect Evaluations
- Replacement & Reproduction Cost Estimates - Insurance
- Narrative Reports & Expert Deposition Testimony

titan
CONSTRUCTION

STEPHEN FLEISHMANN
Stephen@titanconstruction.com
504-455-5411
www.titanconstruction.com





Navigating the Medicare Reporting Minefield—

A Practitioner's Guide to Settlement with a Medicare Beneficiary

By Russell C. Buffkin and Annie J. Dike

Medicare was signed into law in 1965 to provide government-funded health care coverage for: (1) persons age 65 years or older; (2) persons under age 65 years with certain disabilities; or (3) persons with end-stage renal disease. From its inception, it was Congress' intent that the government not be forced to carry the cost of a recipient's medical care if another entity is responsible for the recipient's medical expenses. The Medicare Secondary Payer ("MSP") statute, section 1862(b) of the Social Security Act, 42 U.S.C. § 1395y(b), was created to ensure that certain "primary plans" (liability insurance, including self insurance, and no-fault insurance plans responsible for paying the recipient's medical expenses) act as the "primary payer," making Medicare a "secondary payer" only with the right to reimbursement. The MSP statute ensures Medicare is not saddled with the responsibility of unconditionally shouldering the cost of a recipient's medical care if payment has been, or can reasonably expect to be, made by a primary payer. See 42 U.S.C. § 1395y(b)(2); 42 C.F.R. § 411.20, *et seq.* Although Medicare is authorized to make payments when a primary payer cannot reasonably make payments promptly, any such payments, referred to as "conditional payments," are made by Medicare on the condition that Medicare will be reimbursed by the primary payer. See 42 U.S.C. § 1395y(b)(2)(B)(I); *United States v. Baxter International*, 345 F.3d 866, 892 (11th Cir. 2004).

The MSP statute is designed to protect Medicare's interest where a defendant/insurer is liable for a recipient's medical expenses. Despite its passage in 1980, however, the MSP statute was seldom followed by the business industry, and it was rarely enforced by the Center for Medicare and Medicaid Services ("CMS"). This situation will undoubtedly change with the passage of the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") on December 29, 2007 and the enactment of new mandatory insurer reporting requirements.

Purpose of the Medicare Secondary-Payer Statute

The Eleventh Circuit recognized, in *Baxter International*, the intent of the MSP statute to make Medicare a secondary payer whenever possible. *Baxter International*, 345 F.3d 866. The Eleventh Circuit explained that since enactment of the MSP statute, Congress has expanded the scope of the statute several times to make Medicare "secondary to a greater array of primary coverage sources." *Id.* at 877. The Court further declared that the failure to enforce the MSP statute was costing the taxpayer billions of dollars. *Id.* at 891. Some studies predict that,

unless a change is made, Medicare reserves will be exhausted by 2017. See *Summary of the 2009 Annual Reports* by Social Security and Medicare Boards of Trustees, available at <http://www.ssa.gov/OACT/TRSUM/index.html>.

The MMSEA was enacted to give “teeth” to the MSP statute and provide effective penalties that would force insurers to comply with the reporting requirements. Reporting prevents Medicare recipients from receiving a windfall in the form of unreported lump-sum settlements for medical expenses when their medical costs were previously paid by Medicare. Although the MMSEA went into effect in July 2009, the new reporting requirements were pushed back to January 1, 2010. These new reporting requirements ensure Medicare is notified of any settlement, judgment or payment made to a Medicare beneficiary by a primary payer so it can be reimbursed. Without mandatory reporting, it is extremely difficult, if not impossible, for Medicare to learn of payments to Medicare beneficiaries.

Penalties for Failure to Report

Under the new reporting requirements, primary payers must report payments made to a Medicare beneficiary and reimburse Medicare (to the extent of the insurer’s liability) for any conditional payments made within 60 days of the payment. The penalties for failure to comply with these mandatory reporting requirements include:

1. \$1,000 per day, per plaintiff, for late reports;
2. Direct collection by CMS of the Medicare lien (even if the defendant/insurer has already paid the claimant/plaintiff); or
3. A private cause of action by CMS for double damages (twice the amount of Medicare’s lien).

See 42 U.S.C. § 1395y(b)(2)(B); 42 C.F.R. §§ 411.24, 411.26.

These regulations only grant CMS the ability to recover double damages if it is required to take legal action to recover. The statute of limitations for primary plans is six years. See *Manning v. Utilities Mutual Insurance Co., Inc.*, 254 F.3d 387, 397-398 (2d Cir. 2001). Pursuant to 28 U.S.C. § 2415(a), this six-year period begins to run from the later of either the date of payment to the Medicare recipient or the date Medicare learns of the payment to the Medicare recipient. In addition, CMS has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer that has received a primary payment. See 42 C.F.R. § 411.24(g) (emphasis added). See also *United States v. Weinberg*, No. Civ. A. 01-CV-0679, 2002 WL 323563999, at *3 (E.D. Pa. July 1, 2002) (“Attorneys who have received settlement funds on behalf of clients who have received Medicare benefits may be subject to a direct claim by the Government.”). CMS may also recover interest on a Medicare lien if reimbursement is not made before the expiration of the 60-day time frame. See 42 U.S.C. § 1395(y)(b)(2)(B)(ii).

A defendant/insurer can simply no longer depend on an indemnity provision from the plaintiff because it will not sufficiently insulate the insurer from the double damages Medicare may be able to recover. The defendant/insurer must now ensure Medicare’s lien is satisfied first out of the funds paid as result of a settlement or judgment.

Who Must Report

Persons and entities required to report under Section 111 of the MMSEA are referred to as Responsible Reporting Entities (“RREs”). Determining RRE status is an important first step in assessing Section 111 reporting responsibilities. RREs include:

1. Anyone who funds and pays, in whole or in part, a settlement, judgment, award or other payment to a Medicare beneficiary; and
2. Liability, no-fault and workers’ compensation insurers as well as self-insured entities and TPAs.

A liability insurer and no-fault insurer is defined by CMS as an entity that, in return for the receipt of a premium, assumes the obligation to pay claims described in the insurance contract and assumes the financial risk associated with such payments. Even if the liability insurer does not assume responsibility for claims processing, it must still assume responsibility for the new reporting requirements. The User Guide provided by CMS provides additional information regarding how it defines liability insurer and provides examples of the type of coverages included within that definition. See CMS MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting, Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers’ Compensation USER GUIDE, located at <http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuide2ndRev082009.pdf> (hereinafter the “User Guide”). Interestingly, an insured that pays the claimant directly up to a certain deductible (with the remainder of the settlement/judgment being funded by the insurer) will be considered an RRE up to the amount of that deductible. The User Guide further defines a “self-insurer” as an entity that engages in a business, trade or profession and carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

Determining Whether Your Plaintiff is a Medicare Beneficiary

Determining a plaintiff’s status as a Medicare beneficiary is a core requirement under the new reporting requirements. A defendant/insurer must only report settlements, judgments or payments made to a *Medicare beneficiary*. It is critical that defendant/insurers develop their own procedures to determine a claimant’s Medicare entitlement status. This includes performing follow-up status checks to ascertain whether a claimant who is initially determined *not* to be Medicare recipient subsequently becomes a Medicare recipient before the claim is resolved.

The defendant/insurer should ask the plaintiff if he is a Medicare recipient and/or whether he has applied for Medicare benefits. If it appears the plaintiff may become a Medicare beneficiary before the claim can be resolved, the defendant/insurer should proceed as if the plaintiff were a Medicare beneficiary. The defendant/insurer should discuss with plaintiff’s counsel the parties’ mutual obligation to identify and protect Medicare’s lien and the impact it will have on the parties’ ability to settle and/or otherwise resolve the case. The defendant/insurer should further advise plaintiff’s counsel of the importance of the Section 111 reporting requirements

and recruit him/her as an advocate for eliciting information from the plaintiff concerning his Medicare status and any payments made by Medicare for the injuries at issue.

Defense counsel should also send plaintiff's counsel a letter every few months asking him to update information previously provided concerning plaintiff's Medicare status. Particularly when dealing with a *pro se* plaintiff who is a Medicare beneficiary, it is likely he will not understand the Medicare implications. Although the *pro se* plaintiff may not intentionally hide or misrepresent information concerning his Medicare status, he will likely not have the knowledge or the resources to gather and/or provide accurate information. Ironically, in such situations, the defendant/insurer may become an unintentional advocate for the plaintiff when working with CMS to satisfy Medicare's lien.

The defendant/insurer, however, *cannot* rely upon information provided by the plaintiff or his representative. There is *no* safe harbor provision for a defendant/insurer that relies upon incorrect information from a plaintiff and fails to fulfill its duty to report and/or protect Medicare's lien. Many commentators on this topic have noted it would be extremely beneficial, and fair, for CMS to amend the regulations to add a "safe harbor" provision that would protect defendant/insurers that receive incorrect and/or misleading information concerning a plaintiff's Medicare status.

The defendant/insurer should serve written discovery to the plaintiff to obtain the following Medicare information:

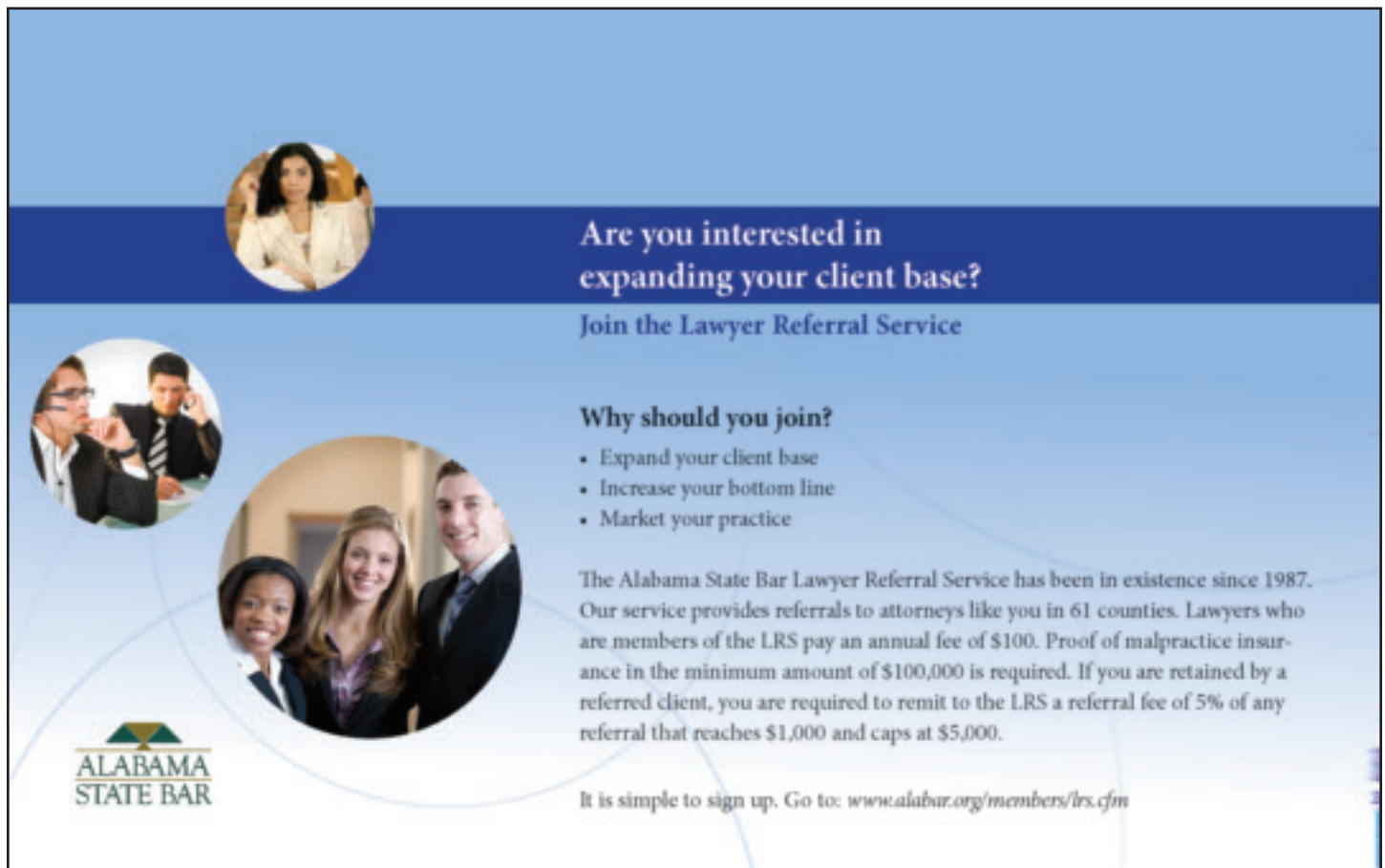
1. Please provide:
 - a. Plaintiff's full legal name;

- b. Plaintiff's Social Security number ("SSN") or Health Identification Number ("HICN"); and

- c. Plaintiff's date of birth.

2. Identify all health care benefits received or which plaintiff will become eligible to receive as a result of injuries allegedly related to the subject accident/incident.
3. State whether plaintiff is or has ever been a Medicare recipient and, if so, provide plaintiff's Medicare Health Insurance Claim Number.
4. State whether plaintiff is currently receiving, has applied for or is eligible for Social Security Disability payments.

Using the plaintiff's name, SSN or HICN, date of birth and gender, an RRE can run a CMS query to determine plaintiff's Medicare status. The CMS Query Database allows an RRE to submit monthly queries to CMS on claimants to determine their Medicare status. CMS must find an exact match on the SSN or HICN. At least three out of the four remaining criteria must be matched exactly. CMS has stated that a response will be returned within 14 days. The CMS query system, however, is not a safe harbor with respect to an RRE's obligations under Section 111. CMS has stressed that a "non-match" response should *not* be viewed as confirmation by CMS that the individual is not a Medicare beneficiary. On the contrary, a "non-match" response only means there was not a match based on the information submitted. The query system also provides limited information. Specifically, the query system will not provide the basis or date of the individual's Medicare entitlement due to privacy reasons.



The advertisement features a blue and white color scheme. At the top left, there is a circular image of a woman in a white blazer. Below this, on the left side, are two more circular images: one showing two men in suits talking, and another showing three people (two women and one man) smiling. The Alabama State Bar logo is in the bottom left corner. The main text is on the right side, starting with the question 'Are you interested in expanding your client base?' followed by 'Join the Lawyer Referral Service'. Below that is the heading 'Why should you join?' with a bulleted list of three points: 'Expand your client base', 'Increase your bottom line', and 'Market your practice'. A paragraph follows, describing the service's history and requirements. At the bottom, it says 'It is simple to sign up. Go to: www.alabar.org/members/lrs.cfm'.

Are you interested in expanding your client base?

Join the Lawyer Referral Service

Why should you join?

- Expand your client base
- Increase your bottom line
- Market your practice

The Alabama State Bar Lawyer Referral Service has been in existence since 1987. Our service provides referrals to attorneys like you in 61 counties. Lawyers who are members of the LRS pay an annual fee of \$100. Proof of malpractice insurance in the minimum amount of \$100,000 is required. If you are retained by a referred client, you are required to remit to the LRS a referral fee of 5% of any referral that reaches \$1,000 and caps at \$5,000.

It is simple to sign up. Go to: www.alabar.org/members/lrs.cfm

Thus, the RRE will not know whether the plaintiff's Medicare entitlement is based on age, disability or end-stage renal disease. Likewise, information concerning whether the plaintiff has applied for Social Security disability will also not be provided.

In situations where a plaintiff is not a Medicare recipient, the defendant/insurer may process the claim just like any other. However, the defendant/insurer must remember that it has a continuing duty to check plaintiff's status throughout the life of the claim to ensure plaintiff does not *become* a Medicare beneficiary prior to the time of payment. The defendant/insurer will be liable for fines and penalties even if it is unaware that it is dealing with a plaintiff who is a Medicare beneficiary. There is no equal obligation on the part of the Medicare beneficiary or his/her attorney. Rather, the MMSEA places the obligation to identify the plaintiff as a Medicare beneficiary squarely on the shoulders of the defendant/insurer. A defendant/insurer should *not* issue any payment without again checking the plaintiff's Medicare status. This practice will increase the likelihood of accurate reporting to the CMS.

Once the defendant/insurer has determined that it is indeed negotiating with a Medicare beneficiary, the defendant/insurer must, at the time of any potential settlement, be prepared to properly submit a report to CMS and/or its contractor, the Coordination of Benefits Contractor ("COBC"), and to satisfy Medicare's lien out of the payment up to the extent of the defendant/insurer's liability. This includes payments made to the estate of a Medicare beneficiary. If settlement proceeds are dispersed to the estate of a deceased Medicare beneficiary, the defendant/insurer must report the payment to CMS and provide both the identifying information for the deceased beneficiary as well as the estate or individual receiving survivor benefits.

What Must Be Reported

If the defendant/insurer determines that the plaintiff is a Medicare beneficiary and a payment is anticipated, the defendant/insurer must place CMS on notice of the loss. *See* 42 C.F.R. § 411.25(a). The defendant/insurer does not need approval or authorization from the Medicare beneficiary to notify CMS of the claim. It is important to note that the trigger to report is whether there is an expectation of making a payment. If the defendant/insurer believes it has no liability and has no expectation of making a payment, there is no duty to report unless and until a payment is made. Notification to CMS will allow it to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim. CMS requires the defendant/insurer report, in part: (1) the claimant's name; (2) the claimant's address; (3) the claimant's date of birth; (4) the claimant's SSN or HICN; (5) the RRE's name; (6) the RRE's address; (7) the policy type; (8) the RRE's Tax Identification Number; (9) the policy number; (10) the insured's name; (11) the date of the accident, nature and cause of injury or incident; and (12) the settlement date and amount.

In classifying the nature and cause of the injury, the RRE must use the ICD-9-CM (International Classification of Disease, Ninth Revision, Clinical Modification) codes to describe the alleged cause of injury/illness. CMS allows use of up to five codes to characterize the injuries. An RRE should take care to supply CMS with the correct ICD-9-CM codes that properly characterize the injuries related to the accident. Some commentators have noted

potential problems with using ICD-9-CM codes as they may not be detailed enough to ensure the RRE is reporting only injuries and treatment related to the claim. For example, ICD-9-CM codes do not differentiate between right and left appendages. Thus, report of an ICD-9-CM code for a left ankle injury incurred in a car accident may cause Medicare to include in its claim medical bills Medicare paid for an injury to the claimant's right ankle. This may cause a trend for increased depositions of representatives of healthcare providers responsible for billing and coding of medical bills to enable the parties to better understand specifically what bills relate to the injuries at issue and to determine what bills have been paid, who paid them and when they were paid. RREs may want to take a little time up-front to hire a doctor, nurse or healthcare provider billing agent to review the records and identify only those codes that are related to injuries the injuries at issue to avoid reporting unrelated ICD-9-CM codes.

The COBC will enter this information into a database and create a working file. The information is then transmitted to the Medicare Secondary Payer Recovery Contractor ("MSPRC"), who assembles the data and issues interim payment statements to the Medicare beneficiary. This process opens up a dialogue between the defendant/insurer and CMS so the parties can determine the amount of Medicare's lien early in the litigation.

Although CMS has provided little information concerning the civil penalties it can impose, CMS has stated that a defendant/insurer can suffer the same civil penalties for flawed reporting just as it would for no reporting at all. It is critical that RREs understand the requirements under this statute and develop policies and procedures to ensure compliance. In addition, if a file was opened with CMS but a finding was made that the defendant/insurer was not liable to the Medicare recipient, it would be prudent to notify CMS of the finding of no liability, perhaps by virtue of a verdict or entry of summary judgment. If this happens, the RRE should notify CMS that it is not subject to the reporting requirements for this particular matter because it is not a primary payer.

CMS has also established certain threshold exceptions for reporting. One-time payments, including structured settlements and annuities, of less than \$5,000 (paid between July 1, 2009 and December 31, 2010) do *not* have to be reported. CMS has stated, however, that these thresholds are subject to change, so RREs are encouraged to monitor CMS' website and stay abreast of changes in the reporting requirements. The initial reporting period was set to start July 1, 2009. CMS then moved the deadline to January 1, 2010. It is recommended, however, that RREs collect and maintain data concerning settlements and payments made as of July 1, 2009 in case CMS decides to conduct a "look-back."

CMS Registration and Account Setup

As part of the mandatory reporting process, all RREs must register with CMS and create a profile so that they can obtain an RRE ID used for reporting. RREs were required to register with CMS on or before September 30, 2009 through CMS' mandatory insurer reporting website at www.cms.hhs.gov/MandatoryInsRep. Registration with CMS allows the RRE to submit CMS inquiries and create claim input files. The electronic reporting requirements for RREs and testing of the claim input files will begin July 1,

2010. RREs will be required to submit quarterly reports thereafter and will face significant penalties (\$1,000 per day per claimant) for failed or flawed reporting. The electronic reporting requirements are tedious and will likely to be difficult to navigate as the process and the CMS system is new to all users. RREs are encouraged to obtain and review the User Guide to ensure compliance with the reporting requirements and to periodically visit the Mandatory Insurer Reporting section of the CMS website to check for alerts and updates. In addition, although an RRE may designate a Responsible Reporting Agent (“RRA”) to handle its mandatory Medicare reporting, the RRE cannot contract away its duties to the RRA. The RRE will still be responsible for information submitted to CMS and subject to the applicable penalties for failing to comply with the mandatory reporting requirements.

Settlement with a Medicare Beneficiary

When dealing with a plaintiff the defendant/insurer knows is, or will soon become, a Medicare beneficiary, it is imperative to open up a dialogue with CMS early in the litigation to ascertain the amount of the Medicare lien. Once CMS is notified of the claim and a working file is created, the defendant/insurer may request, from the plaintiff, copies of the interim statements issued by CMS to the recipient or receive these statements directly from the MSPRC with a consent form signed by the plaintiff.

If the defendant/insurer disputes the amount of Medicare’s lien, the defendant/insurer can work with the MSPRC to discuss the charges included in the calculation and try to reach an agreement with the MSPRC to ensure the lien includes only those injuries related to the accident at issue. Due to the ambiguity involved in classifying the injuries relating to the accident through ICD-9-CM codes, it is recommended that the CMS conditional payment letters be reviewed carefully to ensure CMS does not include unrelated charges in the lien. If the defendant/insurer is able to identify unrelated charges, the MSPRC may amend its calculation and issue a revised conditional payment letter.

Once the amount of the Medicare lien is determined and a settlement is reached between the defendant/insurer and plaintiff, the settlement documents must be sent to the MSPRC for review. The settlement documents should show the amount to be paid at the time of settlement and what portion of the settlement proceeds are attributable to the plaintiff’s attorney’s fees and costs, if any. As discussed in further detail below, the plaintiff’s attorney’s fees and costs should be itemized in the settlement documents as this will allow the defendant/insurer to reduce the amount of Medicare’s lien in accordance with the plaintiff’s procurement costs.

Settlement agreements and releases should also include additional language relating specifically to Medicare’s claim. A simple agreement from the plaintiff to indemnify the defendant/insurer for any liens or subrogation rights of Medicare will no longer suffice. The defendant/insurer should have the plaintiff agree to waive his/her right to initiate an independent action against the defendant/insurer for failure to satisfy Medicare’s claim. Although this will not insulate the defendant/insurer from all potential risk of a suit to recover Medicare’s claim (CMS can initiate a suit itself and

recover exorbitant fines and/or damages), it will help prevent additional attack from the plaintiff. In addition, as a practice point, although defendant/insurers typically prefer a “kitchen sink” approach which requires the plaintiff to release any and all claims, the defendant/insurer should take care to include a provision in the settlement which the specifically identifies, using ICD-9-CM codes, the injuries related to the accident and which form the basis of Medicare’s claim. Additional language should also be included in the settlement agreement wherein the plaintiff acknowledges the importance of satisfying Medicare’s lien and the fact that Medicare may deny his benefits based on payment by the defendant/insurer. There should also be a cooperation clause that requires the plaintiff to cooperate with Medicare and/or the defendant/insurer should Medicare pursue payment following the settlement.

Once the MSPRC receives the settlement documents, it will then issue a final demand letter for payment. CMS will not make an official demand for reimbursement until the claim is resolved. If there is no further dispute as to the final amount of Medicare’s lien, the lien should be paid as part of the settlement. The defendant/insurer should *not* fund a settlement until it has received the final payment request from MSPRC and is sure of the amount of Medicare’s claim. There has been some debate on whether the defendant/insurer should pay Medicare directly for the amount of its lien through a separate check to ensure the lien is satisfied and/or whether a single check should be issued jointly to the plaintiff and Medicare to ensure the plaintiff satisfies Medicare’s lien out of the settlement. Direct payment to Medicare is likely the best way to ensure resolution of the defendant/insurer’s liability to Medicare.

