

The Alabama

May 2012 | Volume 73, Number 3

Lawyer

2012 ANNUAL MEETING

BAYTOWNE WHARF

Registration form inside or register at www.alabar.org.

An Overview of Alabama's New
Daubert-Based Admissibility Standard

Page 196

Finding Malpractice Insurance Does Not Have To Be A Trip Through The Swamp!



Call AIM.
*We Take the Bite
Out of the Process.*



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

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

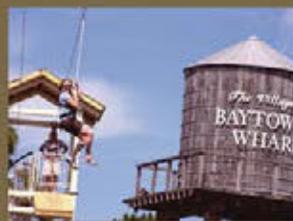
"A Risk Retention Group Organized by and for Attorneys"
www.AttysInsMut.com



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

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

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



415 Dexter Avenue
Montgomery, Alabama 36104



Baytowne Wharf,
Sandestin Beach & Golf Resort,
Sandestin, FL

www.sandestin.com




ALABAMA STATE BAR

New Year's Resolution

It's a new year and one important resolution should be to review your I-Profile.

Go to www.alabar.org/members_only.cfm and make sure your information is up to date so we can keep you up to date!



196



190

FEATURES

162 President-elect Profile: Anthony A. Joseph

171 Leadership Forum Update

190 Improving Jury Service

By Judge Scott Donaldson

196 An Overview of Alabama's New *Daubert*-Based Admissibility Standard

By Professor Robert J. Goodwin

208 Are We the Problem?

By Michael E. Upchurch



ON THE COVER

The Alabama State Bar is going back to Baytowne! Join us July 18–21 at Baytowne Wharf for great programs, renowned speakers and fun activities for the entire family. See the registration form in this issue or go to www.alabar.org to register.

*—Photo courtesy of Sandestin Golf and Beach Resort/
Photographer Allison Yii*



208

ADVERTISERS

Alabama Mediation Center.....221

The University of Alabama
School of Law215

Attorneys Insurance Mutual
of the South.....154

The Bar Plan173

The Bloom Group, Inc.181

CoreVault.....189

Cumberland School of Law167

Davis Direct.....213

J. Forrester DeBuys, III.....195

Steven H. Emerson193

ESH Solutions.....221

Expedited Process Serving, LLC175

The Finklea Group.....214

Freedom Court Reporting.....223

Gilsbar Management Services, LLC224

Law Pay.....187

The Locker Room183

Mahaney Law179

The National Academy of
Distinguished Neutrals.....163

National Purchasing Partners194

PangeaTwo220

Professional Software Corporation211

Restaurant Expert Witness210

Upchurch Watson White & Max188

Willoughby Consulting.....195

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

ALABAMA STATE BAR STAFF

Executive DirectorKeith B. Norman
Director of Personnel and Operations.....Diane Locke
Information Systems Manager.....O. Hunter Harris
Director of Information TechnologyDolan L. Trout
ProgrammerLarry Pratt
Financial Assistant/Scanning Operator.....Kristi Neal
Website Administrator.....Willie Murphy
Assistant Executive Director.....Edward M. Patterson
Director of External Relations
and Projects.....Christina Butler
Assistant Director of External Relations
and ProjectsMary Frances Garner
Director of Regulatory ProgramsAngela Parks
MCLE Administrative AssistantCarol Thornton
Membership
Administrative Assistant.....Cathy Sue McCurry
Regulatory Programs
Administrative AssistantDoris McDaniel
Director of CommunicationsBrad Carr
Director of Publications.....Margaret L. Murphy
Communications and Publications
Assistant.....Marcia N. Daniel
Director of AdmissionsDorothy D. Johnson
Admissions Administrative AssistantsSonia Douglas
Crystal Jones
Financial AdministratorGale Skinner
ASB Foundation AssistantAnn Rittenour
Graphic Arts DirectorRoderick Palmer
Receptionist.....Stephanie Oglesby
Director of Service ProgramsLaura A. Calloway
SP Administrative Assistant.....Kristi Skipper
Lawyer Referral Service DirectorRenee Avery
Volunteer Lawyers Program DirectorLinda Lund
VLP AssistantKatherine L. Church
Intake Specialists.....Deborah Harper
Carrie Black-Phillips
Alabama Lawyer Assistance Program
Director.....Jeanne Marie Leslie (834-7576)
ALAP Administrative AssistantSandra Dossett
ALAP Case ManagerShannon Knight
Alabama Law Foundation, Inc. DirectorTracy Daniel
ALF Administrative AssistantsSharon McGuire
Sue Jones