Opening up a dialogue with CMS, resolving the amount of Medicare’s lien and ensuring Medicare’s lien is satisfied out of the settlement funds will inevitably require additional time and costs. Unfortunately, by making the defendant/insurer the primary party responsible for protecting Medicare’s lien, these new reporting requirements shift these added costs to the defendant/insurer. Defense counsel should be cognizant of the additional costs that will necessarily be incurred when dealing with a Medicare beneficiary in attempting to provide a budget and/or estimated time-frame for the client.

This will also notably create a chilling effect on a defendant/insurer’s ability to settle a claim with a Medicare beneficiary, particularly for nuisance value only. The minimum threshold for settlements with a Medicare beneficiary must essentially exceed the amount of Medicare’s lien. Settlement offers will have to start at the amount of Medicare’s lien and increase from there. This may also discourage the plaintiff’s attorneys from filing suit if the injured party’s Medicare claim outweighs the potential value of the suit.

If a dialogue is not opened with Medicare, and the lien amount is not determined and satisfied before payment is made to the plaintiff, Section 111 requires the defendant/insurer immediately report any payment made to a Medicare beneficiary by virtue of settlement, judgment or otherwise. This includes payments made as a result of ongoing responsibility for ongoing medical benefits (referred to as “ORMs”) and the termination of all liability through a one-time payment (referred to as “TPOCs”). The defendant/insurer must satisfy Medicare’s lien within 60 days of the date of payment to the Medicare beneficiary. If Medicare is not reimbursed within this timeframe, CMS may begin to charge interest on the lien. If Medicare is not reimbursed within 120 days of the date of the payment to the

Medicare beneficiary, CMS will refer the case to the Treasury for further enforcement action and may commence an action to recover double damages from the defendant/insurer.

Reducing Medicare's Lien

CMS does not recognize allocation of fault among the defendants in a liability settlement. CMS also ignores the parties' private agreements concerning allocation of only a portion of the settlement funds to medical expenses (as opposed to other damages such as mental anguish, pain and suffering, punitive damages, etc.). Rather, CMS maintains the position that it is entitled to proceeds of the entire settlement, or a least in an amount equal to Medicare's lien, notwithstanding the parties' private agreements to the contrary. Otherwise, litigants could simply agree to allocate no portion of the settlement to medical expenses in order to avoid Medicare's claim. This also means the plaintiff's counsel cannot avoid Medicare's lien by simply omitting a request for recovery of medical expenses in the complaint. The only exception is a case that has been tried to special verdict in which the jury has allocated between medical expenses and other damage elements on a special verdict form. In this situation, CMS will only appropriate the medical damages allocation for its recovery.

Medicare's claim, however, may be reduced to account for the plaintiff's procurement costs (the attorney's fees or other expenses incurred in pursuing recovery from the defendant/insurer). When CMS recovers directly from an insurer, there is no such pro rata reduction. CMS has publicly disclosed its method for calculating reduction of Medicare's lien by the amount of the plaintiff's procurement costs as follows:

1. Assume: Settlement = \$10,000; Attorney fees = 1/3; Court Costs = \$150; and Medicare's lien = \$2,700.
2. Costs of Procurement = Attorney fee (\$3,333.33) + costs (\$150) = \$3,483.33.
3. \$3,483.33 divided by the \$10,000 settlement = 0.34833. Meaning, procurement costs account for 0.34833 (approximately 35%) of the total settlement.
4. 0.34833 x \$2,700 (the Medicare lien) = \$940.50.
5. \$2,700-\$940.50 = \$1,759.50 (the amount of Medicare's lien, after reduction for procurement costs).
6. Stated otherwise as follows:

Settlement:	\$ 10,000.00
Attorney's Fees:	\$ 3,333.33
Court Costs:	\$ 150.00
Medicare's reduced lien:	-\$ 1,759.50
Amount to plaintiff:	\$ 4,757.17

A provision in the settlement documents, specifically outlining the portion of the settlement funds attributable to the plaintiff's attorney's fees and costs, allows the parties to reduce Medicare's lien by the amount of the procurement costs.

Medicare Set-Asides

The MSP statute states that Medicare will not be responsible for payment, *i.e.* that it is always secondary, when a primary

payer (a workers' compensation or other insurance plan), is available. Although this implies a prospective duty on the part of the primary payer to continue to protect Medicare's lien after the settlement, CMS has not issued any regulations, bulletins or alerts at this time specifically addressing the requirement for Medicare Set-Asides ("MSAs") in liability litigation. There are currently no regulations applying the same MSA requirements to liability suits that are applied to workers' compensation cases. However, there have been discussions that this may be required in the future to ensure Medicare does not unnecessarily shoulder the burden of the cost of future medical care after resolution of the recipient's claim with the defendant/insurer.

Conclusion

The new reporting requirements under the MMSEA will have a dramatic impact on a defendant/insurer's approach to settlement with a Medicare beneficiary. The defendant/insurer is now primarily responsible for protecting Medicare's interest, and the penalties for non-compliance are fierce. Policies and practices must be implemented to ensure early identification of Medicare beneficiaries, open communication with CMS concerning Medicare's lien and satisfaction of Medicare's lien first out of any settlement payment. This will also translate into an exponential increase in the amount of time and money required to resolve a case with a Medicare beneficiary. ▲▲▲



Russell C. Buffkin is a member of Helmsing, Leach, Herlong, Newman & Rouse PC in Mobile. His practice focuses on products liability and personal injury defense, medical malpractice defense, business and commercial litigation, multi-district litigation, and construction disputes. Buffkin earned his undergraduate degree and M.B.A. from Spring Hill College and his law degree from the University of

Alabama, where he graduated cum laude in 1999. He is admitted to practice in all state and federal courts in Alabama, and is a member of the Mobile Bar Association, Alabama State Bar, Defense Research Institute and Alabama Defense Lawyers Association.



Annie J. Dike is an associate with Helmsing, Leach, Herlong, Newman & Rouse PC. Dike obtained her undergraduate degree summa cum laude from the University of Alabama in 2004. She graduated cum laude in May 2007 from the University of Alabama School of Law. Dike's main practice focus is products liability, medical malpractice defense and creditor's rights. She is admitted to practice in Alabama and the

Middle, Northern and Southern districts of Alabama. She is also a member of the Mobile Bar Association, Defense Research Institute and Alabama Defense Lawyers Association.



Contact us:
800-950-0551
www.danielshead.com

Lawyers' Malpractice Insurance

Daniels-Head and Zurich in North America are working together to help you protect your firm's finances and reputation.

Daniels-Head is a leading professional liability insurance provider serving several states with many insurance products that should be of interest to your organization.

Daniels-Head understands the needs of small law firms. This understanding comes from serving professionals for more than 50 years, and is reflected in the quality products and services provided.

Zurich's Lawyers' Malpractice Insurance provides qualified small law firms malpractice insurance and a portfolio of risk management services designed to help mitigate professional liability risk.

The program's value-added services help enhance your firm's legal research capabilities, and put skilled professionals at your disposal when potential malpractice issues arise.

Together, Daniels-Head and Zurich are committed to crafting customized insurance and risk management solutions for businesses of all types and sizes.

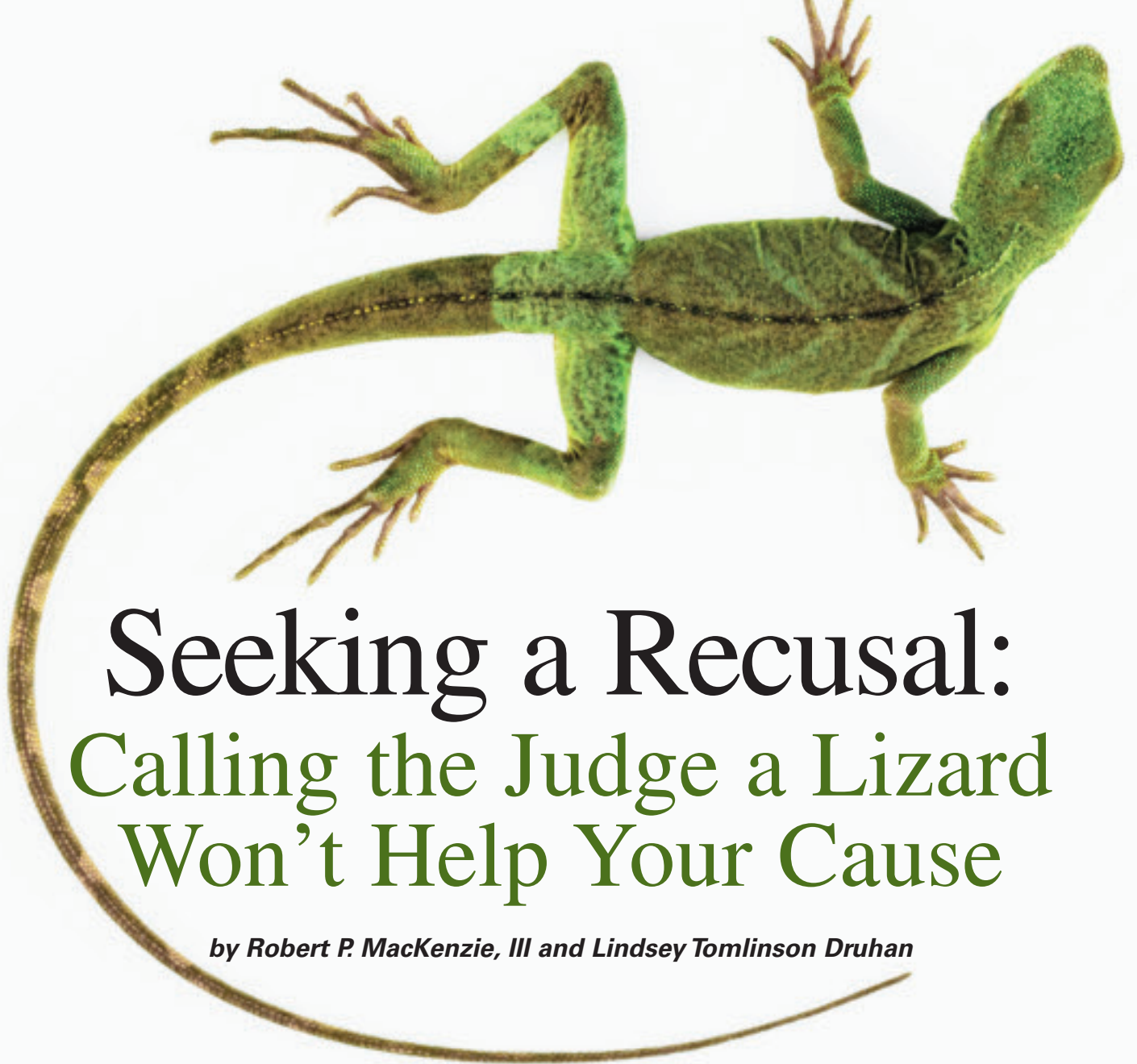
DANIELS-HEAD
INSURANCE



Z ZURICH[®]

Because change happenz.[™]

This is intended as a general description of certain types of insurance and services available to qualified customers through the companies of Zurich in North America. Your policy is the contract that specifically and fully describes your coverage. The description of the policy provisions give a broad overview of coverages and does not revise or amend the policy.
Insurance coverages underwritten by individual member companies of Zurich in North America, including Zurich American Insurance Company. Certain coverages not available in all states. Some coverages may be written on a nonadmitted basis through licensed surplus lines brokers.



Seeking a Recusal: Calling the Judge a Lizard Won't Help Your Cause

by Robert P. MacKenzie, III and Lindsey Tomlinson Druhan

Introduction

Life was not going well for Joe Bentley and now it was about to become worse. Indicted for murder during the course of an armed robbery, Bentley found himself awaiting trial. Dissatisfied with pretrial rulings and without advising his attorney, Bentley elected to convey his feelings directly to the trial judge. From his jail cell, Bentley told the judge he had “sold his soul to Lucifer,” and the judge would “die like his lizard spy.” Later, realizing the significance of his client’s conduct, Bentley’s lawyer sought to recuse the trial judge. The motion contended any judge who had received such a threatening letter could not possibly be in a position to be fair and impartial. The trial court, however, ruled, despite Bentley’s claim, recusal was not warranted. In affirming the

court’s order, the Alabama Supreme Court observed it was the defendant, not the judge, whose wrongful conduct was at issue. *Ex parte Bentley*, 849 So. 2d 997 (Ala. Crim. App. 2002).

Bentley’s actions represent the extreme response of a party’s dissatisfaction with a judge. As the client’s advocate, it is the attorney’s duty to recognize and, if based upon merit, to challenge any judge who cannot be fair and impartial. Asserting the proposition that the trial judge or justice should not hear the case is awkward at best. Judges are required to take a solemn oath to uphold the law and to be fair in all circumstances. To suggest otherwise is a strike at the very core of judicial principle. Yet, there are occasions where guided by the law or common sense, judges must step aside. Be wary, however, that challenges to the court are most often unsuccessful.

I. Alabama Statutory Law and Canons of Judicial Ethics

The law of recusal reflects two fundamental judicial policies; first, it is the duty of a judge to decide cases. Second, a judge should be a neutral, or impartial, decision-maker. *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So. 2d 966 (Ala. 1999). The test for recusal is whether a person of ordinary prudence would qualify the judge's action as prejudicial. *Ex parte Monsanto Co.*, 862 So. 2d 604 (Ala. 2003). Actual bias is not necessary. *Crowell v. May*, 676 So. 2d 941 (Ala. Civ. App. 1996). There is a presumption, however, that a judge is not prejudiced or biased. *Sullivan v. State Personnel Bd.*, 679 So. 2d 1116, 1118 (Ala. Civ. App. 1996). Recusal of a trial judge is not required by the mere accusation of wrongdoing unsupported by substantial evidence. *Gladden v. Gladden*, 942 So. 2d 362 (Ala. Civ. App. 2005). Further, judges must not recuse themselves for imaginary reasons; judge-shopping should not be encouraged. *Glassroth v. Moore*, 229 F. Supp. 2d 1283 (M.D. Ala. 2002). It is, however, the duty of the judge "to disqualify himself whenever, at whatever state of the litigation, it appears that his impartiality might reasonably be questioned." *Streater v. Woodward*, 7 F. Supp. 2d 1215, 1218 (N. D. Ala. 1998).

The grounds for recusal are predicated upon the statutory authority of ALA. CODE § 12-1-12 (1975) and the Alabama Canons of Judicial Ethics. The statutory provisions concern (1) the judge's family relationship with a party, (2) prior involvement in the particular case as an attorney or (3) the validity of any instrument drafted or signed by the judge. See also 28 U.S.C. § 455. Beyond the specifics of ALA. CODE § 12-1-12 (1979), the Canons of Judicial Ethics set forth broader grounds for recusal including bias and financial interests. The Canons are not merely guidelines for proper judicial conduct but have "the force of law." *Ex parte Atchley*, 936 So. 2d 513 (Ala. 2006) (citing *Balogun v. Balogun*, 516 So. 2d 606 (Ala. 1987)).

A. Mechanics for Recusal

When the judge knows of any circumstance or fact which may be grounds for recusal, it is the judge's duty to so advise the parties. *Ex parte City of Dothan Personnel Board*, 831 So. 2d 1 (Ala. 2002). For a moving party, they must file at the first opportunity or, otherwise, the issue may be waived. In *Johnson v. Brown*, 707 So. 2d 288 (Ala. Civ. App. 1997), the plaintiff brought a civil action which was assigned to a judge who had formerly been the county district attorney. While serving in this capacity, his office prosecuted the plaintiff in a criminal matter.

Approximately one year after the civil case was filed, the plaintiff filed a certificate of readiness. The defendants moved for summary judgment. At the hearing on the motion for summary judgment, the plaintiff, for the first time, orally moved for recusal because of the judge's past position as district attorney. The trial judge observed the motion for recusal was likely a dilatory tactic. In fact, the plaintiff's attorney conceded in open court, "I can honestly state I am not completely prepared to respond to the motion for summary judgment." The judge, however, allowed the plaintiff to submit a brief on the recusal issue. When no brief was submitted, the recusal was denied and the summary judgment motion was granted. Given the untimeliness of the motion, the trial judge's ruling was affirmed.

From the court's perspective and to minimize the chance of reversal, the determination of the motion for recusal should be deliberate. The motion may be heard by the judge whose conduct is at issue or transferred for hearing by another. *Ex parte Monsanto Co.*, *supra*. In response to a motion for recusal, the judge may submit testimony on his own behalf. In *Ex parte Knotts*, 716 So. 2d 262 (Ala. Crim. App. 1998), the criminal defendant sought recusal of the trial judge for comments allegedly made by the judge about the defendant's "New York lawyers." In a well-reasoned affidavit, the judge denied making any such statements. Thereafter, the defendant argued the trial judge should recuse himself because, by denying the allegations and setting forth his position by way of an affidavit, the trial judge had now become a material witness. The court of criminal appeals disagreed. The court determined the defendant, by

alleging the trial judge was biased against him, placed the judge in the position of having to address the allegations. *Id.*

The supreme court, however, reached a different conclusion in considering the judge's response to a claim of bias. In *the Matter of Sheffield*, 465 So. 2d 350 (Ala. 1984). In *Sheffield*, the trial judge entered a contempt ruling against the writer of a letter to the newspaper editor which criticized the judge's rulings in a domestic relations matter. When called by a newspaper reporter about the letter, the trial judge outlined his position. Those comments, among other issues, were the basis of an ethics complaint. The Court of the Judiciary determined the judge should recuse himself. The Alabama Supreme Court affirmed the decision.

B. Steps Taken after a Judge is Recused

Once a judge has been recused, the judge should take no further action except to notify the presiding judge. In *Ex parte Jim Walter Homes*, 776 So. 2d 76 (Ala. 2000), the trial judge disqualified himself and, thereafter, pursuant to Rule 13 of the *Alabama Rules of Judicial Administration*, assigned the case to another judge. The defendant moved to recuse the second judge, arguing the case had been improperly assigned. The motion was denied. On appeal, the Supreme Court of Alabama held the trial judge, once disqualified, cannot appoint a successor. To facilitate the proper transfer, the supreme court set forth the following protocol:

In a circuit with only one circuit judge, if the district judge within the county in which the action is pending has been temporarily assigned by the presiding circuit judge to serve in circuit court pursuant to Rule 13, [of the *Alabama Rules of Judicial Administration*], the circuit judge shall notify that district judge of the circuit judge's disqualification. If no judge with authority to hear the case is available in the county in which the action is pending, the case shall be referred to the AOC for assignment of a judge.

Id. In order to avoid the appearance of impropriety, once disqualified, the judge should take no further action in that case, not even the action of reassigning the case.

II. Common Issues Which Suggest Recusal

A. Bias

Canon 3.C. (1) of the Alabama Canons of Judicial Ethics calls for a judge to recuse himself when “he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” This personal bias must “stem from an extrajudicial source” in order for recusal to be required. *Ex parte Melof*, 553 So. 2d 554, 557 (Ala. 1989). Personal bias, as contrasted with judicial bias, is an attitude of extra-judicial origin, or one derived *non coram iudice*. *Woodall v. State*, 730 So. 2d 627 (Ala. Crim. App. 1997).

In *Carruth v. State*, 927 So. 2d 866 (Ala. Crim. App. 2005), Carruth filed a motion for recusal based upon the judge allegedly making comments which reflected the judge’s bias toward the defendant. According to Carruth, the

judge said, “The best news that you’re going to have this year is that I’m no longer in charge of criminal matters, that I’m on the civil side” and “I may be a son-of-a-bitch, but I’m an equal opportunity son-of-a-bitch.” *Id.* at 871. The judge testified he did not recall making the specific statements. In finding insufficient grounds for recusal, the Alabama Criminal Court of Appeals determined that the judge’s alleged bias, if it existed, was not personal, but judicial, in nature. *Id.* at 874. While the comments, if made, may have not been particularly appropriate or “cordial,” a judge’s demeanor during a judicial proceeding is not sufficient to warrant recusal.” *Id.* at 875.

Likewise, in *Hartman v. Board of Trustees of University of Alabama*, the supreme court considered whether the trial judge allegedly expressed favoritism toward the defendant which warranted a recusal. 436 So. 2d 837 (Ala. 1983). The plaintiff had brought suit against university officials. The trial judge contacted the student’s attorney and explained “the University of Alabama [is] ‘our friend’ and ‘we just shouldn’t file suits like this against the University of Alabama.’” *Id.* at 839. When requested, the trial judge did not recuse himself based upon these statements. On appeal, the Supreme Court of Alabama held that while the remarks may not have been appropriate, there was insufficient cause for recusal.

Recusal, however, was necessary in *Ex parte Eubank*, based upon the judge’s opinion of the ability of the defendant’s attorney to provide competent legal service. 871 So. 2d 862 (Ala. Crim. App. 2003). The judge sent a letter to the Alabama State Bar expressing that the attorney was impaired due to his drinking, should be considered a danger to himself and the community, and suspended from practicing law. The court felt these actions by the judge were enough to establish personal bias and the court issued a writ of mandamus.

B. A Judge’s Prior Exposure to a Case

A judge does not have to disqualify himself merely because of prior involvement in the case in a judicial capacity. In *Ex parte Brooks*, 855 So. 2d 593 (Ala. Crim. App. 2003), the defendant argued the judge should be required to recuse

himself after he executed a search warrant which led to the arrest of the defendant. The recusal motion was denied, and then affirmed on appeal.


A trial judge’s participation in a previous proceeding in a case does not ipso facto render him disqualified to preside at trial. A judge is not disqualified to sit in a trial on the merits by having heard and decided a preliminary proceeding in the same cause. So, the fact that he conducted the preliminary examination which resulted in the prosecution of the accused does not, in the absence of any showing as to any personal bias or prejudice, disqualify him from presiding at the trial. Nor is a judge disqualified to try a criminal case because he ordered the grand jury which indicted the defendant, and had presided throughout the grand jury proceedings, and had passed on numerous preliminary motions.

Id. at 595. The court concluded that “the mere fact that the Judge . . . signed the search warrant used to obtain evidence against Brooks is not alone sufficient to warrant the Judge’s . . . recusal.” *Id.*

Similarly, a judge’s exposure to statements relating to the case is insufficient cause for recusal. In *Stallworth v. State*, 868 So. 2d 1128 (Ala. Crim. App. 2001), the judge attended a civic meeting where the guest speaker discussed the facts of the case against the defendant. A witness to the meeting explained the remarks made by the speaker were sarcastic and heard by all including the judge. The judge did not make any comments at the meeting, nevertheless, the defendant sought to recuse him. The recusal motion was denied by the trial court. In affirming the denial, the Alabama Court of Civil Appeals held:

We refuse to hold that a judge is required to recuse himself or herself when the judge has inadvertently been exposed to remarks about a case. It is another matter, however, if the judge chooses to respond to the remarks he or she has overhead about a case.

Id. The court, therefore, determined that the judge was not required to recuse himself because of mere exposure to remarks regarding the case.



J. FORRESTER DeBUYS, III
(de-brweez)

Agent, New York Life Insurance Company
CLU, ChFC, AEP

INDIVIDUAL AND BUSINESS INSURANCE
PRODUCTS AND CONCEPTS

FOR INDIVIDUALS	FOR BUSINESSES
• Life Insurance	• Key Person Coverage
• Fixed Annuities *	• Buy-Sell Agreement Funding
• Disability Insurance **	• Deferred Compensation
• Long Term Care Insurance	• Group Life and Disability Insurance ***

* Issued by New York Life Insurance and Annuity Corporation (A Delaware Corporation)
** Products available through one or more centers not affiliated with New York Life dependent on carrier authorization and product availability in your state or locality

2311 Highland Avenue South, Suite 100
Birmingham, Alabama 35205
(205) 918-1515

It is, however, generally recognized the judge should recuse himself if he is a witness. In *Ex parte Brooks*, the moving party alleged the judge should recuse himself because he planned to authenticate his signature on an evidentiary document. 847 So. 2d 396, 397 (Ala. Crim. App. 2002).