Alabama Center for Dispute Resolution
DirectorJudith M. Keegan (269-0409)
ADR Assistant.....Patsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

General CounselJ. Anthony McLain
Secretary to General Counsel.....Julie Lee
Assistant General Counsel.....Robert E. Lusk, Jr.
Assistant General CounselJeremy W. McIntire
Assistant General Counsel.....Mark B. Moody
Complaints Intake CoordinatorKim Ellis
Disciplinary Clerk.....Bonnie Mainor
Client Security Fund CoordinatorLaurie Blazer
Paralegals/Investigators.....Dianne T. Gray
Cheryl L. Rankin
Carol M. Wright
ReceptionistSherry Langley

Gregory H. Hawley, Birmingham.....Chair and Editor
ghawley@whitearnolddowd.com
Linda G. Flippo, BirminghamVice Chair and Associate Editor
lflippo@whitearnolddowd.com
Wilson F. Green, Tuscaloosa.....Vice Chair and Associate Editor
wgreen@fleenorgreen.com
Margaret L. Murphy, Montgomery.....Staff Liaison and
Director of Publications
margaret.murphy@alabar.org
Marcia N. Daniel.....Communications & Publications Assistant
marcia.daniel@alabar.org

Robert A. Huffaker, Montgomery...Chair and Editor, 1983-2010

BOARD OF EDITORS

Marc James Ayers, Birmingham • Laveada M. Battle, Hoover • Jennifer M. Bedsole, Birmingham • Gregory C. Buffalow, Mobile • Henry L. (Max) Cassidy, Jr., Fairhope • Rhonda P. Chambers, Birmingham • Lisa D. Cooper, Mobile • Katharine W. Coxwell, Monroeville • Patrick C. Finnegan, Mobile • T. Charles Fry, Jr., Birmingham • Amy M. Hampton, Alexander City • Walter E. McGowan, Tuskegee • Jeffrey R. McLaughlin, Guntersville • J. Bradley Medaris, Birmingham • Joi T. Montiel, Montgomery • Richard D. Morrison, Montgomery • Anil A. Mujumdar, Birmingham • Sherrie L. Phillips, Montgomery • Stephanie M. Pollard, Auburn • T. Dylan Reeves, Birmingham • Julia S. Roth, Decatur • Marc A. Starrett, Montgomery • John S. Steiner, Birmingham • Audrey O. Strawbridge, Vernon • Jason B. Tompkins, Birmingham • J. Robert Turnipseed, Mobile • Brian A. Wahl, Birmingham

OFFICERS

James R. Pratt, III, BirminghamPresident
Phillip W. McCallum, Birmingham.....President-elect
Alyce M. Spruell, Tuscaloosa.....Immediate Past President
W. N. (Rocky) Watson, Fort Payne.....Vice President
Keith B. Norman, Montgomery.....Secretary
Navan Ward, Jr., Montgomery.....Young Lawyers' Section President

BOARD OF BAR COMMISSIONERS

1st Circuit, Ronnie E. Keahy, Grove Hill • 2nd Circuit, Cleve Poole, Greenville • 3rd Circuit, Christina D. Crow, Union Springs • 4th Circuit, J. Garrison Thompson, Selma • 5th Circuit, Robert Simms Thompson, Tuskegee • 6th Circuit, Place No. 1, Terri Olive Tompkins, Tuscaloosa • Place No. 2, R. Hays Webb, Tuscaloosa • 7th Circuit, William H. Broome, Anniston • 8th Circuit, Phil D. Mitchell, Decatur • 9th Circuit, W. N. (Rocky) Watson, Fort Payne • 10th Circuit, Place No. 1, Leslie R. Barineau, Birmingham • Place No. 2, S. Greg Burge, Birmingham • Place No. 3, George M. (Jack) Neal, Jr., Birmingham • Place No. 4, Robert G. Methvin, Jr., Birmingham • Place No. 5, Augusta S. Dowd, Birmingham • Place No. 6, Teresa G. Minor, Birmingham • Place No. 7, Joseph A. Fawal, Birmingham • Place No. 8, Robert E. Moorer, Birmingham • Place No. 9, Derrick A. Mills, Birmingham • Bessemer Cutoff, William A. (Pete) 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 C. Ortega, Mobile • Place No. 5, Harry V. Satterwhite, Mobile • 14th Circuit, James R. Beard, Jasper • 15th Circuit, Place No. 1, Frank M. Wilson, Montgomery • Place No. 2, Les Pittman, Montgomery • Place No. 3, J. Flynn Mozingo, Montgomery • Place No. 4, J. Cole Portis, Montgomery • Place No. 5, Jeffery C. Duffey, 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, William R. May, Birmingham • Place No. 2, Julia C. Kimbrough, Birmingham • 19th Circuit, David A. McDowell, Prattville • 20th Circuit, M. 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, Sam W. Irby, Fairhope • 29th Circuit, Robert L. Rumsey, III, Sylacauga • 30th Circuit, Elizabeth S. Parsons, Pell City • 31st Circuit, Braxton W. Ashe, Tuscumbia • 32nd Circuit, Jason P. Knight, Cullman • 33rd Circuit, Robert H. Brogden, Ozark • 34th Circuit, Rebecca Green Thomason, Russellville • 35th Circuit, J. Milton Coxwell, Jr., Monroeville • 36th Circuit, H. Jerome Thompson, Moulton • 37th Circuit, Roger W. Pierce, Auburn • 38th Circuit, Don Word, Scottsboro • 39th Circuit, John M. Plunk, Athens • 40th Circuit, Gregory M. Varner, Ashland • 41st Circuit, Alexander M. Smith, Oneonta