By virtue of the fact that [the Judge[’s] ... name was contained on the alleged search warrant, [the] Judge ... is in the position of having personal knowledge of the truth or falsity of the warrant. [The moving parties] were charged with four counts of capital murder – one count of murder during a burglary. It is necessary for the State to present evidence concerning their method of gaining entry into the Bowyer home. [The] Judge... has personal knowledge of the unlawfulness of the petitioners’ entry into the Bower house.

Id. at 398. This personal knowledge was enough for the court to decide that the judge was required to recuse himself from the case.

The Supreme Court of Alabama has specifically held that recusal is required in those situations where the judge has appointed a judicial officer whose conduct is now at issue. In two similar actions, *Ex parte Bryant*, 682 So. 2d 39 (Ala. 1996) and *Ex parte Price*, 715 So. 2d 856 (Ala. 1997), lawyers were appointed by the circuit courts to hold positions as a guardian and conservator. In both actions, the attorneys were accused of taking money from estates over which the attorneys had been appointed. Recusal was proper as to all judges within the circuit. The supreme court noted reasonable persons could question the impartiality of the judges of the circuit “whose trust the defendant is charged with previously breaching.” *Bryant*, 682 So. 2d at 42.

C. Prior Representations of a Party

There are occasions where prior to election and/or appointment to the bench, the judge represented or was opposite one of the parties. The fact of this relationship in and of itself does not require automatic recusal. In *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000), the defendant plead guilty to receiving stolen property and to burglary in the third

“[t]he fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself.”

degree prior to trial. The sentencing judge was the former district attorney whose office represented the State of Alabama and was now prosecuting the defendant. *Id.* Smith asserted a motion for recusal which was denied. In affirming the trial court, the court of criminal appeals explained “the fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself.” *Id.* at 804.

In *Ex parte Adams*, the judge was the city attorney at the time the defendant was first arrested for two counts of theft of property. 910 So. 2d 827 (Ala. Crim. App. 2005). The defendant made a motion for recusal which the court denied. On appeal, the Alabama Supreme Court explained that although the judge was a city attorney when the defendant was arrested, “[t]he sole responsibility for prosecuting persons charged with felonies rests with the district attorney for the county in which the crime occurred. Here, the attorney of record for the charges against Adams was the district attorney . . . not the city attorney.” *Id.* at 829. Because the defendant could not establish personal bias, the court denied the motion to recuse. *See also Crawford v. State*, 686 So. 2d 199, 200 (Ala. Crim. App. 1996) (even though

judge was the district attorney and had previously prosecuted the defendant, this did not warrant recusal); *Ex parte Adams*, 910 So. 2d 824 (Ala. Crim. App. 2005) (judge was city attorney when defendant was arrested, no recusal). *See Coleman v. State*, No. 06-1242, 2007 WL 2459320 (Ala. Civ. App. Aug. 31, 2007) (case remanded to determine if “circuit judge was the district attorney at the time of the proceedings underlying the prior convictions which were used to enhance appellant’s sentence”).

In *Grider v. State*, the defense made a motion to recuse, claiming the judge, while in private practice, had represented the defendant in two assault cases. 766 So. 2d 189, 193 (Ala. Crim. App. 1999). The trial judge had no recollection of the representations. The Alabama Court of Criminal Appeals court held the trial judge did not abuse her discretion by denying the motion for recusal.

The trial judge stated that she had no recollection of representing the appellant and no knowledge of his opposing interests in any civil cases. Moreover, our review of the record indicates that the facts surrounding the previous cases were separate from the facts in the instant case. Thus, a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find that there is no reasonable basis for questioning the judge’s impartiality.

Recusal, however, was warranted in *Ex parte Atchley*, where the judge, while in private practice, had represented Atchley. 951 So. 2d 764 (Ala. Crim. App. 2006). The judge denied the motion. On appeal, both parties filed affidavits with the court. Atchley explained that he and the judge engaged in heated arguments while the judge represented him. The judge stated she had no recollection of representing the defendant. The judge further argued the facts of the two cases did not relate. The court found there was an appearance of impropriety and granted the writ of mandamus.

D. A Party’s Own Misconduct

A judge is not required to recuse himself when a party’s own misconduct initially

creates the conflict. *Ex parte Bentley*, *supra*. Likewise, the majority of the states observe “that a defendant should not benefit from his or her own misbehavior and that recusal lies within the sound discretion of the trial court.” *Id.* at 998 (quoting *State v. Bilal*, 893 P.2d 674 (Wash. App. 1995)). The judge was not required to recuse himself after a defendant threw a stamping machine and a microphone at the judge. *Wilks v. Israel*, 627 F.2d 32, 37 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981). In *Fitzgerald v. State*, 248 A.2d 667 (Md. App. 1968), the judge was not required to recuse himself after the defendant tossed a chair at the judge. Similarly, threats made by the defendant, including idle death threats, do not require a judge to recuse himself. *In re Marriage of Johnson*, 576 P.2d 188 (Colo. App. 1977).

Threats, however, considered to be genuine may warrant recusal. In *U.S. v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), the FBI became aware the defendant had contracted to kill the judge and his family. The defendant had been convicted, but not yet sentenced, at the time the judge learned of this information. At the sentencing hearing, the defendant moved for judicial recusal. The trial court denied the motion, but the appellate court reversed given the nature of the threats. The threats were not made to delay proceedings or simply harass the judge. Instead, the defendant intended to kill the judge by contracting to do so, and, therefore, recusal was necessary.

E. The Affect of Adverse Rulings/Orders

The court’s fundamental role is to issue rulings. Obviously, no ruling is going to completely satisfy the parties. The mere fact a party is upset by a court’s order is not grounds, in and of itself, for the judge to be recused. Judicial rulings alone almost never constitute a valid basis for bias. In *Williams v. Williams*, 812 So. 2d 352 (Ala. Civ. App. 2001), the parties were in a custody

battle. The father’s attorney and the judge exchanged harsh words and the bailiff had to restrain the attorney. Subsequently, the trial judge made various rulings against the father and granted the mother’s petition to modify custody. The father argued the judge should recuse himself because of the bias against his attorney which allegedly was the basis of various adverse rulings. The Alabama Court of Civil Appeals did not require the judge to recuse himself. The court explained, “Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice on the part of a judge.” *Id.* at 354. Even though the attorney and the judge had a hostile exchange during the proceedings, the court still refused to require recusal.

A judge may question the mental competency of a party and order a defendant to undergo a psychological exam without fearing recusal. In *Key v. State*, 891 So. 2d 353 (Ala. Crim. App. 2002), the judge ordered the exam because Key had made “inappropriate facial expressions to the surviving victim and to the deceased victim’s family.” *Id.* At trial, the judge described Key’s appearance as comparable with Ted Kaczynski. The judge explained it was his responsibility to determine whether the defendant was competent to stand trial, especially in a capital case. *Id.* By ordering an exam, the judge could not comprehend how protecting the defendant’s rights could require his recusal. *Id.* at 371. Because Key had not offered any evidence which established bias or prejudice, the Alabama Court of Criminal Appeals refused to require the judge to recuse himself after ordering a psychological exam.

Similarly, a judge was not required to recuse himself when he called the defendant a “dangerous man.” *Riddle v. State*, 669 So. 2d 1014 (Ala. Crim. App. 1994). In *Riddle*, the judge had presided over misdemeanor charges brought against the defendant in a prior case. The judge stated that the defendant was a “thug and he

needed to be taken off the streets.” *Id.* at 1019. Further, “You’ve dodged that felony bullet on this.” *Id.* Even though the statements appeared to be prejudicial on their face, the court did not require the judge to recuse himself. The court reviewed the evidence presented and explained “the trial judge’s comments . . . were fair assessments of the evidence, rather than indications of bias.” *Id.*

A judge may hold a defendant in contempt of court and not be required to recuse himself. In *Ex parte Vandiver*, the defendant physically assaulted an individual who was seated in the courtroom. 950 So. 2d 1215 (Ala. Civ. App. 2006). The judge held the defendant in contempt of court and sent a letter to the Alabama Department of Corrections detailing the defendant’s actions and requesting that the defendant’s custody classification be increased. The court determined because the alleged bias of the judge occurred during judicial proceedings, this was not enough to require recusal. The Alabama Court of Criminal Appeals relied upon a previous decision by the United States Supreme Court:

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge’s task.

Id. (quoting *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)).

In *Oliver v. Towns*, 738 So. 2d 798 (Ala. 1999), the defendant attorney appealed the judgment of \$1.5 million arising out of a \$12,000 legal malpractice claim. The attorney claimed the high

The mere fact a party is upset by a court’s order is not grounds, in and of itself, for the judge to be recused.

“The opinion of the Commission is that a judge is not obligated to recuse from hearing a case in which a law firm that employs the judge’s daughter or son-in-law as an associate also represents a party and the relative does not participate in the case.”

amount of the judgment was “sufficient to demonstrate that the trial judge had a personal bias.” *Id.* at 804. The court disagreed, explaining that “the judge conducted the trial in an impartial manner.” *Id.* Furthermore, “We will not judicially create a rule under which trial judges are required to recuse where the award of damages is greater than the defendant would have hoped.” *Id.* Thus, the fact that a party feels a judgment was excessive will not warrant recusal of a trial judge.

F. The Family and Personal Relationship between the Judge, the Attorneys and/or the Parties

Alabama Canons of Judicial Ethics specifically list the degree of relationship which require judicial recusal. Alabama Canons of Judicial Ethics 3.C. (1)(d). *See also* ALA. CODE § 12-1-12. The relationship between an attorney’s firm and the judge, however, does not necessarily require recusal as long as there is no genuine issue of impartiality.

The fact that a lawyer in a proceeding is affiliated with a law firm in which a lawyer-relative of the

judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that ‘his impartiality might be reasonably questioned’ under Canon [3.C.](1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be ‘substantially affected by the outcome of the proceedings’ under Canon [3.C.](1)(d)(ii) may require his disqualification.

Alabama Canons of Judicial Ethics 3.C.(1)(d)(i) (Commentary).

In *Liberty Mutual Ins. Co. v. Wheelwright Trucking Co., Inc.*, 851 So. 2d 466 (Ala. 2002), the judge found no reasonable grounds to recuse himself because the judge’s son was a member of the law firm which represented one of the parties at trial. The movant contended such a relationship would foster bias and or prejudice. The judge disagreed, explaining that “the motion made no showing that my son has had any involvement in the matters made the basis of these proceedings, and I am not independently aware that he has had any involvement.” *Id.* at 498. The judge quoted an Alabama Judicial Inquiry Commission Advisory Opinion which states: “The opinion of the Commission is that a judge is not obligated to recuse from hearing a case in which a law firm that employs the judge’s daughter or son-in-law as an associate also represents a party and the relative does not participate in the case.” *Id.* at 498 (citing Ala. Jud. Inquiry Comm’n Adv. Opn. No. 97-665 (August 15, 1997)).

A judge is not required to recuse himself or herself if an attorney appearing on behalf of one of the parties has represented the judge in the past. In *Ex parte City of Dothan Personnel Bd.*, 831 So. 2d 1, 2 (Ala. 2002), one of the attorneys for the plaintiff was also representing the trial judge in a divorce proceeding. Consideration was given as to whether the judge should recuse himself. This concern was “cured,” however, after the attorney withdrew from representing the judge and, instead, his partner continued the representation. The Supreme Court of Alabama explained:

[t]he mere fact that a judge has retained an attorney’s law partner to

represent the judge . . . in a single case would not disqualify the judge under Canon [3.C.], from sitting in a different case where the attorney represents one of the parties.

. . . .

[Absent unusual additional circumstances,] if the judge’s attorney withdraws from a case before the judge, the judge is not disqualified to proceed in the event another member of the same firm who has no involvement in the judge’s case appears.

. . . .

The Commission also has held that, absent extraordinary circumstances, a judge is not disqualified from hearing a case in which another member of the judge’s attorney’s law firm appears.

Id. at 2. Looking at the totality of the circumstances, the court held that the trial judge did not abuse his discretion when he refused to recuse himself.

CONSTRUCTION & ENGINEERING EXPERTS

Forensic engineering and investigative inspection work for Commercial buildings, Residential, & Industrial facilities.

- Construction delay damages
- Construction defects
- Structural issues
- Foundations, settlement
- Stucco & EIFS
- Toxic Sheetrock & Drywall
- Electrical issues
- Plumbing & Piping Problems
- Air Conditioning Systems
- Fire & Explosion Assessments
- Roofing problems
- Flooding & Retention Ponds
- Engineering Standard of Care issues
- Radio & Television Towers

CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER
CAIN AND ASSOCIATES ENGINEERS & CONSTRUCTORS, INC.
HALKCAIN@AOL.COM • WWW.HKCAIN.NET
251.473.7781 • 251.689.8975

Given the cordial relationship between the bench and bar in Alabama, it is expected the judges and attorneys will maintain professional relationships. This relationship, standing alone, is insufficient for recusal even when the attorney is a party. *Smith v. Math*, (Ala. Civ. App. 2060415, Nov. 16, 2007). Further, the fact that the judge has a personal friendship with an attorney is not grounds for recusal. In *General Motors Corp. v. Jernigan*, the judge took a weekend trip with a group of attorneys, one of whom was an attorney for the plaintiff in a civil action pending before the judge. 883 So. 2d 646 (Ala. 2003). Prior to departure, the judge contacted the Judicial Inquiry Commission requesting an opinion as to whether the trip would show bias or impropriety on his part. The Judicial Inquiry Commission responded the trip would not be a problem and, further, that the judge did not have to disclose the trip to opposing defense counsel. The judge did, however, inform all the parties in writing that he would be taking the trip, if there was no objection. No objection was made and the trip went forward. The defendant subsequently filed its motion to recuse which was denied. On appeal, the Supreme Court of Alabama concluded that the judge was not required to recuse himself because his actions and the surrounding facts did not establish bias or impartiality.

G. Campaign Contributions and Political Activities

The Alabama Legislature has adopted statutory limitations for campaign contributions to judges. ALA. CODE § 12-24-1 et seq. On its face, the statute precludes a judge or justice from hearing a case where they have received campaign contributions from a party or lawyer in excess of the statutory limits. Those limits are \$4,000 received by a justice of an appellate court and \$2,000 received by a circuit judge. ALA. CODE § 12-24-2(c). The Act was prescribed to apply to all elections after January 1, 1996. While a part of the Alabama Code, the enforceability of the Act, however, remains in question.

In *Ex parte Kenneth D. McLeod Partnership*, 725 So. 271 (Ala. 1998), the Alabama Supreme Court observed that while the Alabama Legislature has attempt-

ed to address campaign contributions in § 12-24-1 and § 12-24-2, the Act had not been pre-cleared by the United States Justice Department as required. *See id.* at 274. The validity of ALA. CODE § 12-24-1 and § 12-24-2 was further questioned in *Finley v. W. T. Patterson, et al.*, 705 So. 2d 834 (Ala. 1997). In *Finley*, the campaign contribution issue came before the Alabama Supreme Court on motions for disclosure and to stay issuance of a certificate of judgment. *Id.* at 834. The motions were denied. Justice Cook in his concurring opinion explained the enforceability of ALA. CODE § 12-24-2 was in legal limbo. *Id.* at 835. Justice Cook found the required pre-clearance under Section V of the Voting Rights Act by the United States Department of Justice had yet to be performed. *Finley, supra*, at 835.

In a more recent decision, *Brackin v. Trimmer Law Firm*, 897 So. 2d 207 (Ala. 2004), the Alabama Supreme Court again refused to embrace ALA. CODE § 12-24-1 and § 12-24-2 as valid and enforceable. There, a motion to recuse a justice was filed contemporaneously with an application for rehearing. The motion to recuse stated that while the justice was running for re-election for a seat on the Alabama Supreme Court, the Alabama Bankers Association contributed \$45,000 to her campaign. The recusal motion asserted that an additional \$9,000 was contributed to the justice's campaign by the same entity a few days before the original opinion was issued. The plaintiff's argument was not persuasive. The Alabama Supreme Court declared ALA. CODE § 12-24-1 and

Beyond campaign contributions, an attorney's support of a judge's political campaign is not enough to establish bias on the part of the judge.

§ 12-24-2 had not yet obtained pre-clearance from the United States Justice Department under the Voting Rights Act of 1965 and their unenforceability had been documented by the Alabama Supreme Court. 897 So. 2d at 233. In denying the motion to recuse, the opinion further stated that, "I am not aware of any opinions in which this Court has resolved the issue of the enforceability of § 12-24-1 and § 12-24-2 ALA. CODE 1975" *Id.* at 234. *See also Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. —, No. 08-22 (Jun. 8, 2009) (the United States Supreme Court declared that due process required a judge's recusal where the justice received campaign contributions from the principal officer of the corporation who was found liable for damages).

Beyond campaign contributions, an attorney's support of a judge's political campaign is not enough to establish bias on the part of the judge. In *Smith v. Alfa Financial Corporation*, 762 So. 2d 843 (Ala. Civ. App. 1997) the court observed:

The Judges' Association of Alabama has long pushed for bipartisan elections of judges in this state. Unfortunately, the Legislature and other powers that be have continued to require judges to run as members of one political party or another. As long as we are forced to run in partisan elections, situations will arise in which an attorney associated with a specific judge's campaign will have a case come before that judge. If we were to require recusal in such cases, we would be opening Pandora's box leading to untold problems for probate judges, district judges, circuit judges, and appellate judges, all of whom have had numerous attorneys associated with their campaigns.

Id. at 849-50.

H. Financial Interests of the Judge

When a judge has a material financial interest in the outcome of the case, he or she should disqualify himself. The interest must be direct, personal, substantial and pecuniary. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In *Aetna Life*, Aetna brought an appeal after suffering a

Instances where the recusal is clear is most often limited to the existence of family relationships, being a witness or having appointed the party to a position which is now the subject of litigation.

\$3.3 million dollar verdict for bad faith. The appellant determined that one of the justices on the Alabama Supreme Court “had filed two actions in the Circuit Court of Jefferson County, Alabama against insurance companies for bad-faith failure to pay a claim.” *Id.* at 817. The United States Supreme Court found recusal was required given the similarity of the suit being heard by the justice as compared to the two actions being prosecuted on the justice’s behalf.

In a case involving insurance coverage, the plaintiff moved for a new trial after the trial court entered a judgment in favor of State Farm Mutual Automobile Insurance Company. *Ex parte Dooley*, 741 So. 2d 404, 405 (Ala. 1999). The plaintiff argued that the judge should have recused himself “because he held an insurance policy issued by State Farm.” The trial judge stated the following in the recusal hearing:

I’ve been a State Farm policyholder all of my life, my entire term as district judge and a circuit judge. I’ve had I don’t know how many cases involving State Farm before me [during] all of this time. It’s a mutual company, sure, but it has millions of policyholders. And this case would not even make one cent’s worth of difference in what might or might not happen with regard to that mutual company. It’s not a large case at all. If it was a \$10-million case or a \$20-million case, it might be different. It might make one or two cents’ worth of difference in some sort of dividend check. But a case of this size has no effect at all.

Id. at 405-06. Because this case would not materially affect the trial judge’s insurance policy or financial interest, the Supreme Court of Alabama held that the trial judge did not err in denying the motion to recuse.

Likewise, in *Ex parte Potts*, 814 So. 2d 836 (Ala. 2001), the trial judge was not required to recuse himself because he owned a building in which office space was leased to the prosecuting attorney. After being convicted of murder, Potts claimed he had been denied due process of law when the trial judge failed to disqualify himself because of a landlord/tenant relationship the defendant claimed to have existed between the judge and the prosecutor. The lease agreement was signed on behalf of the State of Alabama by one of the prosecutors. Nevertheless, however, the trial judge refused to disqualify himself and said ruling was affirmed on appeal. The appellate court determined the judge’s financial interest in the building was not affected by the success or failure of the district attorney’s office because the district attorney’s office was not financially dependent upon the outcome of the case. In issuing its opinion, the court did note that the Alabama Judicial Inquiry Commission (JIC) had issued an advisory opinion, No. 99-719 (1999) wherein the JIC suggested that the judge recuse himself if an attorney in the case before the judge is renting property directly from the judge or from the judge’s spouse. In that instance, however, the judge’s impartiality may be reasonably questioned because the judge received income as a financial benefit from an attorney occupying a building owned by the judge, and the financial benefit of the judge may be dependent in part upon the financial success of the attorney.

Conclusion

The law in Alabama is well settled that judges are presumed to be competent and qualified to preside over all matters. Instances where the recusal is clear is most often limited to the existence of fam-

ily relationships, being a witness or having appointed the party to a position which is now the subject of litigation. Determining whether a recusal is warranted is, however, much more difficult when the grounds are based upon bias, prior involvement in the litigation or a relationship among the attorneys and parties. There is simply, in Alabama, a lack of uniform decisions beyond the pronouncement of general premises of law. Each case must be decided on the totality of the facts. While the burden is high when seeking a recusal, the down side is even greater if a judge, for whatever reason, chooses to maintain a case when the facts and principal suggest otherwise. ▲▼▲



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



Lindsey Tomlinson Druhan received her undergraduate degree from Auburn University and her Juris Doctorate in 2006 from Cumberland School of Law. She is an associate at Starnes & Atchison LLP in Birmingham.

The VLP and The Scoundrel Relatives



By Pamela H. Bucy

This wasn't my first rodeo. And it was a fight I wanted to win." This is how **Jimmy Knight** described his first Volunteer Lawyers Program ("VLP") case. It was a good thing for Knight's VLP client, Mrs. Anderson¹ that he was tenacious and experienced. Like many cases, this one began after the case was won.

Jimmy Knight, who began practicing law in 1962, signed up with the Volunteer Lawyers Program after hearing about the program at a bar luncheon. Started in 1991, the Alabama State Bar's VLP recruits lawyers throughout the state to provide, pro bono, up to 20 hours of legal services per year for those who cannot afford them.² Offices of Legal Services Alabama screen cases that come to their offices to determine if those cases are appropriate for referral to VLP attorneys. Cases which meet the following criteria

are eligible for referral to the VLP: (1) the case involves certain issues of law³ and (2) the case is simple and straightforward and appears to be resolvable within 20 hours or less.⁴ In Alabama, 23 percent of licensed attorneys are volunteers in the VLP.⁵

A couple of years after enrolling in the VLP, Knight received his first case. His client was deaf. Communicating with her was not easy. To do so, Knight's assistant, **Sara Carden**, contacted an interpreting service in Birmingham. The service telephoned Mrs. Anderson and gave her messages through video equipment and sign language. Even with this interpreting service, however, it was difficult for Knight to communicate with his client and for his client to appear in court on all of the occasions needed.

Mrs. Anderson's case arose when her paternal grandfather passed away, leaving property to his heirs. Mrs. Anderson



Jimmy Knight

was the illegitimate offspring of a father who was deceased. Upon her grandfather's death, some of the grandfather's heirs argued that Mrs. Anderson was not a rightful heir.

Mrs. Anderson's grandfather had five children, including her father. The other four children, all adults, were still alive. Two of the four supported Mrs. Anderson, agreeing that she should be included in the distribution of the grandfather's estate. Two of the four, who were also the executors of the estate, opposed recognizing Mrs. Anderson as a rightful heir.

A hearing was scheduled in probate court to determine heirship. Knight met with Mrs. Anderson and sent her extensive written communication to prepare for the hearing. Knight located witnesses who would testify to conversations they had with Mrs. Anderson's father in which her father referred to Mrs. Anderson as his daughter. Knight prepared cross-examination for witnesses he expected the relatives to call who would testify to the contrary. However, at the hearing, the opposing relatives surprised everyone. They conceded Mrs. Anderson's status as a rightful heir. Knight then had the estate removed from the probate court to the circuit court.

Knight didn't trust the relatives. As it became clear, his distrust was with good reason. The two opposing relatives had a new strategy for getting money out of the grandfather's estate. As executors, they padded, inflated, paid kick-backs and lied about the administrative expenses of the estate, submitting as estate expenses exorbitant amounts for all types of services including grave-opening, gas receipts and bush-hogging. They had other tricks. When ordered by the circuit court to pay Mrs. Anderson a certain amount, they showed up with a check for less. Knight had to obtain a court order to get the full amount due.

For three years, as the executors plotted and thieved, Knight represented Mrs. Anderson, going back to court on her behalf, petitioning the circuit court for relief. He successfully obtained court orders requiring the executors to distribute proceeds of the estate, to reduce the administrative expenses claimed by the executors and to pay amounts due. He

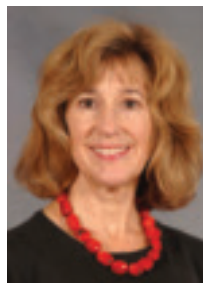
obtained other court rulings on the value of estate assets. After filing dozens of motions, litigating at four hearings and obtaining three court orders, Mrs. Anderson got every penny which she was due from her grandfather's estate.