AT-LARGE BOARD MEMBERS

Walter E. McGowan, Tuskegee • Claude E. Hundley, III, Huntsville • Meredith Shay Peters, Andalusia • Merceria Ludgood, Mobile • Alicia F. Bennett, Chelsea • LaBarron N. Boone, Montgomery • David K. Howard, Florence • Monet McCorvey Gaines, Montgomery • Ashley Elizabeth Swink, Gulf Shores

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 2012. The Alabama State Bar. All rights reserved.





COLUMNS

- 160** **President's Page**
The Optimism of Uncertainty
- 164** **Executive Director's Report**
An Unbelievable Return on Investment for You
- 166** **Important Notices**
Local Bar Award of Achievement
Amendments to the Alabama Rules of Evidence
- 168** **Memorials**
- 172** **The Appellate Corner**
- 184** **Bar Briefs**
Birmingham Bar Foundation Honors 2012 Inaugural Fellows Class
Mobile, Baldwin County Bars Honor Bedsole
- 186** **Disciplinary Notices**
- 212** **Opinions of the General Counsel**
Law Firm Cannot Represent Client in Matter Adverse to Present Client
Absent Consultation/Consent of Present Client
- 216** **Legislative Wrap-Up**
- 218** **About Members, Among Firms**
- 220** **Classified Ads**

CONTRIBUTORS



Judge Scott Donaldson is a circuit judge in Tuscaloosa County. He teaches trial advocacy at the University of Alabama School of Law and advanced evidence as a faculty member of the National Judicial College. He has taught trial-based courses in several states on behalf of the NJC. Donaldson is a commissioner from Alabama on the National Uniform Law Commission and is a fellow of the Alabama Law Foundation.



Professor Robert J. Goodwin is the associate dean and J. Russell McElroy Professor of Law at Samford University's Cumberland School of Law. He also serves as reporter for the Alabama Supreme Court's advisory committee on the Alabama Rules of Evidence.

Professor Goodwin joined Cumberland's faculty in 1983 and served as director of Cumberland's Center for Advocacy and Clinical Education from 1984 to 1991. During this period, the center won the American College of Trial Lawyer's prestigious "Emil Gumpert Award" for excellence in teaching trial advocacy.

Professor Goodwin's primary areas of teaching and scholarly research have been evidence and scientific evidence. He is co-author of the current edition of McElroy's *Alabama Evidence* with Dean Charles Gamble. He is a fellow in the American Academy of Forensic Sciences and the author of a nationally adopted casebook, *Criminal and Forensic Evidence*. He has published numerous scholarly articles relating to evidence and scientific evidence.

Professor Goodwin received his undergraduate degree from the University of Missouri and his law degree from Washington University. He began his teaching career at Washington University School of Law. Prior to entering law teaching, he served as a VISTA volunteer attorney, litigated cases in federal and state court, and held positions of executive director and managing attorney at two major legal services programs.



Michael E. Upchurch is a partner with the Mobile firm Frazer, Greene, Upchurch & Baker. He has over 30 years trial experience in civil cases of all types, primarily as a defense lawyer. Upchurch also is an experienced mediator. He is the president-elect of the Mobile Bar Association and a director of the Alabama Defense Lawyers Association.

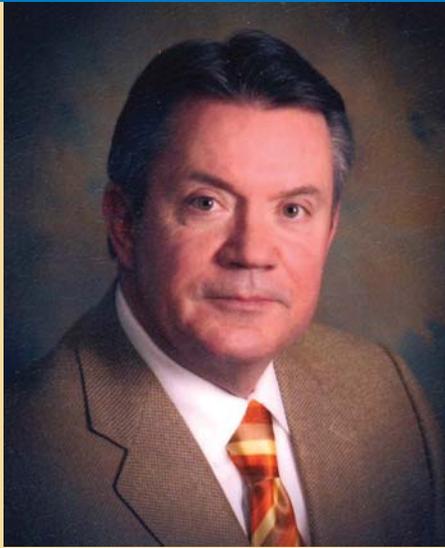
ARTICLE SUBMISSION REQUIREMENTS

Alabama State Bar members are encouraged to submit articles to the editor for possible publication in *The Alabama Lawyer*. Views expressed in the articles chosen for publication are the authors' only and are not to be attributed to the *Lawyer*, its editorial board or the Alabama State Bar unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. The editorial board reserves the right to edit or reject any article submitted for publication.

The *Lawyer* does not accept unsolicited articles from non-members of the ASB. Articles previously appearing in other publications are not accepted.

All articles to be considered for publication must be submitted to the editor via e-mail (ghawley@whitearnolddowd.com) or on a CD through regular mail (2025 Third Avenue N., Birmingham, AL 35203) in Microsoft Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced, utilizing endnotes and not footnotes.

A brief biographical sketch and a recent color photograph (at least 300 dpi) of the author must be submitted with the article.



James R. Pratt, III

jim@hwinn.com



The Optimism of Uncertainty

“Tribulation is the
forge of virtue...
and not a
momentary
inconvenience.”

In this “President’s Page” I will borrow heavily from a speech given by a former dean of the University of Michigan Law School, **John Reed**. In fact, I borrowed the title of this column from a speech he gave to the International Society of Barristers. In Dean Reed’s presentation, he noted uncertainty is generally a bad thing and that people want answers, not questions. But then Dean Reed proceeded to quote the late **Edwin Borchard** of Yale Law School who said, “An optimist is a person who believes that the future is uncertain.” Dean Reed admitted that, at first, he found that statement puzzling, but ultimately was able to reflect and understand that uncertainty about the future necessarily means that the future is not foreordained and, therefore, it remains to be affected by what we do in determining its shape.

It is very important that those of us who practice law in Alabama, as well as the judges in this state, take the words of Edwin Borchard to heart and seek to put the perspective of Dean Reed to work in trying to save the rule

of law and our state’s legal system. Dean Reed also made the point that if there is any category of human beings able to deal productively with uncertainty, it ought to be lawyers. He noted that, by training, lawyers are taught to reject easy answers in favor of searching and persistent inquiry.

I believe the words of Dean Reed are particularly timely because we continue to face very difficult times.

Assault on the financial stability of the bar and the courts

We have been made painfully aware that the revenue generated in our state does not support even essential functions that are constitutionally mandated—for example, the courts. For far too long we have lived off of non-reoccurring revenue, often in the form of windfalls. Now we are faced with the reality that unless our attorney general, through a settlement with BP, generates a sufficient amount of money to reduce or eliminate the shortfall, the result will be proration and budget cuts that will

harm our state agencies, not to mention jeopardize the judicial branch of our government through grossly inadequate court funding. Even if we are so fortunate as to have the attorney general bail us out of this year's shortfall, future budgets may not be so fortunate.

Impose payment to the General Fund

As I write this, a bill has been introduced in the Alabama House of Representatives that would raid the coffers of numerous groups throughout Alabama, allegedly to provide payment to the General Fund for services rendered to those groups by the state. This legislation as written will allow for the transfer of funds to the General Fund from the organizations listed in the bill without consideration as to whether these groups already pay for the services provided and without the establishment of a formula to determine and limit the amount due to be paid.

The Alabama State Bar was one of those groups; however, it appears we were able to have the bar excluded from the bill. Were the bar not to be excluded, this legislation would have imposed payment to the General Fund, notwithstanding the fact that we already pay for the services provided by the state. The only item we do not already pay for is the audit performed each year. Even though the state bar seems to have been excluded from the bill, we might be asked to pay for the state audits and we have indicated that we are willing to pay a fair price for them, if so required. The potential effect of bills like this is why we have been, and must continue to be, vigilant about protecting the interests of the Alabama State Bar and the lawyers of this state.