At age 72, after 37 years of practicing law, Jimmy Knight is lean and fit. Recently, he cut back to practicing law three days a week. He enjoys traveling, farming, hunting and spending time with his 11 grandchildren.

Why did he volunteer as a VLP attorney when he could be taking it easy, enjoying time away from the office? "It's our obligation as lawyers to make the system work for everyone, whether they can afford a lawyer or not." ▲▲▲

Endnotes

1. A pseudonym
2. Individuals qualify as VLP clients if they live below the poverty level, currently \$13,538 gross income per year for an individual, or \$27,563 gross income per year for a family of four.
3. Adoption-by relatives with consent of natural parents; Bankruptcy-Chapter 7; Child Support Modification-caller has major change in circumstances; Collections-small claims with attorney on other side; Contracts and Warranties; Custody-by agreement; Divorce-uncontested parties are separated or defendant's whereabouts are unknown; Education; Guardianship of Child-if needed to enter child in school; Guardianship of Adult-person not of sound mind or medical condition prevents person from caring for self; Home Ownership-deed preparation, pre-foreclosure negotiation, or land dispute; Landlord/Tenant-private housing; Legitimations-by consent; Name Change-adult and minor; Power of Attorney; Probate-wills, living wills, small estate administration; Tax; Tort Defense; Visitation Change-by agreement
4. The average VLP case actually takes five and one-half hours to resolve.
5. To volunteer for the VLP, go to www.alabar.org and click on the VLP link.



commissioner and as vice president of the Alabama State Bar.

Pamela H. Bucy is the Bainbridge-Mims Professor of Law at the University of Alabama. She has served as a member of the Alabama State Bar Access to Legal Services Committee, as an at-large bar



ASB Lawyer Referral Service

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$50 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are \$100, and each member must provide proof of professional liability insurance.

“And Justice for All”

Poster and Essay Contest Winners

POSTERS

Grades K-3

- 1st Place Sydney Brown**
Edgewood Academy
Teacher: Mrs. Beverly Mack
- 2nd Place Tyler Abernathy**
Edgewood Academy
Teacher: Mrs. Cathy Payne
- 3rd Place Caleb Justiss**
Edgewood Academy
Teacher: Mrs. Sharon Lyle

Grades 4-6

- 1st Place Hannah Yost**
Bear Exploration Center
Teacher: Mrs. Kris White
- 2nd Place Jesse Combs**
Bear Exploration Center
Teacher: Mrs. Lindsey Norred
- 3rd Place Caitlyn Tyson**
Bear Exploration Center
Teacher: Mrs. Kris White

ESSAYS

Grades 7-9

- 1st Place Amber Terry**
Athens Bible School
Teacher: Mr. Greg Chandler
- 2nd Place Johnny Banks III**
Indian Springs School
Teacher: Mrs. Kelly Jacobs
- 3rd Place Jaylon Williams**
B. T. Washington Magnet High School
Teacher: Dr. DeShannon McDonald

Grades 10-12

- 1st Place Michael Bellamy**
Central High School
Teacher: Mrs. Barbara Romey
- 2nd Place Cynthia Steelman**
Athens Bible School
Teacher: Mr. Greg Chandler
- 3rd Place Bobby Hannah**
The Lakeside School
Teacher: Mrs. Frankie Speake



Law Day 2010 poster and essay winners stand with Chief Justice Cobb and Judge Kellum after the ceremony at the supreme court.



Sydney Brown, first-place winner in the K-3rd-grade poster division, accepts her medal and certificate from Judge Beth Kellum.



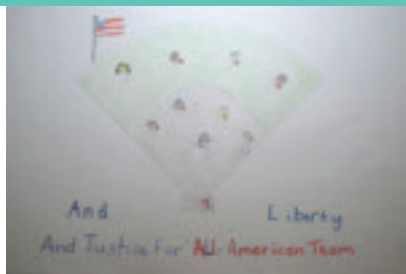
Winning posters and essays are displayed in the boardroom at the Alabama State Bar.



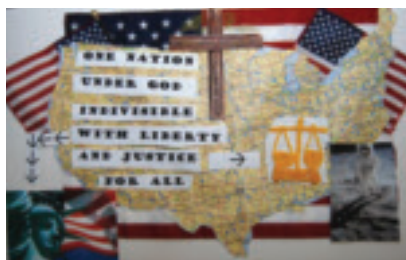
Alvin Benn from The Montgomery Advertiser and officers from Maxwell AFB's JAG office judge the 2010 essays.

Law Day 2010

PARTICIPANTS



1st Place, K-3: Sydney Brown



2nd Place, K-3: Tyler Abernathy



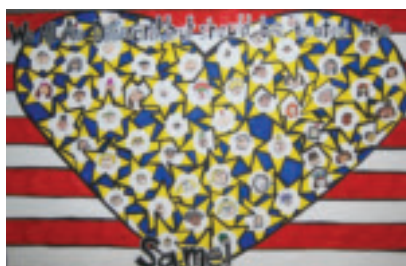
3rd Place, K-3: Caleb Justiss



1st Place, 4-6: Hannah Yost



2nd Place, 4-6: Jesse Combs



3rd Place, 4-6: Caitlyn Tyson

Grades K-3

Claire Harden
 Luke Justiss
 Payton Gray
 Mason Towne
 Hunter Wesson
 Chandler Allen
 Brady Lewis
 R J Sutherland
 Morgan McVay
 Cooper Gray
 Reese Owen
 Drew Carter
 Craig Kenady
 Kaitlyn Roberts
 Bella Farmer
 Ward Golden
 Sydney Brown
 Jay Kujala

Carter Spears
 Gabbie Smith
 Harris Woodruff
 Rebeka Cannon
 Madison Caffee
 Laken Lee
 Amber Johnson
 Tyler Abernathy

Brenna Lee
 Wilson Johnston
 Grace Williamson
 Gracie Gray
 Caleb Justiss
 Sophie Luster
 Carson Peevy
 Seth Wilkins
 Sydney Kallman
 Faith Wheat

Alex Lackey
 Amber Jean Goolsby
 Alex Sessions
 Matt Story
 Sydney Reeves
 Kamden Burleson
 Brayden Parker

Gracie Johnson
 CJ Weldon
 Kenzie Johnston
 David Gray
 Noah Montague
 Avery Roberts
 Turner Payton
 Katie Lynn Carraway
 Kaylee Robbins
 Anna Medina
 Stella Dotson
 Madison Horton
 Jeremy Gardner
 Jordan Ray
 Courtney Ray

Grades 4-6

Jesse Combs
 Anthony Wills
 Ashley Free
 Karmen Guy
 Morgan Anderson
 Rhys Zoldi
 Zoe Ballentine
 Baylor Wood-Pattee
 Garrett Garner
 Anika Hutton
 Hannah Yost
 Caitlyn Tyson
 D'Cimber Robinson
 Evan Mahone
 Jordan Hall
 Alexandria Winston
 Rachel Thompson
 Hunter Mulkey
 Kelly Kim
 Kenneth House

Solomon Hall
 Payton Cherry
 Rachel Roberts
 Ian Robinson
 Mitchell Wilson
 Tahreem Gul
 Dejah Sykes

Queenyetta Deloney
 Ashleigh Allison
 Abby Williams
 Skylar Saunders
 Angel Mack
 Korah Lawrence
 Jaxton Carson
 Wade Chandler
 Kedar Kalpen
 Madison Maddox
 Peyton Rodie
 Logan Alicea
 Chapel Courson
 Chloe Spivey
 Omid Naseri
 Darcie Smith
 Jordyn Burleson
 Hunter Merrit
 Kaitlyn Sampson
 Till Cousins
 Michael Weas
 Sara Ellis
 Tripp Carr
 Cooper James
 Brooke Carr
 Kathryn Davis
 Dylan Sullivan
 Shayna Stodghill
 Weldon Hicks
 Lane Jones
 Matt Guy
 Amber Tucker
 Alysa Martin
 Hunter Roberts

Grades 7-9

Connell Hodges
 Mercedes George
 Ashley Riggins
 Carter Corneil
 Erin Berkebile
 Cole Graviett
 Anna Stinnett
 Zach Ivey

Amber Terry
 Emily Bailey
 Ginger Bullington
 Bobby Sheahan
 Keosha Glance
 Kaelen Scott
 Andrietta Kimber
 Isia Jenkins
 Adrian Rodriguez
 Christopher Griffin
 Jaylon Williams
 Minh Chung
 Rynel Marshall
 D'Eriq Sanders
 Samuel Doleman
 Brantley Dover
 Emma Caroline Campbell
 Trinity McCormick
 Casey Kimbrough
 Jacob Butler
 Angel Calahan
 Hannah Kemp
 Erin Jade Jackson
 Connor Gresham
 Johnny L Banks III
 Drake Williams
 Nora Newcomb
 Erycah Taylor Day

Grades 10-12

Kim Scruggs
 Joshua London
 Craig Bailey Davis
 Justin VanHoozor
 Krys Eubanks
 Colton Palmer
 Kelsey Overton
 Cynthia Steelman
 Allie McCurry
 Cliff Denton
 Michael Bellamy
 Keyanna King
 Blake delCarmen
 Bobby Hannah
 Kaitlin White



Justice in Court

By Amber Terry, Athens Bible School

“Same time next week,” one of Dustin’s friends called after him. “Sure, see ya then,” Dustin replied. Dustin, a single father with two jobs, loved his Saturday evening games with the guys. It was his only free time during the week. He loved his walk home too, it was his only time to let his mind wander freely. He turned the corner to Palmer Street, almost home. Dustin’s peaceful walk soon took a drastic change. Sirens began to blare. Then he heard the word “freeze!” as an officer approached with a gun pointed straight at Dustin. He did as the policeman said, though he had no idea what was going on. The officer handcuffed Dustin and shoved him in the back of his car. Soon they were on their way to jail. Dustin soon learned that a local gas station had been robbed just 30 minutes earlier. The clerk had described the thief as a young, African-American male, wearing a white t-shirt and baggy jeans, just like Dustin.

Dustin’s head was racing in a hundred different directions. He just kept thinking of his little girl back at home, and how he had no money to hire an attorney. Dustin was innocent, but how would he defend himself? He had little education, and knew nothing about the legal system. He felt doomed. Then he remembered what the policeman had said when he had arrested him. “You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.” That’s right, Dustin lived in the United States of America. He did have the right to an attorney, even for a minor offense, thanks to a man named Clarence Earl Gideon.

Clarence Gideon was accused of breaking into a poolroom and taking money from a vending machine and stealing wine, beer, and soda, as well. (Dudley 11) He was arrested for the burglary on June 3, 1961. (Dudley 13) Just like Dustin,

Gideon was not a wealthy man and had little education. Clarence Gideon had a wife and five children at home. He had worked numerous odd jobs over the years. He was not a model citizen and had been in and out of jail over the years, usually for burglary. This time, Clarence Gideon was innocent of the crime he had been accused of committing. He soon learned that he would have to go to trial and defend himself without a lawyer. Gideon realized that his chances for defending himself were slim. He knew that judges and juries rarely believed the word of a poor person with a criminal record. Gideon, however, could not afford a lawyer and was forced to defend himself. (Dudley 12) In the early 1960s, when this event occurred, states were not required to provide a lawyer in many criminal cases. (Story of Gideon) The only time a lawyer was provided was if the crime was considered a capital offense, but Gideon’s crime was only considered a minor offense. A capital offense is a crime that has the possibility of a death sentence, if convicted. (Dudley 14) Clarence Gideon did request an attorney but was denied because his case was considered a minor offense that was being tried in a state court, not a federal court. (Ibid)

Clarence Gideon had to represent himself. Although he tried his best it wasn’t enough. He was convicted by the jury, and sentenced to serve five years in prison. (Gideon’s Trumpet) Gideon refused to simply give up. He started reading law books from the prison library. He learned that the United States Constitution, the supreme law of the land, gave everyone the right to an attorney. The United States Supreme Court, however, had never given that right to the thousands of people who were facing the same situation in various state courts and couldn’t afford to hire a lawyer. Clarence Gideon got a pencil and started writing to the Supreme Court about how the situation was unfair. The United States Supreme Court, against all odds, picked Clarence Gideon’s letter and decided to hear his case. (Story of Gideon) His appeal to the Supreme Court was originally heard under the name *Gideon v. Cochran*. H.G. Cochran was the director of the Florida Division of Corrections. The name was later changed to *Gideon v. Wainwright* when Louis L. Wainwright took over as the director of the prison system. (Dudley 18) Clarence Earl Gideon would finally have his day in court. A few months later, on March 18, 1963 the United States

Supreme Court gave a final decision on Clarence Gideon’s letter. They agreed with him. Clarence Gideon’s trial had been unfair because he had been denied the right to a lawyer. (Story of Gideon) Clarence Gideon had made a difference.

Gideon’s fight was not over yet. He was still not a free man. He was, however, granted a second trial, with a defense attorney, Fred Turner. At Clarence Gideon’s new trial, Fred Turner was able to show that the state’s eye witness was lying, and may have even been involved in the robbery himself. He was also able to show that some of the evidence shown in the original trial appeared guilty, but had a perfectly innocent explanation. Fred Turner also made sure that Clarence Gideon was able to tell his side of the story and get a fair trial. Clarence Earl Gideon was proven innocent and became a free man. (Story of Gideon)

Gideon v. Wainwright is a landmark Supreme Court case that has aided in giving justice to all Americans in regards to their legal right to counsel. As the late Robert F. Kennedy said, “If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell ...to write a letter to the Supreme Court... the vast majority of American law would have gone on functioning undisturbed. But Gideon did write that letter, the Court did look into his case ...and the whole course of American legal history has been changed.” (Gideon’s Trumpet) On Clarence Gideon’s tombstone, the following words can be found “Each era finds an improvement in law for the benefit of mankind.” These words are a truly fitting tribute to an ordinary American who believed in justice and pursued it with a passion. (Gideon’s Trumpet) Gideon made a difference in the lives of so many Americans. No matter how poor you may be, or how little the crime, as an American you will always be granted a fair trial with an attorney to help defend you. Justice truly is for all. ▲▼▲

Works Cited

Dudley, Mark. *Gideon v. Wainwright*. 1st. New York: Henry Holt and Company, Inc. 1995. 11 -12-13-14-18. Print.

“Gideon’s Trumpet.” www.criminaljustice.org/public.nsf/championarticles/A030lp61?OpenDocument. Feb 2003. National Association of Criminal Defense, Web. 27 Feb 2010.

“Story of Gideon v. Wainwright.” www.ocpd.ct.us/content/Gideon/Gideon%20Story.htm. Web. 27 Feb 2010.



Do Terrorists Deserve Justice?

By Michael Bellamy, Central High School

Today a great choice has been placed in front of the nation; this choice exists to determine if terrorists such as those involved in 9/11 are to be tried in military tribunals or in federal court. This topic raises the question of whether those who have committed one of the most heinous acts against the United States deserve treatment as regular people who have broken the law or as enemy combatants in a war. The urge to punish these people is great, maybe even merited. But is a punishment clearly for revenge just? The debate on this topic has been going on for months and neither those in favor of tribunals nor federal courts seem to be making any salient impacts on the issue since President Barack Obama had terrorists moved to the mainland to await trials and although the fates of some have been decided, it is difficult to judge these terrorists on a case-to-case basis considering the severity and number of cases. Despite this relocation and previous cases the decision on how to try them remains mostly undecided.

The vacillation in this issue arises from a great divide on whether the Constitution's procedure should be followed or will the desire of the people be satisfied. These are two very important parts on the hindrance of an actual decision on this issue and next the role of the people will be addressed.

Today the people of America are once again in a great fervor over the issues currently plaguing our country. This has led to some harsh contradictions, because although it is good to be involved in politics, the qualities that make it work are being left out of some groups' and individuals' agendas. An example is the growing lack of compromise and bipartisanship found in the political ideas of these conglomerates. These discrepancies cause the representatives elected by people where these groups reside to

enact and support ideas that gridlock the system in order to maintain some job security. The personal views of those involved are also subject to come into play and there is no doubt that any American would wish for the toughest time on the terrorists.

Next on the other side of this debate are the procedures and directions of the Constitution. The Constitution is the backbone of our democracy and it gives procedure on how to deal with situations like our current fight with terrorists, but not in concrete terms for an America in our current standpoint. The debate starts with the fact that there really is no war on terrorism, despite the numerous soldiers we have sent to fight and the "War on Terror" that is often discussed no war had been declared in fact it would be impossible to have a "War on Terror" considering that it is an emotion. These decisions and actions by our government have led to misconceptions on the status of our country's affairs. The Constitution states that only enemy combatants we are at war with can be tried by military tribunal, and since we are not at war with terrorists we can not properly charge them in that fashion. This causes a discrepancy because terrorists can be held as enemy combatants when caught; this was the primary basis for their stays at Guantanamo Bay.

The numerous problems in procedure are currently heading toward the use of federal courts with actions like those of President Obama. This decision is primarily contested because many believe that civilian or federal courts will not punish terrorists heavily enough. They want to make sure that the fates of the terrorists are sealed and justifiable to their great crimes. There are also many that think that the use of these courts will hurt our country's moral or cause some other sort of harm to those who might show up or be exposed to the terrorists in their trips and trials in America, this is a common argument in the case of Khalid Sheikh Mohammed's move to New York for trial. The reasons for military tribunals listed above are being disapproved though. The results of numerous endeavors to investigate how to better handle the situation has yielded information that clearly shows that federal courts are actually harder on terrorists, for instance tribunals have only tried three suspects and convicted them for a combined time of less than two years. Meanwhile federal courts have given out numerous life sentences.

The tribunals do have the potential to be tougher than federal courts because of the few but significant differences that help to produce verdicts. Tribunals are a court system created within the military to handle enemies we are at war with. They allow for the quick and systematic presentation of evidence and cases in a way the leader of the court deems correct, to a certain degree. This system has worked well in the past in such instances as the attempted spying of two German officials during WWII that resulted in their capture and heavy sentencing. The differences start with the fact that regular citizens are not allowed to be present at military tribunals; this is because of the possibility of classified information being used in a case. Tribunals do feature an appointed counsel for the defendant; they also feature a jury like counsel to decide the verdicts of defendants. The differences even extend to how the proceedings of the court are handled and what is allowed and deemed presentable in court. The leader of the court is usually an officer and they serve as a sort of judge for the tribunal. This officer is responsible for deciding what evidence is admissible in the tribunal and moderating the case. The case is also different in the aspect of its admittance of hearsay, testimony to the thoughts or words of one actually involved, as evidence. Lastly, the council of soldiers that serves as the jury does not require unanimous votes. The largest majority they need is in pursuit of the death penalty when a seven-out-of-nine vote is needed.

The argument over the destination of the terrorists of America is still sketchy. They are the most discriminated faction for the US and their justice would not in all likelihood be considered behind closed doors. This leads to the question of whether or not our greatest enemies deserve justice by our hands. The answer is yes because we all deserve justice and unfair treatment in the pursuit of petty revenge will only perpetuate the claims of terrorists. The implications of not treating our enemies with at least the respect of a reasonable trial could be catastrophic for those unlucky enough to fall into the hands of our terrorist enemies. Justice for all in this situation may not be deserved but for a country trying to gain the world's respect and obtain peace for its citizens some things must be put aside in order to reach a final goal and this kind of gesture is often needed to get an even bigger point across. ▲▼▲



Alabama State Bar • 415 Dexter Avenue • P.O. Box 671 • Montgomery, Alabama 36101
{334} 269-1515 • {334} 261-6310 FAX • Toll-free {800} 354-6154 {for ASB members only}

Alabama State Bar members have access to valuable educational programs and select discounts on products and services to benefit both your practice and achieve a work-life balance. You also can take advantage of invaluable contacts, resources, ideas and information that will enhance your professional success. As your partner in the practice of law, we encourage you to use these benefits.

Managing your law practice

- Casemaker Legal Research334-269-1515 Ext. 2242
- Business Planning & Technology Assistance334-269-1515
Ext. 2242
- Lawyer Referral Service334-269-1515 Ext. 2140
- Join a Substantive Law Section.....334-269-1515 Ext. 2162
- CoreVault [data backup].....1-866-609-4ASB
- Pennywise Office Products1-800-942-3311
- CLE Information334-269-1515 Ext. 2176
- Fee Dispute Resolution Program.....334-269-1515 Ext. 2176
- Schedule Meeting Room Space
(at the Bar Center)334-269-1515 Ext. 2162
- Legal Specialization334-269-1515 Ext. 2176
- Schedule Video Conferencing Room
(at the Bar Center).....334-269-1515 Ext. 2242
- FedEX1-800-636-2377
- Legal Directories Publishing Co. (Blue Book).....214-321-3238
- Easy Soft Discounted Software.....1-800-905-7638

Ethics & professional responsibility

- Ethics Opinions334-269-1515 Ext. 2184
 - Volunteer Lawyers Program.....334-269-1515 Ext. 2246
 - Lawyer Assistance Program334-269-1515 Ext. 2238
 - Point, click & find what you need334-269-1515 Ext. 2218
- www.alabar.org*

Insurance & retirement

- ISI (Insurance Specialists, Inc.) - major medical.....1-888-ISI-1959
- Blue Cross Blue Shield Long-Term Care1-866-435-6669
- GEICO - automotive, home, etc.1-800-368-2734
- ABA Retirement Funds.....1-877-947-2272
- AirMed.....1-800-356-2161

Online

- Membership Directory334-269-1515 Ext. 2124
- The Alabama Lawyer*.....334-269-1515 Ext. 2124
- Addendum*.....334-269-1515 Ext. 2124
- Public Information Pamphlets.....334-269-1515 Ext. 2126





J. ANTHONY MCLAIN

Absent Valid Attorney's Lien, the File of the Client Belongs to the Client

QUESTION:

"Fact Situation No. 1: A law firm (the "Firm") represents a client (the "Client") and maintains five different files relating to five different matters ("Matter 1, Matter 2, Matter 3, Matter 4, Matter 5") all of which are different. The Firm has an account receivable due from the Client relating to work performed on Matter 5, but all amounts due the Firm for previous work performed on matters 1 through 4, inclusive, have been paid in full. The Client has delivered a letter to the Firm directing the transfer of his files to a different firm (the "New Firm"). With respect to the foregoing, please respond to the following questions:

- "1. Does the Firm have a lien, pursuant to Section 34-3-61 *Code of Alabama* (1975), on all papers of the Client in its possession, which would include all papers relating to matters 1 through 5, inclusive, even though matters 1 through 4 were not in reference to the services rendered creating the purported lien, or
- "2. Does the Firm have a lien solely on the papers relating to Matter 5 and, thus, must release to the New Firm, in accordance with the Client's instructions, all files relating to matters 1 through 4, inclusive?"

"Fact Situation No. 2: Assume facts are the same that are contained in Fact Situation No. 1 except that all work product of the Firm relating to matters 1 through 5, inclusive, has been maintained and kept in one file of the Client. Would the questions set forth in Fact Situation No. 2 be answered in the same manner, and if not, please explain?

"Because client matters are now pending and work has been requested on various client files, (much of which is a matter of urgency), the ability to perform services is dependent on your ruling on the above facts. Accordingly, please expedite your response to this ruling request."

OPINIONS OF THE GENERAL COUNSEL Continued from page 235

ANSWER:

Fact Situation No. 1: As a matter of ethics, it would appear that the firm would have a lien only on the papers relating to Matter 5, and therefore must release the client files in accordance with the client's instructions.

DISCUSSION:

The Disciplinary Commission has repeatedly held that the files of a client belong to the client absent some fee dispute or attorney's lien. See RO-86-02, RO-91-06 and RO-90-92, attached. Specifically, in RO-86-02, the Commission stated:

"Subject to the attorney's lien provided for in *Code of Alabama* (1975), §34-3-61, the attorney must provide copies of a client's complete file to the client upon request if it is material delivered to the lawyer by the client or if it consists of an original document prepared by the lawyer for the client."

The Commission further opined that:

"Where the attorney has received full compensation for his services rendered in connection with a given file, he must surrender these materials to the client upon the client's request." (Emphasis supplied).

This principle was reaffirmed in RO-87-148, attached hereto, which fully cites the then-applicable disciplinary rule, as well as the statutory provision concerning attorneys' liens.