The district attorneys and the courts throughout the state also will see significant reductions in their funding. The DA's Association has faced deep cuts over several years and now faces a 10.6 percent proration cut on top of the other ones. If currently anticipated cuts occur, in excess of 400 positions would have to be eliminated from our court system. Circuit clerks and other essential court personnel, who are already well below appropriate manpower levels, may not be able to adequately support the system. This will be a real tragedy. As Judge Learned Hand once said, "Thou shalt not ration justice."

The Efforts of Courts and the Bar to Respond

Under the leadership of **Chief Justice Malone** and **Director of the AOC Alyce Spruell**, every effort has been

made to consolidate judicial services and eliminate non-essential spending. Working in conjunction with the leadership of the state bar, the judges' associations and the clerks' association, they have streamlined AOC functioning in every conceivable manner. Along with all the others who work in the Administrative Office of Courts, they deserve your praise and support for fighting the difficult battle of trying to do more with less. Every senator and representative who has met with the two of them has been very impressed with the efforts made.

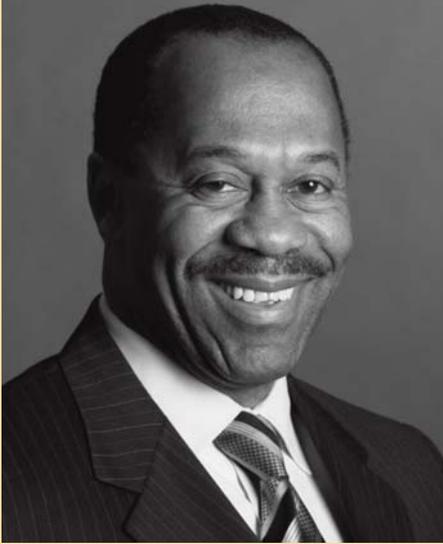
What must be done

Notwithstanding those efforts, though, we are going to have to do what state government has been unwilling to do. Neither the executive branch nor the legislative has been willing to entertain the thought of creating new, ongoing sources of revenue. The chief justice, AOC, the state bar, the state judges, and the circuit clerks association have come together to propose additional court costs necessary to fund the shortfall in the system. All of us are cognizant of the issue of access to justice and would not recommend that the legislature impose additional court costs but for the tremendous need and lack of alternatives. It was Mother Teresa who reminded us of the saying of the ancients: "Tribulation is the forge of virtue... and not a momentary inconvenience."

Conclusion

As the lawyers and judges in this state, we will do whatever we can to preserve the Bar Association, the Judiciary, and the Administrative Office of the Courts. We will oppose legislation that seeks to avoid the Legislature's moral obligation to adequately fund the essential services of government by draining the resources of groups like the Alabama State Bar. We will continue to insist that the Legislature meet their constitutional obligation to adequately fund the courts while at the same time doing our part, even when the solution is painful. In the end, although the future is uncertain, as Dean Reed said, "There is no category of human beings better able or equipped to deal productively with that uncertainty." Together we will find a way to keep justice from being rationed.

So I remain optimistic because I believe that the lawyers of this state will find solutions even in the most difficult of times. | [AL](#)



Anthony A. Joseph

Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketch is provided of Anthony A. Joseph. Joseph was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2012-13 term and he will assume the presidency in July 2013.

Anthony A. ("AJ") was born and raised in Birmingham. He is a graduate of Vanderbilt University (B.A. 1975), Howard University (M.C.P. 1977), Cumberland School of Law (J.D. 1980) and the FBI Academy (1983).

AJ began his legal career in 1980, working as an assistant district attorney in the District Attorney's Office in Bessemer. He then joined the FBI as a Special Agent, working in Birmingham, St. Louis and Philadelphia. Since moving back to Birmingham in 1986, AJ worked as an Assistant United States Attorney, and later joined the firm of Johnston Barton Proctor & Powell. He is a shareholder with Maynard, Cooper & Gale, where he specializes in white-collar criminal defense and general civil litigation.

He has served as an adjunct professor at Cumberland School of Law and Miles School of Law, and as lawyer-in-residence at Cumberland in 2007. He is a member of Cumberland's Advisory Board. AJ has taught at the National Trial Advocacy College, Virginia School of Law and ABA TIPS National College, and is on the advisory board and is a faculty member for the NACDL's White Collar Criminal Defense College at Stetson School of Law.

AJ is active in the local, state and national bar associations. He is a member of the Alabama State Bar, the American Bar Association, the Birmingham Bar Association, the Magic City Bar, and the Alabama Lawyers Association. He is also a member the National Association of Criminal Defense Lawyers.