ANSWER:

Fact Situation No. 2: If the work product of the firm relating to matters 1 through 5, inclusive, is so intricately interwoven that it cannot be, with reasonable effort, segregated, the statute would appear to allow the attorney's lien to attach to the entire work product.

DISCUSSION:

The work product of the firm relating to matters 1 through 5, inclusive, may or may not be subject to segregation. If the work product is such that the matters for which the firm has been compensated cannot be, with reasonable effort, separated from the whole, the language of the statute would appear to protect all papers of the integrated file.

If, on the other hand, with the exercise of reasonable effort, such segregation of the work product relating to matters 1 through 4 can be accomplished, then the answer to Fact Situation No. 2 would be the same as that stated in Fact Situation No. 1, above. [RO-92-05] ▲▼▲

Lake Martin, Alabama



YES " SHE " DID 30 lbs.

Alabama
State Record
Lake Martin
1955 - 55 lbs.



A Birthday Present 24 lbs.

Can You
Catch The
Next State
Record ???



A Trophy Catch 45 lbs.

Private Guide Service
Group Charter Accommodations
Unique Business Meeting
Fish Aboard The " Striper 2 "



Private Lake Home Rentals
Professional or Personal Gift
Concierge Services
We " ONLY " Fish For The Record

Lake Martin Concierge * Alexander City, AL * Thomas Looney, Jr. * (256) 234-5233 * LakeMartinConcierge.Net



ROBERT L. MCCURLEY, JR.

For more information about the Institute, contact Bob McCurley at (205) 348-7411 or visit www.ali.state.al.us.

There were over 1,300 bills filed but only 240 passed both houses of the legislature. There were also a record number of vetoes by the Governor. Some of the bills listed do not have act numbers because they have not been signed by the Governor and may still be pocket-vetoed.

Headline-grabbing issues

The legislature, in this election year, faced some of its most difficult and highly contentious issues, with bingo, charter schools, ethics and budgets just to name a few. Only the budgets were passed. Here is some background information on these issues since they are bound to be an election issue and will probably be back next year:

Bingo – The Alabama Constitution Section 65 provides:

Lotteries and gift enterprises prohibited

“The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.”

The Criminal Code, Title 13A-12-20 *et. seq.* enumerates the “Gambling Offenses.”

LEGISLATIVE WRAP-UP

Continued from page 237

In light of these prohibitions there are currently 16 counties that have some form of authorized “charity bingo.” Most noteworthy have been Victoryland, Greenetrack, Jefferson County and over 2,000 machines in Walker County. In all, five counties were operating “bingo machines.”

The Alabama Supreme Court in *Barber v. Cornerstone Community Outreach, Inc.*, on November 13, 2009, held the term “bingo” as used in the Lowndes County amendment was referenced to the traditionally known game of bingo with characteristics following:

1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
2. Alphanumeric or similar designations are randomly drawn and announced one by one.
3. In order to play, each player must pay attention to the values announced; if one of the values matches a value on one or more of the player’s cards, the player must physically act by marking his or her card accordingly.
4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
5. A player must recognize that his or her card has a “bingo,” i.e., a predetermined pattern of matching values, and, in turn, announce to the other players and the announcer that this is the case before any other player does so.
6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.

The court enumerated the machines operate like slot machines, the entire game lasts six seconds, involves no

numbered cards, requires no player interaction other than inserting cash and pressing a button, and the player learns the outcome through a display that tells the player if he or she won and a smaller display that shows a bingo board and the balls that could have been drawn. The player is not told who, if any, won the “bingo” game.

The following week, November 20, 2009, the supreme court in *Macon County Greyhound Park v. Knowles* reversed an award of \$10,000,000 against Victoryland for failure to pay off on an award she claims she was entitled due to a bingo machine award but expressed no opinion as to whether the amendment authorizing bingo was legal.

In yet another case, the supreme court in *Surles v. City of Asheville*, on January 29, 2010, overturned a trial court’s ruling that the 1992 amendment authorizing “charity bingo” was legal and that bingo could be played electronically on a machine. The court concluded the ordinance allowing bingo extended far beyond the permissible definition of bingo.

The senate approved a substitute bill by a narrow vote. The next day officials from the U.S. Justice Department interviewed three senators who previously had not voted for the earlier version of the bingo bill. This inevitably chilled the prospects for passage in the house of representatives. The bill never came up for a vote in the house of representatives.

Charter Schools

Governor Riley made charter schools one of his priority pieces of legislation. Forty states have approved legislation allowing for charter schools, including all those around Alabama. Our surrounding states have embraced charter schools in varying degrees: Tennessee has 12, Georgia has 71, Mississippi has one and Florida has 356. Charter schools have been around since the first one in Minnesota and became more active since 1998 as a part of the “Charter School Expansion Act of 1998.”

Charter schools are elementary or secondary schools in the United States that receive public money but do not abide by some of the rules, regulations and statutes that apply to other public schools in exchange for some type of accountability for producing certain results, which are set forth in each school's charter. (See www.uscharter schools.org.) This bill was never considered.

Ethics

Forty-seven bills were introduced concerning various aspects of ethics, including campaigning, the Ethics Commission, lobbying, use of public funds, etc. Although there are only 140 legislators, there are over 630 lobbyists. The first bill to pass the house of representatives this year banned pac-to-pac transfers but it died in the senate.

Budgets

With the lagging economy and unemployment, funding the needs of state budgets was a challenge. Both the General Fund and the Education Trust Fund passed the legislature without the anticipated additional federal stimulus money. There will inevitably be cutbacks in all agencies.

Alabama Law Institute- Prepared Legislation

The Acts with Comments are available at
www.ali.state.al.us.

Amendments to Revised Lt. Partnership Act—Enacted

Act 2010-211 (HB 115)—Representative Cam Ward and Senator Roger Bedford

This Act changes the effective date for coverage of all existing lt. partnerships from January 1, 2012 to January 1, 2011 to be consistent with the effective date of the new Business Entities Code.

Child Abduction Prevention Act— Enacted

HB 213 (Act 2010-212)—Representative Cam Ward and Senator Wendell Mitchell

This Act provides a procedure to be followed by a court when there is a credible risk a child is about to be abducted and taken to another state or foreign country. This Act will become effective January 1, 2011.

Adult Guardianship Jurisdiction— Enacted

HB 114 (Act 2010-500)—Representative Tammy Irons and Senator Arthur Orr

This Act provides the same jurisdictional procedure for adult guardianships of aging parents as with children living in different states. It also provides that a state will recognize the initial order of a guardianship when the individual moves to another state. The Act follows the same procedure as the current law for child guardianships in Alabama.

Amendments to Trademark Act— Enacted

HB 165 (Act 2010-747)—Representative Greg Canfield and Senator Ben Brooks



Physician Experts!
We have thousands of practicing, board certified physician expert witnesses in all medical specialties.
☑ Testimony
☑ Opinion Letters
☑ Review for merit
Flat rate referrals; flat rate reviews
Your satisfaction GUARANTEED
Med-mal EXPERTS, Inc. www.medmalEXPERTS.com
888-521-3601

LEGISLATIVE WRAP-UP

Continued from page 239

This Act amends the current trademark law passed in 1988 to keep Alabama's law consistent with changes to the federal law and the Model Trademark Act.

Satisfaction of Residential Mortgages

SB 170—Senator Del Marsh and Representative James Buskey—Passed Senate unanimously but died on house calendar

This bill makes the supplying of payoff statements and the satisfaction of real estate mortgages the same as for personal property mortgages in Alabama. It further provides for an alternative method of satisfaction of a real estate mortgage other than filing a bill to quit title in circuit court.

Election Law

HB 145 Write-In Candidates (Vetoed)

This Act amends *Ala. Code* § 17-6-28 concerning requirements for write-in candidates.

HB 161 (Act 2010-687) Municipal Elections

This act amends *Ala. Code* §§ 11-46-25, 11-46-27, 11-46-39, 11-46-44, 11-46-45, 11-46-46, 11-46-50, 11-46-55, 11-46-55.1, 11-46-57, 11-46-58, and 11-46-67, as well as *Ala. Code* §§ 17-7-25, 17-11-14, and 17-11-15. These amendments provide for extensive changes in municipal elections.

SB 108 (Act 2010-537) Statewide Voter Registration Lists for Political Parties

This Act amends *Alabama Code* §17-4-33 regarding the computerized statewide voter registration list to provide that the Secretary of State would provide a copy of the electronic voter list to each political party that satisfies the ballot access requirements for that election.

Schools

HB 37 (Act 2010-264) Revocation of Teachers' Certificates upon Conviction

This Act amends § 16-23-5 of the *Alabama Code* which relates to the revocation of a teacher or principal certificate and the termination of employment contracts based upon a conviction of a Class A felony or misdemeanor sexual offense involving a minor child or an offense of immoral conduct.

HB 38 (Act 2010-497) School Employee/Sex with Student

This Act makes it a crime for a school employee to engage in a sex act with a student, male or female, who is under 19 years of age. The employee may be placed on paid administrative leave pending adjudication of the charge, and further disciplinary action may be taken pursuant to the Teacher Tenure Act or Fair Dismissal Act.

HB 79 (Act 2010-210) School Vacancies Posted

This Act amends §§ 16-9-11, 16-12-1 and 16-60-111.1 of the *Alabama Code* which relates to the manner and method of posting notices for vacancies in the offices of certain personnel for K-12 schools and post-secondary educational institutions.

HB 105 Physical Education (Vetoed)

This Act amends § 16-40-1 of the *Alabama Code* which relates to physical education in public and private schools and requires all students in grades K-8 to take physical education, which can include dance, marching band or JROTC.

SB 162 (Act 2010-725) Prepaid College Tuition

This Act funds the PACT Plan to make it actuarially sound and make other changes to how the plan is run

as follows: The Act appropriates \$547,629,100 in the years 2014-2027. In the event the plan is certified as actuarially sound at any point before 2027, any remaining appropriations would be cut off.

With the exception of the University of Alabama System and the Auburn University System, institutions of higher education may only increase mandatory fees, charges and tuition, paid under a PACT contract, by an amount equal to 2.5 percent annually. This amount may increase based on the rate of return achieved by the PACT investments.

Criminal Law

HB 2 (Act 2010-496) Short-barrel Shotguns

This Act amends § 13A-11-63 to permit the possession of short-barreled rifles and short-barreled shotguns that are permitted under federal law.

HB 144 (Act 2010-129) Registered Sex Offender Commercial Driver's License

This Act creates new *Ala. Code* § 36-6-49.25 to prohibit a registered sex offender from being issued or renewing a commercial driver license with an endorsement allowing operation of a commercial passenger vehicle (P endorsement) or a school bus (S endorsement).

HB 259 (Act 2010-504) Interstate Compact for Adult Offenders

This Act requires out-of-state convicted offenders to pay a transfer fee for supervision when moving into the state.

HB 298 (Act 2010-508) Metal Recyclers

This Act amends the criminal code to provide criminal penalties for selling or giving cash for stolen metal to metal recyclers.

HB 348 (Act 2010-754) County Drug Courts

This Act authorizes each presiding judge of a judicial circuit to establish a drug court.

HB 432 (Act 2010-705) Human Trafficking

This Act creates crimes relating to human trafficking, and provides a civil action for a victim of human trafficking. A victim of human trafficking may bring a civil action for actual, compensatory and punitive damages, treble damages, injunctive relief, and attorney fees.

HB 485 (Act 2010-438) Solicitor's Fees Added to Court Costs

This Act provides that a solicitor's fee shall be added in all criminal cases where a finding of guilty is issued. The solicitor's fee shall be equal to the court costs and in addition to and not in lieu of any other fees or costs.

HB 528 (Act 2010-215) Electronic Tracking of Ephedrine Sales

The Alabama Criminal Justice Information Center will implement and make available to retailers and law enforcement a real-time electronic sales-tracking system to monitor over-the-counter nonprescription sale of products with ephedrine or pseudoephedrine and maintain records of the names of purchasers and amounts of all products sold for at least 36 months. It further requires that purchasers be adults and provide government-issued photographic identification.

SB 570 (Act 2010-734) Community Punishment and Corrections Act

This Act amends §§ 15-18-171 & 184 of the *Alabama Code* relating to the Community Punishment and Corrections Act.

LEGISLATIVE WRAP-UP

Continued from page 241

Family Law

HB 32 Grandparent Visitation (Vetoed)

This Act repeals the provision in *Ala. Code* § 30-3-4.1, relating to grandparent visitation, which currently prohibits granting visitation to a grandparent where the related parent has given up or lost custody or has financially abandoned the child, unless the grandparent has an established relationship with the child, thus allowing a grandparent to obtain visitation if it is in the best interest of the child. The Act would further provide that if the child is living with a biological parent, there is a rebuttable presumption the custodial parent or parents know what is in the best interest of the child.

Court Bonds Online THE BAR PLAN

A Broad Range of Bonds:

- Probate
- Court Bonds
- Notary Bonds

We Offer:

- 24-Hour Turnaround Time
- Competitive Rates
- Knowledgeable Underwriting

Anytime. Anywhere.

Apply at www.onlinecourtbonds.com
or call our underwriters at 877.553.6376
from 8:00 a.m. to 5:00 p.m. CST.

HB 159 (Act 2010-502) Privacy of 911 Calls

This Act provides the audio recording of a 911 call cannot be released except: (a) to law enforcement; (b) with consent of the caller; or (3) with a court order stating the right of the public outweighs the privacy interest of the individuals involved.

SB 134 (Act 2010-538) Protection from Abuse Act

This Act amends the Protection from Abuse Act to define crimes covered, persons protected and clarifying provisions relating to uniform acts.

SB 195 (Act 2010-260) Criminal Littering

This Act permits county license inspectors and county solid waste officers to give citations for littering but not make arrests and place persons in jail unless they are also certified law enforcement officers.

Roads

HB 65 (Act 2010-735) Three-tiered Drivers' Licenses

This Act creates a three-tiered structure for drivers' licenses. This act amends §§ 23-5-64, 32-6-7.2 and 32-6-8 of the *Code*. A student may not operate a vehicle while operating any handheld communication device.

Stage I: Learner's permit

Stage II: Regular driver's license with restrictions

Stage III: Unrestricted driver's license

HB 100 (Act 2010-692) School Reduced-Speed Zones

This provides schools are authorized to have a "reduced-speed zone" for schools. The zones are to be marked at appropriate distances and maintained by the appropriate authority maintaining the road.

SB 121 (Act 2010-555) Road Bond Plan

This proposed amendment to the Constitution of 1901 provides for a ten-year road, bridge and transportation construction and improvement plan.

If approved, this amendment would provide that beginning in the fiscal year ending September 30, 2011 and continuing through 2020 the legislature shall appropriate \$100,000,000 from the Alabama Trust Fund.

SB 349 (Act 2010-599) Revocation of Youthful Offenders' Drivers' Licenses

This Act allows revocation of driver's license of a person adjudicated a youthful offender based on a vehicular homicide.

Taxes

HB44 (Act 2010-135) TVA Payments in Lieu of Taxes

The TVA has been making payments to the State of Alabama in lieu of taxes. The proceeds were partially distributed to "dry counties" (counties in which it was illegal to sell liquor). This Act distributes proceeds to counties served by the TVA.

HB 260 (Act 2010-557) Reemployment Act of 2010

Businesses who hire an unemployed person who is drawing unemployment compensation and keeps them employed for one year will receive an income tax deduction of 50 percent of the gross wages of the person hired.

HB 504 (Act 2010-568) Alabama Income Taxes

This Act amends the Alabama Income Tax Code to conform state income tax payments to be the same as payments for the federal system.

Other Bills of Interest

HB 102 (Act 2010-499) Trade Secret Crimes

This Act amends § 8-27-4 to include a provision creating criminal penalties for malicious appropriation of trade secrets in addition to civil penalties.

HB 258 (Act 2010-557) Attorney General Opinions on Internet

This Act amends *Ala. Code* § 36-15-1(3) to eliminate the requirement that the Attorney General print and distribute paper copies of his or her official opinions, instead requiring the Attorney General to post them on the Internet and send e-mail copies to any public official who has asked to receive them.

HB 546 (Act 2010-709) Death Benefits for Peace Officer Dependents

This Act amends § 36-30-2 of the *Code of Alabama* 1975 which provides death benefits for the dependents of a peace officer, firefighter or volunteer firefighter as a result of injuries received in the line of duty, by removing the requirement that the death be within 10 years of the injury which causes death.

SB 127 (Act 2010-218) Volunteer Firefighters

Volunteer firefighters and volunteer emergency medical service providers who are subpoenaed as witnesses in civil actions are authorized under this Act to receive per diem and mileage.

SB 315 (Act 2010-185) Model Energy Code

The Model Energy Code is replaced by the Alabama Energy and Residential Codes, amending *Ala. Code* §§ 41-23-80 to 41-23-85.



ANNUAL MEETING CLE

Now Available on Flashdrive!

\$15

CLE Program Materials from the 2009 Alabama State Bar Annual Meeting are available on a Flashdrive. It's convenient, portable and worth every cent!

PLUS! You'll get the Alabama Rules of Professional Responsibility and other information from many of the bar's programs, sections and services.

How do I order a Flashdrive?

Simply remit a check or money order made payable to the Alabama State Bar for \$15 and forward it with your name and mailing address either clearly marked on the check or money order, or by filling in the following information:

Order as many Flashdrives as you would
like for only \$15 each!

Name: _____

Address: _____

For informational purposes only.
No CLE credit will be granted.

MAIL TO:
Alabama State Bar, Programs Department, Post Office Box 671, Montgomery, AL 36101

Notice

- **Randy Scott Arnold**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 21, 2010 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 08-185(A) before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Supreme Court of Alabama entered an order reinstating Birmingham attorney **Monroe Dykes Barber, Jr.** to the practice of law in Alabama, with certain conditions, effective December 9, 2009, based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Barber had been on disability inactive status since October 10, 2006. [Pet. No. 09-2095]
- Birmingham attorney **Daryl Patrick Harris**, who was summarily suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective December 2, 2009, was reinstated to the practice of law in Alabama, effective January 25, 2010, pursuant to order of the Disciplinary Commission of the Alabama State Bar dissolving the summary suspension. [Rule 20(a), Pet. No. 09-2677]
- The Supreme Court of Alabama entered an order reinstating **Walter Mark Northcutt** to the practice of law in Alabama, effective February 5, 2010. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Northcutt had received a 91-day suspension effective September 11, 2009. [Rule 28, Pet. No. 09-2784]

Transfer to Disability Inactive Status

- Montgomery attorney **Jennifer Renee Jordan** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective December 16, 2009. [Rule 27(c), Pet. No. 09-2789]
- On February 17, 2010, the Supreme Court of Alabama accepted the February 3, 2010 order entered by the Disciplinary Board, Panel I, of the Alabama State Bar and ordered that Mobile attorney **Ryan Scott Small** be transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective February 3, 2010. [Rule 27(c), Pet. No. 09-2097]

Disbarments

- Scottsboro attorney **Grady Douglas Benson** was disbarred from the practice of law in Alabama effective January 25, 2010 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the April 10, 2009 order of Panel III of the Disciplinary Board of the Alabama State Bar. In ASB No. 08-175(A), Benson failed to disburse settlement funds on a subrogation claim for medical expenses and court reporting fees. Benson also converted client funds deposited into his trust account for his own personal use. [ASB No. 08-175(A)]
- Birmingham attorney **Christopher Patrick Moseley** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 13, 2009, the date of Moseley's previously ordered interim suspension. The supreme court entered its order based upon the December 2, 2009 order of the Disciplinary Board of the Alabama State Bar. Moseley improperly withdrew client or lender funds totaling approximately \$533,367 from his trust account from January 2004 through September 2008. Moseley also incurred approximately \$18,028 in overdraft and insufficient funds charges which he failed to reimburse to his trust account. [Rule 20(a), Pet. No. 09-1152(A); ASB No. 08-1417(A)]
- The Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Board, Panel I, disbarring Montgomery attorney **Beatrice Elaine Oliver** from the practice of law in Alabama, effective January 22, 2010. The disbarment was entered as reciprocal discipline regarding the April 7, 2009 disbarment of Oliver entered by the State Bar of Texas. [Rule 25, Pet. No. 2009-1489]

Suspensions

- Oneonta attorney **James Robert Bentley** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for 91 days. The Disciplinary Commission ordered that said suspension be held in abeyance and Bentley be placed on probation for a period of two years pursuant

to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Commission accepted Bentley's conditional guilty plea wherein he pled guilty to violations of rules 1.3, 1.4(a), 1.15(a), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* Bentley failed to perform legal work for a client which he was hired to do. [ASB No. 09-1794(A)]

- On October 5, 2009, an order was entered by Panel I of the Disciplinary Board of the Alabama State Bar suspending Gadsden attorney **John Edward Cunningham** for two years with the suspension being held in abeyance. Cunningham was also placed on probation for three years. Cunningham entered a conditional guilty plea to violations of rules 1.3, 1.5(a), 8.4(a), 8.4(c), and 8.4(g), *Alabama Rules of Professional Conduct*. In or about October 2003, Cunningham was retained to represent a client in a domestic matter and was paid attorney's fees and expenses. Although being assured the divorce pleading had been filed, after approximately one year, the client learned nothing had been filed. [ASB No. 04-282(A)]
- Effective January 27, 2010, attorney **Temo Lopez** of Birmingham was suspended from the practice of law in Alabama for noncompliance with the 2008 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 09-1506]
- Birmingham attorney **Temo Lopez** was suspended from the practice of law in Alabama for 91 days, effective January 27, 2010, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of Disciplinary Commission of the Alabama State Bar. On September 11, 2009, the Disciplinary Commission accepted Lopez's conditional guilty plea in ASB nos. 07-82(A) and 09-1053(A) and Rule 20(a), Pet. No. 09-1150, and ordered that he be suspended from the practice of law in Alabama for 91 days. The suspension was deferred pending successful completion of a two-year probationary period. As part of the plea, ASB No. 07-82(A) and Rule 20(a), Pet. No. 09-1150 were dismissed. Lopez pled guilty to a violation of Rule 8.1(b), *Ala. R. Prof. C.*, and admitted that during the course of a disciplinary investigation, he failed to respond to requests for information from a disciplinary authority.