AJ has served in many roles and on various committees of the Alabama State Bar, including vice president (2004-05); bar commissioner (10th Judicial Circuit) (2000-09); member of the Disciplinary Commission (2001-2009), member of the Disciplinary Panel (2000-2001), and member of the Character & Fitness Committee. He has served on the Alabama Criminal Justice Council.

He has also served many roles in the Birmingham Bar Association, including president (2007), secretary/treasurer (2002), BBA representative to the ABA House of Delegates (2002-2006), member of its Executive Committee (1997-2000), Grievance Committee (subcommittee chair), Nominating Committee (chair), and Public Service Committee. He also served as president of the Legal Aid Society.

AJ currently serves on the American Bar Association Criminal Justice Section's Council, and has served as chair of the section, and as a member of its Executive Committee, White Collar Crime Committee and Criminal Justice Standards Committee.

He is a Fellow of the American College of Trial Lawyers, the Alabama Law Institute and the Birmingham Bar Foundation.

He is a member of Leadership Alabama—Class XVII, Leadership Birmingham's Executive Committee and the

Birmingham Metropolitan YMCA Board, and has served on the boards for Advent Episcopal School, Homewood City Schools Foundation, Downtown YMCA (chair), American Red Cross, Alabama Center for Law and Civic Education (president), and Big Brothers/Big Sisters (president).

AJ is married to Cassandra Joseph, and they have three sons, Kevin, Justin and Aaron. The Josephs are members of St. Mark's Episcopal Church, where AJ has served as senior warden, junior warden and clerk. | [AL](#)

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

Alabama Chapter online at www.Alabama-Mediators.org

The following attorneys have all been recognized as Alabama Charter Members for Excellence in the field of Alternative Dispute Resolution



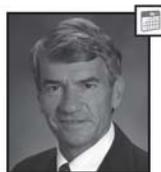
Phil Adams
OPELIKA



Danny Banks
HUNTSVILLE



William Coleman
MONTGOMERY



Sam Crosby
DAPHNE



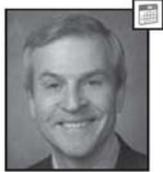
Charles Denaburg
BIRMINGHAM



Charles Fleming
MOBILE



Arthur Hanes
BIRMINGHAM



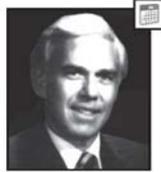
Bernard Harwood
TUSCALOOSA



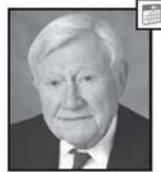
Braxton Kittrell
MOBILE



Rodney Max
BIRMINGHAM



Ed McDermott
MOBILE



Frank McFadden
MONTGOMERY



Michelle Obradovic
BIRMINGHAM



William Ratliff
BIRMINGHAM



Allen Schreiber
BIRMINGHAM



Kenneth Simon
BIRMINGHAM



Fern Singer
BIRMINGHAM



Clarence Small
BIRMINGHAM



Michael Upchurch
MOBILE



Michael Walls
BIRMINGHAM



Brad Wash
BIRMINGHAM



Litigation Staff: Compare these members' available dates online at www.Alabama-Mediators.org

The National Academy of Distinguished Neutrals is a nationwide association of over 700 mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes. All members have been recognized for their accomplishments through the Academy's peer nomination system and extensive attorney-client review process.

Membership is by invitation only and is limited to individuals who devote a substantial percentage of professional efforts to civil/commercial ADR practice. For more information about the Academy please visit www.NADN.org/about. To visit our complete national roster, visit www.NADN.org/directory.html



Keith B. Norman

keith.norman@alabar.org



An Unbelievable Return On Investment for You

What would you think if I told you that I know a way for you to make a return on investment (ROI) of between 35 and 70 times your investment in one year? Your first reaction would probably be to tell yourself that this is a scam and Bernie Madoff must have gotten out of jail early. Or, you might think that I was merely pulling your leg. Well, I can show you that such a return is neither a scam nor a joke. In fact, many of your colleagues are already enjoying this ROI.

As a mandatory bar, you must pay your annual license fee (\$300) or special member dues (\$150) to maintain your status as a member in good standing. Naturally, your license fee extends to you the privilege to earn a livelihood by practicing law. Besides being a member in

good standing, though, your annual license fee or special member dues afford you a yearly ROI in real dollars of 35–70x the money you pay to the Alabama State Bar.

Typically, lawyers think that the Alabama State Bar is just a licensing and regulatory agency and that there are few tangible benefits from paying their fees and dues. In fact, the state bar is also a professional association which is able to provide members with access to products and services tailored to lawyers and that have a real dollar value of as much as \$10,625 a year. Each lawyer's specific dollar value in benefits could be considerably more. Below are some of the key member benefits that account for this tremendous value.