Thereafter, Lopez failed to comply with the terms and conditions of probation and failed to respond to a subsequent order to show cause why his probation should not be revoked by the Disciplinary Commission. Based upon Lopez's failure to respond to the order to show cause, the Disciplinary Commission revoked Lopez's probation and placed into effect his 91-day suspension. [ASB No. 09-1053(A)]

- Huntsville attorney **Barbara Currie Miller** was inter-
imly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated January 15, 2010. The Disciplinary Commission found that Miller's continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a), Pet. No. 2010-176]
- Mobile attorney **Wesley Dale Rogers** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective January 22, 2008, the date of Rogers's previously ordered summary suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Rogers's conditional guilty plea wherein Rogers admitted that he violated rules 1.3, 1.4(a), 1.4(b), 8.1(b), and 8.4(a), *Alabama Rules of Professional Conduct*. Rogers failed to appear in court on behalf of his clients and failed to respond to repeated requests from the bar concerning pending disciplinary matters. [Rule 20(a), Pet. No. 08-05; ASB No. 08-024(A)]
- Centre attorney **Rodney Loring Stallings** was suspended from the practice of law for 91 days in Alabama by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission ordered that said suspension be held in abeyance and Stallings be placed on probation for two years pursuant to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Commission accepted Stallings's conditional guilty plea to violations of rules 1.2(a), 1.3, 1.4(a), 1.4(b), and 8.4(a), *Ala. R. Prof. C.* Stallings failed to appear at court dates and did not file an answer in a case resulting in the issuance of a default judgment. [ASB No. 09-1288(A)]

- On February 8, 2010, Birmingham attorney **Cynthia Hooks Umstead** was summarily suspended from the practice of law for her failure or refusal to respond to the Office of General Counsel regarding a disciplinary matter. A hearing on a petition to dissolve the suspension was held February 16, 2010 and an order was entered dissolving the suspension. Umstead was instructed to contact the Alabama State Bar Practice Management Assistance Program and was taxed all costs regarding the disciplinary matter and hearing. [Rule 20(a), Pet. No. 2010-238]
- Phenix City attorney **Elliot Joseph Vogt** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 5, 2010. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Vogt had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 10-266]
- Tuscaloosa attorney **Benjamin Lee Woolf** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective December 23, 2009. The supreme court entered its order in accord with the provisions of the November 18, 2009 order of the Disciplinary Commission of the Alabama State Bar accepting Woolf's conditional guilty plea to violations of the *Alabama Rules of Professional Conduct*. Specifically, in ASB No. 09-1574(A), Woolf admitted that he was paid to represent a client in a land/survey dispute and failed to take substantive action in the matter. Woolf offered to make a full refund of the attorney's fees to the client. Thereafter, it was determined that the refund was made from his operating account. Woolf admitted that he failed to deposit the client funds into his trust account. The investigation also revealed that Woolf made personal payments out of his trust account. In ASB No. 09-2223(A), Woolf was retained to represent a client in a discrimination case against a former employer. Woolf obtained a right-to-sue letter

DISCIPLINARY NOTICES

Continued from page 247

from the EEOC but failed to file the suit prior to the expiration of the statute of limitations. Thereafter, Woolf informed the client that he had missed the statute and entered into a negotiated settlement with the client without advising the client that she should consult an independent attorney about the matter. According to the terms of the settlement, Woolf was to pay the client \$4,000 upon execution of the agreement and sign a promissory note for the payment of \$8,000 by October 15, 2008. Woolf paid the initial payment, but subsequently failed to honor the promissory note. In doing the above, Woolf violated rules 1.3, 1.4(a), 1.8(h), 1.15(a), 8.4(a), 8.4(b), and 8.4(g), *Ala. R. Prof. C.* [ASB nos. 09-1574(A) and 09-2223(A)]

Public Reprimands

- On January 15, 2010, Montgomery attorney **Roianne Houlton Conner** received a public reprimand without general publication for violations of rules 3.3(a)(1) and 8.4(c), *Ala. R. Prof. C.* On April 1, 2009, the Disciplinary Board entered an order accepting Conner's conditional guilty plea. In or about May 2006, Conner represented the husband in a domestic relations case and a related civil case. Two other attorneys were opposing counsel. Conner was directed by the court to prepare an order in the domestic relations matter. After the order was prepared, it was circulated to opposing counsel and was rejected due to concerns surrounding language ordering the sealing of the court file. Conner redrafted the order and opposing counsel objected again to the same language. Later, opposing counsel received a copy of the order still containing the objectionable language which had been signed by the judge. Conner submitted an order to the court that did not reflect the actual agreement of the parties and their counsel. Conner's conduct in this matter violated rules 3.3(a)(1) and 8.4(c), in that she provided false information to the court. [ASB nos. 07-21(A) and 07-22(A)]
- On October 30, 2009, Bessemer attorney **David James Hobdy, Jr.** received a public reprimand without general publication for violation of rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct.* In or about July 2004, the client retained Hobdy to represent him with an auto accident claim. The client had

difficulty contacting Hobdy. After the client declined a settlement offer of \$1,500 from the insurance carrier, he was not able to contact Hobdy for approximately six months. From March 2005 until March 2006, the insurance carrier contacted Hobdy on numerous occasions with requests for information. Hobdy responded on only one occasion. On or about May 26, 2006, the insurance carrier offered \$3,800 but heard nothing further from Hobdy. After the statute of limitations expired in July 2006, the insurance carrier closed its file. Hobdy failed to diligently pursue his client's claim, allowed the statute of limitations to run and failed to adequately communicate with his client.

- Birmingham attorney **Scott Patrick Hooker** received a public reprimand without general publication on January 15, 2010 for violations of rules 1.3, 1.4(a) and 8.4(d), *Alabama Rules of Professional Conduct.*

In 2003, while a sole practitioner, Hooker represented a client in a medical malpractice case. During the course of the representation, Hooker failed to return the client's telephone calls, failed to timely file a response to a motion for summary judgment and failed to timely submit expert testimony. The court set a hearing on the motion for summary judgment and allowed Hooker an additional opportunity to name an expert and submit testimony, with a warning that he would be sanctioned if he failed to comply. The court also ordered that Hooker file written acknowledgment of receipt of the order.

Although Hooker disclosed the identity of the expert, he did not acknowledge receipt of the order, did not file expert testimony and did not attend the hearing. A motion for summary judgment was entered in favor of the defendant. Thereafter, Hooker filed a motion to alter, amend or vacate the judgment, claiming that he failed to note the date of the hearing when he received the order. The court granted Hooker's motion and reset the hearing. Hooker was held in contempt of court and ordered to pay attorney's fees incurred by the defense and a fine. [ASB No. 08-199(A)]
- On January 15, 2010, Anniston attorney **Donna Britt Madison** received a public reprimand without general publication for violations of rules 1.3 and 1.4(a),

Ala. R. Prof. C. In February 2007, Madison was retained to represent a client in a child custody matter and was paid a retainer of \$1,500.

During her representation of the client, Madison failed or refused to adequately communicate with her client. Madison was unavailable to the client for long periods of time. Madison's landlord informed the client that she had not seen her at her office in several weeks. Madison's telephone was also disconnected and certified mail sent to her was returned unclaimed. Neither the client nor the court was able to contact Madison. A hearing was held August 1, 2007 regarding temporary custody of the client's child. Madison failed to inform the client of the court's order and did not file the motion to alter, vacate or amend the final order until October 8, 2008. The client almost lost permanent custody of her children because Madison neglected her client's case and failed or refused to communicate with her and the court. [ASB No. 2008-111(A)]

- On January 15, 2010, Auburn attorney **Julie Boggan Kaminsky** received a public reprimand without general publication. Kaminsky's prior discipline was also considered. On or about March 7, 2008, the Office of General Counsel received a copy of a letter to Kaminsky from her bank informing her that her law firm's trust account was overdrawn. On or about March 13, 2008, the Office of General Counsel again received notice from Kaminsky's bank that she had previously transferred \$5,000 from her personal account to her trust account. On March 17, 2008, the bar wrote Kaminsky requesting a written explanation within 14 days. On March 27, 2008, she responded via e-mail and stated that she did not believe her trust account held any client funds and that when the bank

AMERICAN LEGAL SEARCH

Where Lawyers Look for Lawyers®

Attorney Search Consulting

- Partner Level Placements
- Practice Group Acquisitions
- Law Firm Merger Consulting



Contact:

Richard G. Brock, Esq.

richard@AmericanLegalSearch.com

Birmingham
(205) 930-9811

Nationwide
(800) 930-9128

www.AmericanLegalSearch.com

Atlanta Birmingham Nashville New York Tampa

DISCIPLINARY NOTICES

Continued from page 249

notified her of the overdraft, she closed the account. She also offered to send copies of her bank statements and she was granted an extension to submit said records.

After receiving no records or further response and after several unsuccessful attempts to contact Kaminsky, on July 11, 2008, the bar sought and obtained an order summarily suspending her license to practice law. Kaminsky ultimately submitted her responses to this matter and another disciplinary matter on August 7, 2008.

Examination of Kaminsky's trust account records revealed several personal transactions. Although it appeared that the transactions did not involve client funds, Kaminsky improperly utilized her trust account for personal transactions. Kaminsky's conduct in this matter violated rules 1.15(a), 8.1(b), 8.4(a) and 8.4(g), *Ala. R. of Prof. C.*, in that she used her trust account to conduct personal transactions, and failed or refused to respond to the bar in a disciplinary matter. [ASB No. 08-127(A)]


- On January 15, 2010, Auburn attorney **Julie Boggan Kaminsky** received a public reprimand with general publication for violations of rules 1.3, 1.4(a), 1.4(b) and 8.1(b), *Ala. R. Prof. C.* Prior discipline was also considered. Kaminsky was retained and paid a \$500 retainer by the clients in or about July 2007 to represent them regarding the adoption of their grandchild. Although Kaminsky was moving to another city, she assured the clients that she could still represent them. Kaminsky subsequently contacted them on only one other occasion.

Kaminsky failed or refused to respond to the bar regarding this matter; therefore, a petition for summary suspension was filed and a restraining order suspending Kaminsky's law license was entered July 11, 2008. Kaminsky submitted her response on August 7, 2008. A hearing was held concerning her suspension following which her license was reinstated.

Kaminsky failed or refused to adequately pursue this matter and failed or refused to adequately communicate with her clients. [ASB No. 08-129(A)]

- Mobile attorney **Michael Hilding McDuffie** received a public reprimand without general publication on January 15, 2010 for violations of rules 8.4(b) and (d), *Alabama Rules of Professional*

Conduct. In 2008, during a visit to the Mobile County jail, McDuffie provided an inmate with tobacco and rolling papers, which is considered prison contraband, and is a misdemeanor. The criminal case was eventually *nolle prossed*. [ASB No. 08-161(A)]

- Mobile attorney **John Charles Wilson** received a public reprimand without general publication on January 15, 2010 for violations of rules 1.3, 1.4(a) and 8.4(g), *Alabama Rules of Professional Conduct.* Wilson represented a client in various matters over a three-year period. Although there was considerable disagreement regarding the scope of his representation in each of the matters, it was clear that Wilson either undertook to represent the client or did not reasonably communicate to him that he was not undertaking the specific representation or limiting the scope of that representation. Wilson specifically agreed to represent the client in a contemplated civil action against a bank and was subsequently authorized to file suit. However, Wilson never filed suit and the client's attempts to communicate with him were unsuccessful. By the time the client verified that a civil action had not been filed, the statute of limitations had run. [ASB No. 08-121(A)]
- On September 11, 2009, Montevallo attorney **Barry Dean Woodham** received a public reprimand without general publication for a violation of Rule 1.3, *Alabama Rules of Professional Conduct.* On February 11, 2009, Panel I of the Disciplinary Board of the Alabama State Bar entered an order accepting Woodham's conditional guilty plea. Woodham represented the complainant as a plaintiff in a civil matter. Woodham failed to keep his client adequately informed about the status of her case. He failed to conduct discovery and missed several discovery deadlines that had been set forth in a scheduling order. Woodham filed a motion to withdraw and a motion to continue but failed to follow up to determine whether the motions were granted. The complainant was not aware of her court date and failed to appear. As a result, the court ruled in favor of the defendant. Woodham's conduct in this matter violated Rule 1.3, *Alabama Rules of Professional Conduct*, in that he did not diligently pursue the legal matter for his client. [ASB No. 08-05(A)] 

About Members

John D. Gibbons announces the opening of **John D. Gibbons & Associates PC** at 306 Morgan Ave., Mobile 36606. Phone (251) 479-0700.

R. Allen Kilgore, Jr. announces the opening of **Kilgore Firm LLC** at 505 20th St. N., Ste. 1675, Birmingham 35203. Phone (205) 321-4200.

Christopher M. McIntyre announces the opening of **The Law Firm of Christopher M. McIntyre LLC** at 502 Church Ave., SE, Jacksonville 36265. Phone (256) 782-2080.

Samuel H. Monk, II, retired circuit judge, announces he is no longer of *counsel* with Wilson, Dillon, Pumroy & James, LLC but will continue an independent ADR and limited general practice at 1419 Leighton Ave., Ste. A, Anniston 36207.

B. Dale Stracener announces the opening of **The Law Firm LLC** at Sixth Ave.-Court St. East, Ste. 1, Ashville 35953. Phone (205) 594-3223.

Among Firms

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces two new shareholders in its Birmingham office, **J. Murphy McMillan** and **Chad J. Post**.

William B. Beckum and **Dustin J. Kittle** announce the opening of **Beckum Kittle LLP** at 6919 Hwy 119 S., Ste. 300, Alabaster 35007. Phone (205) 358-3100.

Benton & Centeno LLP announces that **Amy M. Hazelton** has become a partner.

Bond, Botes, Shinn & Donaldson PC announces **Amy M. Hampton** has joined as an associate.

Raymond C. Bryan announces the opening of **The Bryan Law Firm LLC** at 114 West 10th St., Ste. A, Anniston 36201. Phone (256)

237-5018. **Stephen H. Miller** and **Robert B. Folsom, Jr.** have joined the firm.

Burr & Forman LLP announces that **William J. Long, IV, Briana M. Montminy, Marc P. Solomon, Calvert Sullins Whatley**, and **Thomas M. Wood** have become partners.

The **City of Decatur** announces the appointment of **Emily Baggett Prater** as city prosecutor.

Daniell, Upton, Perry & Morris PC announces that **Jonathon R. Law** has become a partner.

Duell Law Firm LLC announces a name change to **Duell/Hunt LLC** and that **Robert O. McNearney** has joined as an associate.

Estes, Sanders & Williams LLC announces that **Rob Hornbuckle, R. Matthew Elliott, Fisher Wise** and **Tim Allen** have become associates.

Feld, Hyde, Wertheimer, Bryant & Stone PC announces that **Donna M. Bailer** has been made a shareholder.

Fields Law Firm announces that **J. Douglas Fields, Jr., Stuart McAtee** and **Charles J. Lorant** have joined the firm and the firm name is now **Fields McAtee Lorant Attorneys**.

Thomas S. Hale, Terry A. Sides and **G. Meador Akins** announce the opening of **Hales, Sides & Akins LLC** in Birmingham and Fairhope. Phone (205) 453-9800.

Hill, Hill, Carter, Franco, Cole & Black PC announces that **James Edwin Beck, III** has joined as an associate.

The shareholders of **Nix Holtsford Gilliland Higgins & Hitson PC** announce the firm name is now **Holtsford Gilliland Higgins Hitson & Howard PC**. They also announce that **Murry S. Whitt** has become a partner and that **Joana S. Ellis** has joined as *of counsel*.

Johnson & Walker LLC announces that **Virginia E. Miller** has become a partner and the firm's new name and address are



PLEASE E-MAIL
ANNOUNCEMENTS TO
MARCIA DANIEL
marcia.daniel@alabar.org

REMINDER: Due to space constraints, *The Alabama Lawyer* no longer publishes changes of address unless it relates to the opening of a new firm (not a branch office) or a solo practice.

ABOUT MEMBERS, AMONG FIRMS

Continued from page 251

Johnson, Johnson & Miller LLC, 2727 19th Place S., Ste. 110, Birmingham 35209.

Johnston Barton Proctor & Rose LLP announces that **Kenny Williamson Keith, Alan D. Mathis** and **Mary Brunson Whatley** have become partners.

Jeffrey C. Kirby and **William T. Johnson, III** announce the formation of **Kirby Johnson, PC** and that **Micah S. Adkins** has joined as an associate, with offices at 2007 Third Ave., N., Birmingham 35203. Phone (205) 458-3553.

Lanier Ford announces that **J. Mark Bledsoe** and **W. Graham Burgess** are now shareholders.

Little Mendelson PC announces that **Charles Powell** and **Jennifer Swain** have joined as shareholders.

Mann, Cowan & Potter PC announces that **M. Dykes Barber, Jr.** has joined as an associate.

Morris & Brumlow PC announces that **J. Andrew Isom** has joined as an associate.

William L. Campbell, Jr. is now a member of **Riley Warnock & Jacobson PLC**.

Scott, Sullivan, Streetman & Fox PC has named **Nicholas P. Hebert** partner.

Pamela B. Slate, Clinton C. Carter and **Sabrina L. Comer**

announce the formation of **Slate Carter Comer PLLC** with **Amy D. Gundlach** and **Matthew D. Shaddrix** as associates with offices at One Commerce St., Ste. 850, Montgomery 36104. Phone (334) 262-3300.

The **Law Offices of Aimee C. Smith PLLC** announces that **Elizabeth Bern Spear, Jacob P. Mauldin** and **Sarah F. Henson** have joined as associates.

Smith, Spires & Peddy PC announces that **Thomas M. Little** and **Jason M. Langley** have become partners.

Kelley M. Tynes and **L. Ben Morris** have been named partners of **Starnes & Atchison LLP**.

Wooten, Thornton, Carpenter, O'Brien, Lazenby & Lawrence announces a name change to **Thornton, Carpenter, O'Brien, Lazenby & Lawrence**, and that **W. Lee Sims** has joined as an associate.

Philip A. Barr has become assistant chief counsel with the **U.S. Immigration and Customs Enforcement Department of Homeland Security**.

Walding LLC announces that **Jan M. Eberhardt** has joined the firm.

John Bradwell, Robert C. Black, Jr., Mike Cohan and **Scott M. Speagle** have joined **Webster, Henry, Lyons, White PC** as partners and the new firm name is **Webster, Henry, Lyons, White, Bradwell & Black PC**.

Kacy O'Brien Donlon announces the opening of **Wiand Guerra King PL** at 3000 Bayport Dr., Ste. 600, Tampa 33607. Phone (813) 347-5104.

Chad E. Woodruff and **Huel M. Love, III** announce the opening of **Woodruff & Love** at 119 East St. N., Talladega 35160. Phone (256) 362-4949. ▲▼▲

WILL THEY BE TAKEN CARE OF IF SOMETHING HAPPENS...

Drane Insurance has been assisting lawyers and their families with the purchase of affordable life insurance from highly rated insurance companies since 1993. To avoid overpaying, call or visit our web site for a free quote to compare with your current life or business insurance policy. Look at the sample rates below.

\$250,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Annual Premium							
AGE:	30	35	40	45	50	55	60
10	\$110	\$110	\$132	\$220	\$282	\$475	\$748
15	\$125	\$125	\$152	\$270	\$398	\$600	\$960
20	\$152	\$152	\$202	\$340	\$515	\$775	\$1,325
30	\$230	\$241	\$339	\$525	\$797	\$1,545	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Annual Premium							
AGE:	30	35	40	45	50	55	60
10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
15	\$195	\$200	\$255	\$485	\$725	\$1,150	\$1,830
20	\$255	\$255	\$355	\$620	\$950	\$1,480	\$2,520
30	\$385	\$414	\$609	\$985	\$1,524	\$2,960	

Drane Insurance
(877) 610-3770

Life Insurance • Employee Benefits • Estate Planning • Annuities

LET US FAX OR EMAIL YOU A QUOTE

www.draneinsurance.com

In less time than it takes to
drink a cup of coffee...you can get a
PRONTO QUOTE for your

**LAWYERS PROFESSIONAL
LIABILITY INSURANCE.**



- ✓ Get a premium estimate during your first phone call.
- ✓ Get a customized quote usually within 6 hours.
- ✓ Get your CNA policy at your desk usually within 1 business day.

Call the Pros.
(800) 906-9654
www.gilsbarpro.com

*CNA is the largest underwriter of legal malpractice coverage in the U.S.
GilsbarPRO is the exclusive administrator for the CNA Lawyers
Professional Liability Program in the State of Alabama.*

GILSBARPRO CNA

Training Alabama Mediators for 15 Years!

MEDIATION

www.AlabamaMediation.com

For 15 years, our basic and advanced mediation seminars have provided an informative, entertaining and interactive CLE experience for Alabama attorneys. If you want to be a mediator (or just think like one!) our seminars will provide you with a marketable skill and a CLE experience unlike any other. Come find out why attorneys, judges, and mediators tell us that our programs are the best CLE seminars they've ever attended. Visit www.alabamamediation.com or call **800-237-3476** for more information.



BIRMINGHAM ■ HUNTSVILLE ■ MOBILE ■ MONTGOMERY

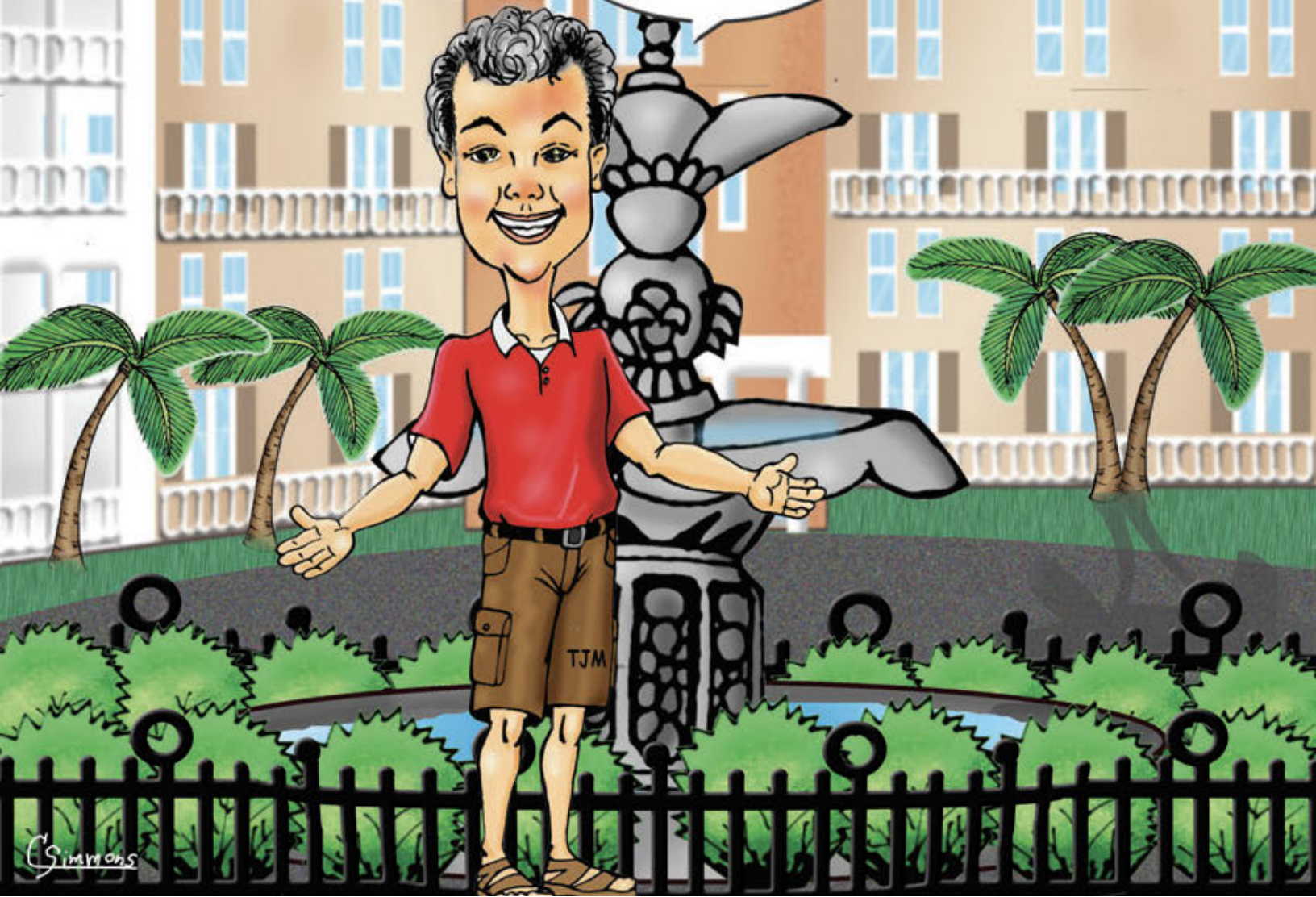
ALABAMA STATE BAR

2010 ANNUAL MEETING

July 14-17

Baytowne Wharf, Sandestin Golf and Beach Resort

Welcome to the meeting!





Amy & Tom

During my year as your Bar President, I've asked you to make a number of commitments. Perhaps most important of these is your commitment to Access to Justice. Since we started recruiting Volunteer Lawyers, and as of April 2010 we have added more than 1,200 new attorneys to this program and you have also agreed to donate \$800,000.00 to help with this. Thank you for all you have done.

Now, Amy and I invite you to make another commitment, one I am sure you will enjoy. Mark your calendar for the Alabama State Bar Annual Meeting, July 14-17, at the Village at Baytowne Wharf, in Sandestin. If you have not visited Baytowne, you're in for a treat! This is a beautiful resort, with lots of different accommodation choices and tons of things to do – shopping, dining, golf and, of course, the beach. There's even a shuttle service on the property to take you wherever you need to go. This is a great opportunity for a summer getaway with your family!

Of course, as a lawyer, the Annual Meeting also provides you with valuable opportunities to increase your knowledge about a variety of legal issues. But one of the most valuable parts of the Annual Meeting is the opportunity it provides for networking.

Please make your plans now to join us!

Thomas J. Methvin
President
Alabama State Bar



VIVA LAS VEGAS!