Ethics—\$1,700 value¹

- Formal ethics opinions available online and optimized for mobile browsing using a smartphone or tablet, as well as informal ethics advice

Casemaker Legal Research—\$960 Value²

- Unlimited free legal research in a national state and federal online library

Annual Meeting CLE—\$1,400 Value³

- Obtain 12 hours of MCLE for the cost of a meeting registration

Insurance—\$1,000 value⁴

- Significant savings with GEICO's special auto insurance plan for bar members and with ISI of Alabama on any one or more of several insurance lines, including life, disability and casualty

Career Assistance and Practice Resources—\$4,300⁵

- Generate fees from paying clients by joining the Lawyer Referral Service
- Free consulting services, "how-to" publications and extensive lending library to help you improve your practice
- Free internet legal marketing through *LocalLawyers.com*

Professional Magazine and Electronic Newsletter—\$225⁶

- Keep up with your profession and benefit from helpful practice-oriented articles.

Discounted Products and Services—\$1,040⁷

- *ABA Retirement Funds*—full-service 401(k) plans with institutionally priced funds offered to firms of all sizes at no out-of-pocket expense.
 - *AirMed*—leading air ambulance service
 - *Clio*—web-based practice management system
 - *CoreVault*—online electronic backup service
 - *FedEx*—package delivery service
 - *Identity Secure*—identity theft protection service
- As impressive as the dollar value of this group of member benefits is, there are a number of other benefits available to members for which I have not calculated a value. Some of those are:
 - *ASB Job/Source*—helps match lawyers seeking jobs with firms that have openings
 - *ALAP*—helps lawyers struggling with substance abuse or depression
 - *Verizon Wireless*—discounts for phones, voice and data plans
 - *Pennywise*—substantial discounts on office supplies and products

A full listing of all the benefits and services available to you is located at www.alabar.org or by scanning this QR



code. The real dollar value of the all the member benefits available could easily exceed a suggested ROI of 35-70x.

When all is said and done, your bar membership has more real dollar value than ever. As incredible as the ROI indicated above is, your license fee or dues

also allow the legal profession to continue to be self-regulated and the value of self-regulation is *priceless!* | [AL](#)

Endnotes

1. By comparison, the cost of an annual subscription to the *ABA/BNA Lawyer's Manual on Professional Conduct* is \$1,700.
2. Comparable online legal research services charge a minimum of \$80 per month.
3. Charges for MCLE presentations vary greatly by sponsor but the general average charge for a credit hour is \$150.
4. GEICO policyholders report an average annual savings of over \$500. ASB members can save \$500 or more and benefit from simplified underwriting on insurance products available through ISI of Alabama.
5. Last year, LRS participants reported an average \$3,000 in fees earned through referrals. A full day of Professional Management Assistance Program (PMAP) consulting services are valued at \$1,000 based on comparisons with programs of other bars. A member could save as much as \$450 by checking out six books during the course of a year from the lending library. And, the free online listing for members is a \$300 value.
6. One state association values its trade publication at \$150. Based on the valuation of the magazine, the *Addendum* online newsletter is valued at \$75.
7. A hypothetical \$50,000 401(k) plan with a minimum annual management fee of 1 percent would result in a savings of \$500 if managed by ABA Retirement Funds. The AirMed plan saves \$65 for an individual and \$85 for family coverage. Clio and CoreVault both save you \$60. A member whose annual shipping charges are \$500 would realize a \$130 in savings with FedEx. Shipping more saves more. ASB members save \$150 off Identity Sources' retail value.

Education Debt Update

Sixty-one percent of first-time takers of the February 2012 bar exam had education debt. The average amount of debt was \$97,554.



Local Bar Award of Achievement

Recommendations to the Alabama Rules of Evidence

Local Bar Award of Achievement

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

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by **June 1, 2012**. Applications may be obtained from www.alabar.org, or by contacting Christina Butler at (334) 517-2166 or christina.butler@alabar.org.

Recommendations to the Alabama Rules of Evidence

Recommendations for numerous amendments to the *Alabama Rules of Evidence* were submitted to the Alabama Supreme Court by the court's Advisory Committee on the *Alabama Rules of Evidence*. Alabama lawyers and judges are invited to submit comments on the proposed amendments to the Alabama Supreme Court on or before September 1, 2012. The proposed amendments can be viewed at <http://judicial.alabama.gov/proposed> and comments should be submitted to Supreme Court Clerk Robert G. Esdale at resdale@appellate.state.al.us or the Heflin-Torbert Judicial Building, 300 Dexter Avenue, Montgomery 36104. | [AL](#)



Cumberland School of Law CLE offers a wide range of online courses.