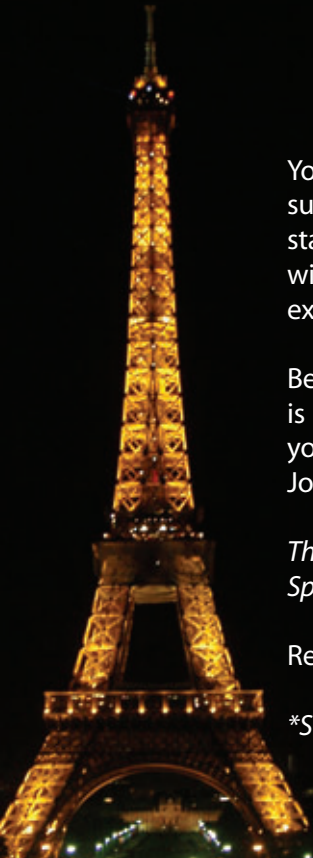
Your lucky day will have arrived when you win this year's Grand Prize Getaway to sunny Las Vegas. Included is round-trip airfare for two, with a four-day/three-night stay at the Hilton Club, located on the Vegas Strip. At this phenomenal resort, you will enjoy a full range of facilities including a fabulous spa and state-of-the-art exercise facilities.

Be sure to take a break from your winnings to fit in your VIP seating for "The Rat Pack is Back", the renowned dinner show revival of the legendary Vegas foursome. As you croon to the tunes at The Plaza, you will personally get to know Frank, Sammy, Joey and Dean.

*This incredible prize is provided compliments of ISI ALABAMA, a division of Insurance Specialists, Inc.**

Remember, what happens in Vegas will be shared at next year's Annual Meeting!

**Subject to availability for both airfare and resort accommodations*





Egil "Bud" Krogh was a member of the Nixon Administration's Special Investigation Unit (do you remember "The Plumber's Unit"?) who helped conduct illegal investigations of key administration opponents and was subsequently jailed for his role. Krogh, who went to prison and was disbarred for ordering and planning illegal actions at the behest of his mentors in the highest levels of government,

eventually was reinstated as an attorney. Today, an older and wiser Krogh tours the country speaking to attorneys and other groups about the importance of ethics and professionalism in a world where our ideals are constantly being tested. Many of his lessons are related in his new book, *Integrity: Good People, Bad Choices, and Life Lessons from the White House*. This is a cautionary and inspirational tale of regret and redemption placed in the context of a nationally-acclaimed CLE program.



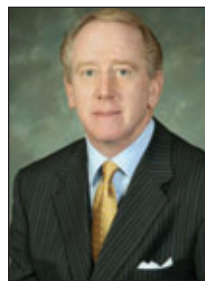
Bobby Lee Cook, 82, has tried thousands of cases in more than 40 states and several countries during the past six decades. Cook has represented moonshiners and money-launderers, bootleggers and bank-fraud schemers. The Rockefellers and Carnegies have been his clients and his defense of Savannah, socialite Jim Williams helped bring to life John Berendt's true-crime classic *Midnight in the Garden of Good and*

Evil. He remains one of the most sought-after criminal defense lawyers in the South and is widely believed to have inspired the TV-show character Ben Matlock. Cook has a history of representing unpopular clients and has frequently used people's basic mistrust of government and power as a foundation for his cases.



R. Lawrence Purdy is a litigation partner in the Minneapolis firm of Maslon Edelman Borman & Brand LLP. He has represented clients in product liability claims and lawsuits venued in virtually every state as well as the U.S. Virgin Islands and Puerto Rico. A significant portion of his practice deals with the issues of federal preemption and regulatory control over claims involving FDA-approved medical

devices. He also served as pro bono trial counsel for the plaintiffs in two landmark U.S. Supreme Court cases involving race-conscious admissions policies at the University of Michigan. As a result of his involvement in the Michigan cases, he has frequently been invited to discuss the role of race in college and university admissions.



When people think of **Archie Manning**, they think football. But Manning's appeal transcends his athletic achievements. Wherever he goes, he is recognized as an ambassador of goodwill and a molder of people. His drive, warm personality and sense of humor have been an inspiration to people. He was selected as one of 10 outstanding New Orleanians by Family Service of Greater New Orleans. Manning's

diverse and accomplished background sets the playing field as an inspiration for what is truly important in our lives – our family. While collegiate and professional football career is legendary it is his values that set him apart in today's world of role models. He and wife Olivia reside in New Orleans and have three sons, Cooper, Peyton and Eli. You may have heard of them. In honor of the Mannings' college football accomplishments, the Sugar Bowl has created the Manning Award to go to the nation's best college quarterback.

Maximum MCLE Credit-at-a-Glance

Wednesday <i>(3.0 hours Ethics credit)</i>	3.0 credit
Thursday	4.5 credit
Friday <i>(includes one hour of ethics credit)</i>	4.5 credit
Saturday	2.0 credit
Wednesday - Saturday	14.0 total

Note: Grand total of 26.5 hours of CLE credit programming offered during the annual meeting. CLE materials and general meeting and bar information will be placed on flash drives available to all attorneys at registration.

*Separate written materials will be furnished to all attorneys at this opening plenary session.

11:30 am

Executive Council Luncheon

Jasmine Ballroom, Second Floor

Noon – 6:00 pm

Refreshments upon arrival

Noon – 8:00 pm

2010 Annual Meeting Registration Opens

Magnolia Foyer – Baytowne Conference Center



WOW! 1:00 – 4:15 pm (includes 15-min. break)

Opening Plenary Session (3.0 hours CLE Ethics credit) **Good People, Bad Choices and Life Lessons from the White House**

Azalea Ballroom – Conference Center,
Second Floor

Speaker: Egil “Bud” Krogh, Hopkins, MN

This is a must-attend seminar and one of the most outstanding programs ever offered to ASB members. From a rising young presidential counsel, to indictment and a prison sentence, then redemption and the power of choosing what is right, Bud Krogh will “wow” you. Few of us will ever get that close to a President; he gives a history lesson that not only those who lived through the Nixon years can appreciate, but will make it spell-binding for other generations as well. Presented by The Professional Education Group, a national continuing education provider

Program Outline & Schedule

[Part I: 90 minutes]

Introduction

- *The Day Elvis Met Nixon* — Hidden ethical traps in personal loyalty
- The Integrity Zone model

The Fall — Rule 8 Run Amuck

- White House career
- Hot dogs, crime in D.C. and Judge G. Harrold Carswell

- Dr. Daniel Ellsberg and the White House Plumbers - Were we, as lawyers, competent for our task?
- Pleading guilty to a felony: 18 USC 241 — Deprivation of Rights of Citizens
- Watergate — lawyers disciplined
- Groupthink, peer pressure, unquestioned obedience to authority, misplaced loyalties, vanity (hubris and pride), ignorance and other threats to integrity
- National security? The ultimate conflict of interest
- The Williamsburg epiphany

Paying the Price — Seven-year Attorney Discipline Case, *In Re Krogh*

- We Shall Prevail - William L. Dwyer, Esq.
- "60 Minutes": Mike Wallace and Krogh
- Challenges in jail: Feb. 5, 1974 - June 15, 1974... on to DisneyWorld

15 minute break

[Part II: 90 minutes]

Legal Representation and Redemption

- William L. Dwyer, Esq.
- *In re Krogh*, 85 Wn.2d 462 (1975) and *In re Krogh*, 95 Wn.2d 504, 610 P.2d 1319 (1980)
- The right to a private hearing doesn't mean a private hearing is right
- Lessons from the reinstatement process and making amends

Groupthink Exercise

- Based on *Victims of Groupthink: A psychological study of foreign policy decisions and fiascoes* (1972 – Professor Irving Janis)
- How Groupthink occurs and strategies for overcoming Groupthink

Lessons for Professionals Today

- Honoring professional oaths and integrity in action
- IPSE DIXIT — How the world looks to a federal judge

4:15 pm

MCLE Commission Meeting

Commences immediately following Board of Bar Commissioners' meeting

Jasmine Ballroom, Second Floor

4:15 pm

Board of Bar Commissioners' Meeting

Camellia Ballroom I, Second Floor

4:15 pm

Young Lawyers' Section Business Meeting

Oak Boardroom, Second Floor

5:00 pm – 6:00 pm
Leadership Forum Alumni Wine and Cheese Reception (for classes 1-6 and their spouse or guests)

Azalea Foyer, Second Floor
Sponsored by LookingGlass Online Jury Research

6:30 pm
Board of Bar Commissioners' Cocktail Party and Dinner

Burnt Pines Country Club at Sandestin

WOW! 7:00 pm – 9:30 pm
Family Pizza and Movie Night (\$30 per person age 13 and above; children 12 and under free)

(For registrants and their families)
 Grand Sandestin Lawn
 Starting at 7 pm, as the sun begins to set, listen for the music, smell the oven-baked gourmet pizzas and trimmings in the buffet line and grab a cold beer as friends gather on the expansive lawn. As darkness settles, enjoy an old-fashioned outdoor movie with your family with popcorn, ice cream and drinks.

9:30 pm
Commissioners' Late-Night Cocktails

Third Floor Hospitality Suite, Grand Sandestin Hotel

Thursday, July 15, 2010

7:30 am – 5:00 pm
Registration

Magnolia Foyer - Conference Center, First Floor

7:30 am – 9:30 am
Coffee Bar

Magnolia Foyer

7:30 am - 8:30 am
Alabama Law Foundation Trustees' Meeting

Jasmine Ballroom, Second Floor

7:30 am – 8:45 am
Senior Lawyers' Breakfast (\$25 per person)

Camellia Ballroom II, Second Floor
"Not Done Yet" – 65 is the New 50
 Presenter: T. Maxfield Bahner, Chambliss Bahner & Stophel, PC
 Chattanooga

Chair, ABA Senior Lawyers Division
 All attorneys and their guests "around 55 and older" are cordially invited to this breakfast to hear an expert discuss opportunities and challenges for attorneys as we move into senior positions and transition into quasi - or actual retirement. With baby-boomers working longer years while enjoying excellent health, very few attorneys are slowing down. Come learn how baby-boomers are remaking retirement. Also, learn about the ASB's newly-formed Senior Lawyers' Section to see if you'd be interested in joining.

8:00 am – 5:00 pm
Legal Expo 2010

Magnolia Foyer, First Floor and Azalea Foyer, Second Floor
 Introduce yourself to representatives from suppliers that tailor their products and services to the legal community. Enjoy the array of valuable products, services and equipment that can help you deliver legal services more effectively. Be sure to enter your business card for daily drawings offered by the exhibitors.

9:00 am – Noon
Cartoons by Deano Minton

Baytowne Conference Center
 By popular demand, he's baaack! Cartoons by Deano Minton specializes in gift caricatures. Deano will make a free, personalized sketch for annual meeting registrants and their families. His caricatures have been published as editorial cartoons and illustrations in several local, regional and national magazines and newspapers. Be on the lookout for Deano; you'll find him wherever there's a large crowd!

9:00 am – 10:00 am
Featured Workshop: The Court as Commercial Radio: Telling the Story in Three Minutes or Less (Most of the Time) (1.0 hour CLE credit)

Magnolia Ballroom B
 Presenters: Hon. Thomas J. Marten, U.S. District Judge, Wichita and singer/songwriter Don Schlitz, Nashville



Hon. Thomas J. Marten



Don Schlitz

What happens when a two-time Grammy-winning Hall-of-Fame singer-songwriter with numerous Top 10 songs to his credit (e.g., "The Gambler," "Forever and Ever Amen") meets up with a fellow musician hidden as a U.S. District Judge? The results are terrific, amusing and informative to say the least.

9:00 am – 10:00 am
2010 Administrative Law Update (1.0 hour CLE credit)

Camellia Ballroom I, Second Floor
 Presenter: Jamie A. Durham, Alabama Home Licensure Board, Montgomery
Sponsored by the Administrative Law Section

9:00 am – 10:00 am
2010 Workers' Compensation Law Update (1.0 hour CLE credit)

Magnolia Ballroom C
 Presenters: Tracy W. Cary, Morris Cary Andrews Talmadge & Driggers, LLC, Dothan; Beverly S. Williamson, Zeanah Hust Summerford & Williamson, LLC, Tuscaloosa
Sponsored by the Workers' Compensation Law Section

10:00 am – 10:30 am

Visit Legal Expo

Magnolia Foyer, First Floor and Azalea Foyer, Second Floor

10:30 am – 11:30 am

Workshop: Your Individual Marketing Plan: Making the Commitment to Take Charge of Your Career in Turbulent Times (1.0 hour CLE credit)

Magnolia Ballroom D

Presenter: John Remsen, Jr., The Remsen Group, Atlanta
 Listen and learn from one of the country's leading authorities on law firm marketing. In a tight economy the rules have changed. Today's law firm must chart a course to improve profitability, secure new clients and sharpen strategic focus — while generating new enthusiasm and commitment among partners, associates and staff. This session features 60 minutes of solutions, not guesswork.

10:30 am – 11:30 am

2010 Labor and Employment Law Update (1.0 hour CLE credit)

Camellia Ballroom II, Second Floor

Presenter: David T. Wiley, Jackson Lewis, LLP, Birmingham

Sponsored by the Labor and Employment Law Section



10:30 am – 11:30 am
Workshop: Gamble on Gamble with a Little Update on Evidence (1.0 hour CLE credit)

Camellia Ballroom I, Second Floor

Presenter: Professor Charles W. Gamble, Henry Upson Sims Professor of Law, Emeritus, University of Alabama School of Law, Tuscaloosa



Hon. Charles Price



Hon. J. Scott Vowell



Hon. Sarah H. Stewart

10:30 am – 11:30 am

2010 Litigation Law Update: Tips for Litigators from the State Court Bench (1.0 hour CLE credit)

Magnolia Ballroom E

Moderator: Rhon E. Jones, Beasley Allen Crow Methvin Portis & Miles, PC, Montgomery

Panelists: Hon. Charles Price, 15th Judicial Circuit, presiding judge, Montgomery; Hon. Sarah H. Stewart, 13th Judicial Circuit, Mobile; Hon. J. Scott Vowell, 10th Judicial Circuit, presiding judge, Birmingham.

Sponsored by the Litigation Section

11:30 am – 11:45 am

Visit Legal Expo

Magnolia and Azalea foyers



Hon. Ed Carnes



Chief Justice Sue Bell Cobb



Hon. Joyce Vance

11:45 am – 12:45 pm

Appellate Practice: Effective Oral Arguments: Views from the Bench and Bar (1.0 hour CLE credit)

Magnolia Ballroom E

Moderator: Marc James Ayers, Bradley Arant Boult Cummings LLP, Birmingham

Panelists: Hon. Ed Carnes, U.S. Court of Appeals for the Eleventh Circuit, Atlanta; Chief Justice Sue Bell Cobb, Supreme Court of Alabama, Montgomery; Hon. Joyce Vance, U.S. Attorney for the Northern District of Alabama, Birmingham.

Sponsored by the Appellate Practice Section

11:45 am – 12:45 pm

Workshop: Characteristics of Today's Most Successful Law Firms: How Does Your Firm Perform? (1.0 hour CLE credit)

Magnolia Ballroom D

Presenter: John Remsen, Jr., The Remsen Group, Atlanta
 Our presenter brings effective and cost-efficient marketing and business development programs to law firms of all sizes and types. Take some notes to see how your firm measures up in today's economic environment.



Hon. Sharon L. Blackburn



Hon. Kristi K. DuBose

11:45 am – 12:45 pm

Workshop: State of the Federal District Courts in Alabama (1.0 hour CLE credit)

Magnolia Ballroom F

Moderator: David B. Byrne, III, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery

Panelists: Hon. Sharon L. Blackburn, chief judge, Northern District of Alabama; Hon. Kristi K. DuBose, U.S. District Judge, Southern District of Alabama

Sponsored by the Federal Practice Section

12:30 pm - 1:00 pm

Bloody Mary and Mimosa Reception Honoring 2010 ASB Award Winners

Magnolia Foyer and Veranda

Bloody Marys and Mimosas will be served prior to the annual Bench & Bar Luncheon and Awards program. You'll have an opportunity to congratulate some of the 2010 ASB award winners to be recognized during the luncheon.

Sponsored by ISI Alabama, Inc.

1:00 pm – 2:00 pm

Annual Bench & Bar Luncheon and Awards Program

Magnolia Ballrooms A, B, C

Presiding: Thomas J. Methvin, Beasley Allen Crow Methvin Portis & Miles PC, president, Alabama State Bar

Invocation: Clay A. Lanham, Vickers Riis Murray & Curran, LLC, Mobile, president, ASB Young Lawyers' Section

Special Presentations:

- Alabama Law Institute Legislative Awards
- Walter P. Gewin Award
- Judicial Award of Merit
- Alabama State Bar Award of Merit
- Alabama State Bar Pro Bono Awards
- Commissioners' Awards



WOW! 2:30 pm – 4:30 pm
Paint'n Place Pottery Studio Entertainment
(\$30 adults; \$15 children 12 and under)

Magnolia Ballroom F

Artist Denise Ives and her staff bring her popular hands-on pottery painting boutique shop inside one of the ballrooms in Baytowne Conference Center for an afternoon of creativity and fun. Children and adults will enjoy selecting from an assortment of ceramic pottery designs and painting them. All paints and materials will be provided. The painted pieces will be taken to the shop, fired in the kiln and returned to the conference center the following morning wrapped with each person's name. What a wonderful way to spend quality time with your family, explore your creative side and take home a unique, personalized piece of pottery.

2:30 pm – 4:30 pm

2010 Family Law Update (1.0 hour CLE credit)

Camellia Ballroom II, Second Floor

Presenter: Hon. J. Gary Pate, circuit judge, 10th Judicial Circuit, Birmingham

Sponsored by the Family Law Section (includes a one-hour business meeting to follow)

2:30 pm – 4:00 pm

Program #1 - 2010 Real Estate Law Update: The Real Estate Program: Recent Developments (Both programs total 1.5 hours CLE credit)

Magnolia Ballroom D

Presenter: Robert L. McCurley, Jr., director, Alabama Law Institute, Tuscaloosa

Program #2 – Electronic Recording & Real Estate Records Standards

Presenters: Honorable James W. Fuhrmeister, Chair, Commission on Electronic Recording of Real Property Records, Birmingham; Othni J. Lathram, Assistant Director, Alabama Law Institute, Tuscaloosa

Sponsored by the Real Property, Probate and Trust Law Section



2:30 pm – 4:00 pm

Workshop: An Introduction to Alabama's New eDiscovery Rule (1.5 hours CLE credit)

Magnolia Ballroom E

Moderator: Allison O'Neal Skinner, Sirote & Permutt, PC, Birmingham

Panelists: Hon. Robert S. Vance, circuit judge, 10th Judicial Circuit, Birmingham

and two attorneys will join Skinner in an updated and thorough analysis of the new rules. She is the first Alabama attorney to serve as a mediator or special master for eDiscovery.

4:00 pm – 5:00 pm

ADR Section Business Meeting

Magnolia Ballroom D

American Board of Trial Advocates 

5:00 pm – 6:00 pm

Cocktail Reception for the Alabama Chapter of the American Board of Trial Advocates (For ABOTA members)

Marlin Grill, Baytowne Village

Sponsored by the Alabama Chapter of American Board of Trial Advocates; Fred W. Tyson, president, Rushton Stakely Johnston & Garrett, PA, Montgomery

5:00 pm – 6:30 pm

14th Annual Alabama State Bar Volunteer Lawyers Program Reception (No ticket required)

Bistro Bijoux, Baytowne Village

Sponsors: Beasley Allen Crow Methvin Portis & Miles, PC; Maynard Cooper & Gale, PC; Cumberland School of Law; Ball Ball Matthews & Novak, PA; University of Alabama School of Law



6:00 pm – 7:30 pm

University of Alabama School of Law Alumni Reception (\$30 ticket required)

Camellia Ballrooms I, II



6:30 pm – 7:30 pm

Samford University Cumberland School of Law Alumni Reception (\$30 ticket required)

Magnolia Ballroom A



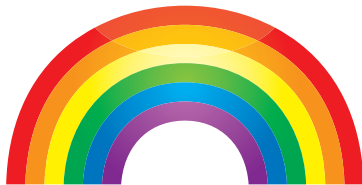
7:30 pm – 8:30 pm

Dessert Party for All Registrants (No Charge)

Jasmine Ballroom, Second Floor

Gather with alumni and friends and continue the long tradition of networking and collegiality.

Sponsored through the generosity of the Thomas Goode Jones School of Law



8:00 pm until

The Rainbow Reception – Celebrating the Diversity of Our Profession

Magnolia Ballrooms E, F

Come enjoy great food, drinks, music and collegiality. This is “the” party for everyone and “the place to be!”

Sponsored by the Alabama State Bar, the Alabama Lawyers Association, the Magic City Bar Association, and others to be determined.

9:00 pm

Fireworks Over the Bay

It wouldn't be summer in the South without a spectacular fireworks show on a warm summer evening. The fireworks can be seen from most locations in The Village at Baytowne Wharf. This favored signature event highlights a perfect Thursday night at the annual meeting.

Friday, July 16, 2010

7:30 am – Noon

Registration

Magnolia Foyer - Conference Center, First Floor

7:30 am – 9:30 am

Coffee Bar

Magnolia Foyer

8:00 am – 12:30 pm

Legal Expo 2010

Magnolia Foyer, First Floor and Azalea Foyer, Second Floor

7:30 am – 8:30 am

Early Morning Breakfasts

- **Past Presidents' Breakfast**
Camellia Ballroom I, Second Floor
- **The Univ. of Ala. Chapter of the Order of the Coif Breakfast (\$25 per person)**
Jasmine Ballroom, Second Floor
- **Fifth Annual Leadership Forum Alumni Breakfast (\$25 per person)**
Camellia Ballroom II, Second Floor
- **Inns of Court Coffee (No Charge)**
Cypress Ballroom, Second Floor

Sponsored by the Cumberland School of Law



9:00 am – 10:00 am

Second Plenary Session: Defense of Liberty (1.0 hour CLE credit)

Magnolia Ballrooms A, B, C

Presenter: Bobby Lee Cook,

Cook & Connelly, Summerville, GA

Bobby Lee Cook, 82, has tried thousands of cases in more than 40 states and sev-



eral countries during the past six decades. Cook has represented moonshiners and money-launderers, bootleggers and bank-fraud schemers. The Rockefellers and Carnegies have been his clients and his defense of Savannah, socialite Jim Williams helped bring to life John Berendt's true-crime classic *Midnight in the Garden of Good and Evil*. He remains one of the most sought-after criminal defense lawyers in the South and is widely believed to have inspired the TV-show character Ben Matlock. Cook has a history of representing unpopular clients and has frequently used people's basic mistrust of government and power as a foundation for his cases.



10:00 am – Noon
Cartoons by Deano Minton

Baytowne Conference Center
 Cartoons by Deano Minton specializes in gift caricatures. Deano will make a free, personalized sketch for annual meeting registrants and their families.



10:15 am – 12:15 pm
Featured Workshop – To D or Not to D: A Debate on Diversity (2.0 hours CLE credit, including 1.0 hour CLE Ethics)

Magnolia Ballroom F
 Moderator: Bryan Fair, Thomas E. Skinner
 Professor of Law and Associate Dean of Special Programs, University of Alabama

School of Law, Tuscaloosa
 Presenters: R. Lawrence Purdy, Maslon Edelman Borman & Brand, LLP, Minneapolis; Hon. John L. Carroll, Cumberland School of Law, Birmingham
Sponsored by the Alabama State Bar, Diversity in the Profession Committee, Alabama Lawyers Association and the Women's Section of the Alabama State Bar

10:30 am – 11:30 am
Legislative Update - The Gubernatorial Candidates (1.0 hour CLE credit)

Magnolia Ballroom D
 (Followed by the Alabama Law Institute 2010 Annual Meeting)

10:30 am – 11:30 am
2010 Criminal Defense Law Update (1.0 hour CLE credit)

Camellia Ballroom I, Second Floor
 Presenter: Donald L. Colee, Jr., Birmingham
Sponsored by the Alabama Criminal Defense Lawyers Association



WOW! **12:30 pm – 2:00 pm**
NEW! Sports Tailgate Party Luncheon (\$35 per person)

Magnolia Ballrooms A, B
 Presenter: Archie Manning, New Orleans,
 When people think of Archie Manning, they think football, Mississippi roots, former NFL Pro Bowl quarterback and league MVP, father of the modern NFL as well as father

of three sons, Cooper, Peyton and Eli. People far and wide have been inspired by his warm personality, his drive and his sense of humor. The Alabama State Bar Annual Meeting is all about families. Come and meet Archie and listen to what he has to say about "family values in the limelight" and what matters the most in life.

12:30 pm – 1:00 pm
Women in the Law Reception

Magnolia Ballroom C
 Women's Section Reception/Cocktails
Sponsored by the Women's Section and the Alabama State Bar

1:00 pm – 2:00 pm
Eighth Annual Maud McLure Kelly Award Luncheon

Magnolia Ballroom C
 This year's recipient is Sara Dominick Clark, Birmingham
Sponsored by the Women's Section

2:00 pm – 5:00 pm
Family Tennis Tournament (\$25 per person)

Sandestin Resort Tennis Center, Baytowne
 The third annual Family Tennis Tournament will be held at the Sandestin Resort Tennis Center (located at Baytowne). This tournament will be a Round Robin. *Partners will be drawn and players will rotate partners* after each match of four games. All family tennis players are encouraged to participate in this event, but a partner is not required when registering to play.
Sponsored by Regions Morgan Keegan Trust

2:00 pm – 3:30 pm
Alabama Access to Justice Commission Meeting (No CLE credit)

Magnolia Ballroom E



2:00 pm – 4:00 pm
Build-A-Bear Special Event – Children's Party

Camellia Ballroom I, Second Floor
WOW! Kids will have a blast at this year's Children's Party as each child will make an animal of their choice at no charge. Bears, bunnies and dogs will be among the furry friends to bring to life. Clothes and shoes for your "new best friend" will be on sale from the Build-A-Bear Workshop staff during the party, so bring a little extra money if you would like to purchase any accessories. **Recommended for all children under the age of 12.** Parents and grandparents are welcome to attend.

2:30 pm – 3:00 pm
Women's Section Business Meeting

Cypress Boardroom, Second Floor

2:30 pm – 4:00 pm

**Payday Lending Reform, a Legal Perspective:
Consumer Assistance to Avoid Payday Loan Debt
Trap (1.5 hours CLE credit)**

Magnolia Ballroom D

Moderator: Roman A. Shaul, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery

Panelists: Shannon M. Farley, legal director, Alabama Appleseed Center for Law & Justice, Inc., Montgomery; Stephen A. Stetson, policy analyst, Alabama Arise, Montgomery; Earl P. Underwood, Jr., Fairhope

Sponsored by the Alabama Appleseed Center for Law & Justice, Inc.

2:30 pm – 3:30 pm

**2010 Alabama Defense Lawyers Association
Update on Employment Law (1.0 hour CLE credit)**

Magnolia Ballroom F

Presenter: Christopher W. Weller, Capell & Howard PC, Montgomery

Sponsored by the Alabama Defense Lawyers Association

6:00 pm – 8:30 pm

**Fifth Annual Silent Auction Fundraiser
(No ticket required)**

Magnolia Foyer

(Proceeds benefit the Lawyer Assistance Foundation and the Justice Janie L. Shores Scholarship Fund)

Here's your chance to bid on some fabulous items at incredible prices. Mingle with your friends while you shop until you drop.

The auction is organized with the assistance of Karen L. (Mastin) Laneaux & Jeanne Marie Leslie.

Sponsored by the Alabama State Bar, Lawyers Helping Lawyers Committee and the Women's Section

6:00 pm – 9:00 pm

Cartoons by Deano Minton

Baytowne Conference Center

Cartoons by Deano Minton specializes in gift caricatures. Deano will make a free, personalized sketch for annual meeting registrants and their families.



6:30 pm – 9:30 pm

**President's Closing Night Family
Paradise Island Feast (\$40 per
person age 18 and above; \$20
per person ages 13-17; children
12 and under free)**

Magnolia Ballrooms A, B, C

As the 2010 Annual Meeting comes to a close, there's nothing better than taking

a trip to the tropics. This outstanding party includes drinks and a full buffet dinner featuring music and tropical mood lighting as we honor and thank Tom, and his wife, Amy. During the evening, each person (or family group) registered will receive a 6" X 9" (matted to 11" X 14") print of a special commissioned piece of art to commemorate the meeting. The celebrated artist is Donna Burgess of Sandestin and Seaside, whose paintings are widely collected. You must be present to receive your special take-away gift.

Saturday, July 17, 2010



7:00 am - 8:00 am

Legal Run-Around

The 1-Mile Fun Run/Walk and 5K Run will start on Baytowne Avenue East and continue around the Baytowne Loop (Village/Lakeside Loop). The registration table will be located near the entrance sign, "Baytowne Marina & Tennis Center." The course will take you along a bike path and walkway showcasing Sandestin's natural beauty. Runners and walkers of all ages are invited to participate. First-place male and female attorney winners in the 5K will receive a complimentary registration to the 2011 Annual Meeting.

Advance registration is required. T-shirts will be awarded to all participants who complete the course. Water and Gatorade will be provided, and water stations will be set up along the course.

Sponsored by Freedom Court Reporting, Inc.

7:30 am – 8:45 am

Christian Legal Society Breakfast (\$20 per person)

Camellia Ballroom II, Second Floor

Moderator: Samuel N. Crosby, Stone Granade & Crosby PC, Daphne

Presenter: Chief Justice Sue Bell Cobb, Supreme Court of Alabama, Montgomery

Sponsored in part by Stone Granade & Crosby PC, Daphne and Spruell & Powell LLC, Tuscaloosa

7:30 am – 9:30 am

Coffee Bar

Magnolia Foyer

8:30 am – 9:15 am

Silent Auction Wrap-Up

Magnolia Foyer

For those with a winning bid who did not pick up or pay for items during the Silent Auction

9:15 am – 11:15 am

Grand Convocation: State of the Judiciary (2.0 hours CLE credit)

Magnolia Ballrooms A, B, C

Presiding: Thomas J. Methvin, Beasley Allen Crow Methvin Portis & Miles PC, president, Alabama State Bar

- Brief State of the Judiciary Address

Presenter: Chief Justice Sue Bell Cobb, Supreme Court of Alabama, Montgomery

Special Presentations

- Recognition of 50-year members
- Recognition of retiring commissioners
- Local Bar Achievement awards
- Most improved local bar in VLP Participation
- Recognition of alumni of Alabama State Bar Leadership Forum (Classes 1-6)
- Grand Prize Getaway

The program concludes with the installation of Alyce M. Spruell as the 134th President of the Alabama State Bar

11:15 am

Board of Bar Commissioners' Meeting

Magnolia Ballroom F



**11:30 am – 1:30 pm
Presidential Reception
Honoring Alyce M. Spruell, 134th
President of the Alabama State Bar**

Magnolia Foyer

Everyone, including family members, is cordially invited to stop by as the 2010 Annual Meeting comes to a close and wish Alyce well as she assumes the presidency of the Alabama State Bar

Children will enjoy a number of special activities available to them at Baytowne

The Baytowne Adventure Zone in The Village of Baytowne Wharf will give you four more reasons to "hang" around Sandestin longer. Get an aerial view of the Village and its surroundings as you soar across the lagoon. Then head over to the ropes course for skill-testing fun. If you still haven't had enough fun, the Coconut Climb and Eurobungy are sure to put you over your limit.

Baytowne Wharf Adventure Zone Rates:

- Zipline - \$18
- Eurobungy - \$12
- Ropes course - \$12
- Coconut Climb - \$6
- Baytowne Tug Boats - \$3 (per ride)

Hours of operation:

- Zipline - Open Daily 1:00 pm - 11:00 pm
- Tug Boats - Open Daily 9:00 am - 10:00 pm
- Eurobungy, Ropes Course and Coconut Climb - Open Daily 9:00 am - 11:00 pm



Adventure Landing Playground

Relax while the kids play mornings through evenings on the imaginative nautical themed playground. There is an enclosed, fenced area for climbing, swinging, running and playing.

Boondocks Family Arcade

Play the latest video and interactive games in this safe and friendly environment. Perfect for families with children and teenagers, as well as adults. Collect tokens and win exciting prizes.

KidZone Day Camp

The camp is a fully-supervised program of indoor and outdoor activities for children ages three -10. The KidZone operates from 9 am – 2 pm and includes lunch. The cost is \$55 per child. Registration begins at 9 am with activities starting at 9:30 am. You must register by 5 pm the day prior. The program requires that at least three children are signed up in order for the program to occur. Cancellations after 5pm the day prior will be charged for the full day. For reservations and hours of operation dial ext. 7000.

Children's Evening Out

This program offers children ages 3-10 an evening out with new friends, including dinner, movies and activities from 6 pm -10 pm. The cost is \$45 per child. Registration begins at 6 pm. The program requires that at least three children are signed up in order for the program to occur. Reservations are required by 2 pm the day of the program. Cancellations after 2 pm will be charged for the evening's program. For reservations dial ext. 7000.

Baby-sitting services are also available. No "pull-ups" or diapers permitted.

Sandestin Teens

Whether you want to kick back or kick it up and hang out with pals or just chill solo, Sandestin is the place for teens. From relaxing at Starbucks to shopping for hot surf fashions, the options are up to you. Just add water to stir up the best kind of fun at Baytowne Ma-

rina. Options include private sailing classes, cruises, waverunners, pontoon boats, parasailing, charter fishing, canoes and kayaks, boogie boards, and YOLO boarding. For more information call the Baytowne Marina upon arrival.

Getting Around Baytowne

Trams – As a resort guest, you have access to on-call property-wide tram service, available from most units to any location on the property from 6 am – 3 am. For pick up call *2 and show your Resort Key Card. You can visit the Village of Baytowne Wharf in style and with ease using the on-call tram service or the water shuttle that travels to and from the Village from the Horseshoe Bayou Parking Area.

PLEASE NOTE: only guests renting through Sandestin or rental companies paying for amenity cards have access to the tram. The reduced room rate on VRBO (Vacation Rentals By Owner) does not include these amenities.

Sponsors (as of April 22)

Platinum

ISI ALABAMA*

Gold

The Alabama Lawyer*
Beasley Allen Crow Methvin Portis & Miles, PC
Business Law Section
Freedom Court Reporting, Inc.
Litigation Section
Real Property, Probate & Trust Law Section

Silver

Alabama Law Foundation
GEICO**

Bronze

ABA Retirement Funds*
Appellate Law Section
Blue Cross Blue Shield of Alabama Preferred LTC*
Cumberland School of Law
Family Law Section
Gilsbar
Health Law Section
LookingGlass Online Jury Research
Regions Morgan Keegan Trust
Spruell & Powell LLC
Stone, Granade & Crosby, PC
Thomas Goode Jones School of Law
Workers' Compensation Section
Young Lawyers' Section

*Denotes an Alabama State Bar Member Benefit Provider

Exhibitors

ABA Retirement Funds*
Attorneys Insurance Mutual of Alabama, Inc.
Bain & Associates
Blue Cross Blue Shield of Alabama Preferred LTC*
Bradford Health Services

CLE Alabama
Comprehensive Investigation Group
Document Outsourcing/Expedius Envoy
Easy Soft
Freedom Court Reporting, Inc.
GEICO**
Gilsbar
International Visa Service
ISI ALABAMA*
Jackson Thornton
Legal Services Alabama
LexisNexis
LookingGlass Online Jury Research
Merrill Corporation
Pine Grove Behavioral Health
Privateyez
West, a Thomson Reuters business

*Denotes an Alabama State Bar Member Benefit Provider

A Special Thank-You to Our Exhibitors and Sponsors

The Alabama State Bar thanks our sponsors and exhibitors for their continued support and generosity. We appreciate your contributions to this annual meeting.

Legal Expo 2010 Door Prizes

- Rolling Laptop Bag
\$100 value – Compliments of West, a Thomson Reuters business
- Sunglass Gift Card
\$100 value – Compliments of ABA Retirement Funds
- Wine Gift Basket from Pleasure's All Wine
- \$150 value – Compliments of Merrill Corporation
- Beach Prize Basket
\$130 value – Compliments of Gilsbar
- Video Camera
\$100 value – Compliments of Freedom Court Reporting
- Luggage
\$50 value – Compliments of Freedom Court Reporting
- Wal-Mart Gift Card
\$25 value – Compliments of Expedius Envoy
- Outback Steakhouse Gift Card
\$25 value – Compliments of Expedius Envoy

Environmental and Social Responsibility

Here are six ways the Alabama State Bar's Annual Meeting is committed to environmental and social responsibility:

- We use our Web site and e-mail to communicate with meeting registrants and presenters and we take additional steps to reduce the amount of paper we produce in connection with the meeting.
- We make all CLE materials available on a flash drive instead of printing hard copies.
- Registrants can browse the complete annual meeting program online.
- Online registration is available.
- We communicate with registrants, speakers, etc. almost exclusively via e-mail and telephone.
- Vegetable-based ink is used in printing.



- 3 • Sunset Shoes - Birkenstock
- 5 • Sunset Shoes - Guy Harvey & Columbia
- 6 • Barefoot Princess
- 7 • Zoo Gallery
- 8 • Starbucks Coffee
- 9 • Kitchenique & Cooking School
- 10 • M. Cline
- 11 • My Favorite Things
- 13 • Chico's
- 14 • LaBonboniere Ice Cream
- 15 • Sandestin Clothing Co.
- 16 • Angels Cosmetics
- 17 • New store opening soon
- 18 • New store opening soon
- 19 • Beyond the Grape Wine & Gifts
- 20 • Azure/Blue Marlin Trading Co.
- 21 • Donna Burgess Gallery
- 22 • Beef 'O' Brady's
- 23 • New store opening soon
- 25 • U.S. Post Office at Sandestin
- 26 • New store opening soon
- 27A • Vert•able
- 27B • New store opening soon
- 28 • Reading Room/Free Wi-Fi
- 29 • Tooley Street
- 30 • New store opening soon

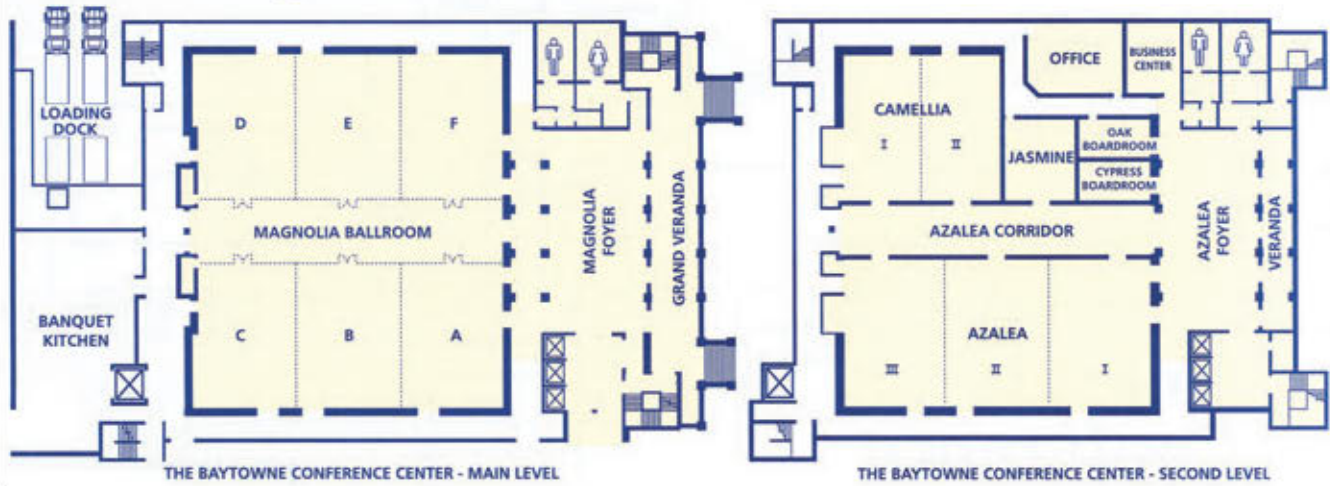

The Village of
BAYTOWNE WHARF
at SANDESTIN

 Retail
 Restaurant/Eatery
 Nightlife/Bar
 Service
 Restrooms

- | | |
|---|---|
| <ul style="list-style-type: none"> 1 • Wachovia Bank 2 • Another Broken Egg Café 3 • Lumpy's Wine Bar 4 • Paint'n Place Pottery Studio 5 • Bistro Bijoux 6 • Starbucks Coffee 7 • Wharf General Store 8 • Trading Co.
at Baytowne Wharf 9 • Fresh Produce 10 • Island Clothiers 11 • Marlin Grill 12 • Rum Runners 13 • Coconut Kids 14 • Fat Tuesday Daiquiri Bar 15 • Candymaker 16 • Roberto's Pizzeria 17 • Acme Oyster House 18 • Village Babes 19 • Hartell's Village Diner 20 • Toys & Treasures 21 • New store opening soon 22 • Tales by the Sea • Books, Body & Bath 23 • Coco & Co. | <ul style="list-style-type: none"> 24 • Listen Honey 25 • New store opening soon 26 • Baytowne Wharf
Neighborhood Association 27 • Raspberry Rhino 28 • Jim 'N Nick's Bar-B-Q 29 • Poppy's Seafood Factory 30 • Hammerhead's Bar & Grille 31 • John Wehner's Village Door 32 • Sandestin Real Estate 33 • New Orleans
Creole Cookery 34 • Osaka Sushi Rocks 35 • Trader Tom's Shells & Gifts 36 • Trader Tom's Dogs,
Gyros & Suds 37 • Aloha Surf Co. 38 • Aloha Surf Co. 39 • Frill Seekers Gifts 40 • Sweetie's Gelato & Desserts 41 • Mangos Paradise Grille 42 • New store opening soon 43 • Bark Avenue 44 • Mermaids' Fashions 45 • Graffiti & Funky Blues Shack 46 • Discovery Center |
|---|---|



Baytowne Conference Center





 **Sandestin**
Golf and Beach Resort
www.sandestin.com



2011 Annual Meeting

Wednesday thru Saturday, July 13-16, 2011

Grand Hotel Marriott, Point Clear



Please Print

Name (as you wish it to appear on name badge) _____

Bar ID: _____

Check categories that apply: Bar Commissioner Past President Local Bar President Justice/Judge

Firm Office Phone _____

Business Mailing Address _____

City /State /Zip Code _____ E-Mail _____

Spouse/Guest's Name _____

Child/Children's Name(s) And Age(s) _____

Please indicate any dietary restrictions: Vegetarian Other _____

Please send information pertaining to services for the disabled: Auditory Visual Mobility

	By June 30	After June 30	Fees
Alabama State Bar Members	\$400	\$450	\$_____
Full-Time Judges	\$200	\$250	\$_____
Non-Member <i>(Does Not Apply to Spouse/Guest or Legal Expo Vendors)</i>	\$500	\$550	\$_____
TOTAL REGISTRATION FEE			\$_____

Scholarships

(Limited number of full tuition scholarships are available to first-time attendees to the 2010 Alabama State Bar Annual Meeting and those attorneys with a demonstrated need for financial assistance. Minorities, women and solo practitioners are encouraged to apply. Send an e-mail to marie.updike@alabar.org and request an application form.)

Optional Event Tickets	No. of Tickets	Cost Per Ticket	Total Cost
Wednesday, July 14			
Family Pizza and Movie Night			
Adults and Children 13 and Over	_____@	\$30.00	\$_____
Children 12 and Under	_____@	No Charge	
Thursday, July 15			
Senior Lawyers' Breakfast	_____@	\$25.00	\$_____
Bench & Bar Luncheon	_____@	\$32.00	\$_____
Paint 'n Place Pottery Studio Entertainment			
Adults and Children 13 and Over	_____@	\$30.00	\$_____
Children 12 and Under	_____@	\$15.00	\$_____
University of Alabama School of Law			
Alumni Reception	_____@	\$30.00	\$_____
Samford University Cumberland School of Law			
Alumni Reception	_____@	\$30.00	\$_____
Faulkner University Jones School of Law			
Dessert Reception	_____@	No Charge	

Rainbow Reception – Celebrating The Diversity of Our Profession

_____@

No Charge

Friday, July 16

Inns of Court Coffee

_____@

No Charge

Order of the Coif Breakfast

_____@

\$25.00 \$ _____

Leadership Forum Alumni Breakfast

_____@

\$25.00 \$ _____

Sports Tailgate Party Luncheon

_____@

\$35.00 \$ _____

Women in the Law and Maud McLure Kelly Award Luncheon

_____@

\$35.00 \$ _____

Family Tennis Tournament

_____@

\$25.00 \$ _____

Build-A-Bear Special Event – Children’s Party (for Children 12 and Under)

_____@

No Charge

President’s Closing Night Family Paradise Island Feast

Adults 18 and over

_____@

\$40.00 \$ _____

Children 13-17

_____@

\$20.00 \$ _____

Children 12 and Under

_____@

No Charge

Saturday, July 17

Christian Legal Society Breakfast

_____@

\$20.00 \$ _____

5K Run

_____@

No Charge

1 Mile Fun Run/Walk

_____@

No Charge

Total Event Tickets

TOTAL FEES TO ACCOMPANY FORM

\$ _____

Payment MUST Accompany Registration Form. Checks for Registration/Tickets Should Be Made Payable to the Alabama State Bar.

Mail Registration Form and Check To: 2010 Annual Meeting, Alabama State Bar, P. O. Box 671, Montgomery, AL 36101

PLEASE BILL MY CREDIT CARD:

VISA MasterCard American Express

Card Number _____ Expiration Date _____

Cardholder’s Signature _____

Advance Registration Forms Must Be Received No Later Than July 9, 2010

Cancellations with full refund, minus a \$25.00 administrative fee, may be requested through noon,

Friday, July 9, 2010

NOTE: In order to claim CLE credit for the annual meeting, you must be registered for the meeting.



HOUSING REQUEST FORM

Book online: <http://www.Sandestin.com/21A1A2.aspx>

Sandestin® Group Reservations

Call 800.320.8115 or Fax: 850.267.8221

ALABAMA STATE BAR 2010 ANNUAL MEETING

Tuesday, July 13 - Sunday, July 18, 2010

GROUP CODE: 21A1A2

Name _____ Number in Party: Adults ____ Children _____

Company Name _____ Business Phone _____

Address _____ E-Mail _____

City _____ State _____ Zip _____

Sharing With _____

Arrival Day/Date _____ Departure Day/Date _____

Please select method of payment:

Credit Card # _____ Exp. Date _____ Signature _____

Authorization # _____ (located on the reverse side of card) Check # _____

Your cut-off date for reservations is **June 13, 2010**, after which rooms will be sold on a space-available basis.

ACCOMMODATIONS AND RATES

A deposit of one night's room rate is required to secure rooms.

All room rates quoted **DO NOT** include fees and taxes.

Please circle your preferred accommodations. All requests are subject to availability at time booking request is received.

Any other type of accommodation besides what is in your block will vary in cost depending on location.

<u>ACCOMMODATION</u>	<u>DAILY RATE</u>	<u>ACCOMMODATION</u>	<u>DAILY RATE</u>
VILLAGE – STUDIO*	\$187.00	BEACHSIDE STUDIO**	\$299.00
VILLAGE 1 BDRM*	\$219.00	BEACHSIDE 1 BDRM**	\$309.00
VILLAGE 2 BDRM*	\$309.00	BEACHSIDE 2 BDRM**	\$439.00
VILLAGE 3 BDRM*	\$352.00	BEACHSIDE 3 BDRM**	\$559.00
GRAND SANDESTIN STUDIO*	\$199.00	WESTWINDS 1 BDRM**	\$349.00
GRAND SANDESTIN 1 BDRM*	\$229.00	WESTWINDS 2 BDRM**	\$489.00
GRAND SANDESTIN 2 BDRM*	\$319.00	WESTWINDS 3 BDRM**	\$629.00
GRAND SANDESTIN 3 BDRM*	\$409.00	LUAU STUDIO	\$189.00
DOCKSIDE 2 BDRM	\$199.00	LUAU 1 BDRM	\$229.00
DOCKSIDE 3 BDRM	\$289.00	LUAU 2 BDRM	\$299.00
TIVOLI 2 BDRM	\$289.00	TIVOLI 3 BDRM	\$399.00

*Village and Grand Sandestin Complex Units are within walking distance of the Baytowne Conference Center.

**A minimum stay of 5 nights is required on Beachfront accommodations.

IF ONE OF THE ABOVE ROOM TYPES ARE UNAVAILABLE ON-LINE, PLEASE CALL OUR RESERVATIONS DEPARTMENT AT 800-320-8115 TO CHECK FOR AVAILABILITY.

The Grand Sandestin® consists of accommodations in the Grand, Lasata, Bahia, and Elation
Self-Parking for the Village of Baytowne Wharf and Grand Sandestin® is \$6.00 per night

Deposit is refundable in the event of individual room cancellation, provided notice is received by Sandestin® 14 days prior to scheduled arrival date.