Cumberland School of Law can help you meet your professional education requirements with numerous courses in various categories. Conveniently view anytime, anywhere, 24/7, in increments of time that are convenient for you, and without the time and expense of travel away from your office.

Start earning 2012 credits now. Go to www.cumberland.samford.edu/cle and select "Online On-demand Courses."

Find the information you need with these **NEW** one-hour online courses:

A View from the Bench: Trends in Employment Cases
Insurance for Your Next Disaster
Title Insurance: Today's Most Prevalent Claims Issues
The Pitfalls and Perils of Family Law
Social Networking in the Workplace: The Virtual Water Cooler (Social Media) and Attorney Ethics
Ideas on Post-Disaster Rebuilding



CUMBERLAND
SCHOOL OF LAW
SAMFORD UNIVERSITY

cumberland.samford.edu/cle
205-726-2391 or 1-800-888-7454
lawcle@samford.edu

Samford University is an Equal Opportunity Educational Institution/Employer.



Alto Loftin Jackson, Sr.

Hon. Thomas Virgil Pittman

Alto Loftin Jackson, Sr.

Alto Loftin Jackson, Sr., a life-long resident of Clio, died Saturday, July 16, 2011 at age 97. He was the oldest child of William Alto Jackson and Lula Jane Loftin Jackson.

Jackson graduated from Barbour County High School in 1931, the College of Commerce at the University of Alabama in 1935 and the University of Alabama School of Law in May 1937, where he was a charter member of the Farrah Law Society. In 1994, he received honorary membership into Omicron Delta Kappa at the University of Alabama.

On March 28, 1941, he married Emma Pearl Norton, of Louisville, Alabama, the daughter of Dr. and Mrs. Robert Olon Norton, Sr.

He practiced law in Clayton and Clio until he volunteered for the U.S. Army where he remained in the Judge Advocate Division until 1945.

Jackson was deeply involved in his professional practice, in his business (farming) and in numerous commitments. He was a long-time member and chair of the Barbour County Board of Education, a member of the Clio First United Methodist Church and a teacher for the adult Sunday School class for many years.

In 1967, he associated with Troy University as a teacher. He served as deputy director of Troy University at Fort Rucker and chair of the Business faculty at the same institution. The award of Associate Professor Emeritus was conferred upon Jackson December 13, 2004.

Jackson was a capable, prolific writer. He authored *So Mourns the Dove* in 1965; *Clio, Alabama, a History* in 1980; *A Chronicle of My Remembering* in 1997; and *Reflections* in 2002, as well as numerous publications of historical and genealogical nature. He was one of the founders of the Amariah B. Stubbs, Sr. Historical Association. The A.B. Stubbs, Sr. Manuscript Collection at the Dale County Library in Ozark created a perpetual resource of historical nature.



Jackson was preceded in death by his parents; his sister, Jane Grace Jackson Pelfrey; and his brother, Samuel W. Jackson, Sr. He is survived by his wife of 70 years, Emma Pearl Norton Jackson; two daughters, Caroline Jane Jackson, of Arlington, Virginia, and Pearl Norton Jackson Strawbridge and her husband, Ronald H. Strawbridge, Sr., (an Alabama State Bar member) of Vernon, Alabama; two sons, Dr. Alto Loftin Jackson, Jr. and his wife, Tricia A. Jackson, Montgomery, and Robert Olon Jackson, (Alabama State Bar member) and his wife, Brittany H. Jackson, Birmingham; six grandchildren, Caroline Jackson Strawbridge, (Alabama State Bar member) Tuscaloosa; Ronald H. Strawbridge, Jr., (Alabama State Bar member) and his wife, Audrey Oswalt Strawbridge, (Alabama State Bar member), Fayette; Barrett Beatrice Jackson and Jillian Loftin Jackson of Durham, North Carolina and Washington, D.C.; Julia Elizabeth Jackson and Thomas Christopher Jackson of Houston and Dallas; two great-grandsons, Langston Howard Strawbridge and Hollis Loftin Strawbridge, Fayette; and a host of cousins, nieces and nephews.

Hon. Thomas Virgil Pittman

When Mrs. Pittman asked me to present this eulogy [of Judge Thomas Virgil Pittman, who was born March 28, 1916 and died January 6, 2012], I was honored and began to work on it. It has been a moving experience. There were many changes, and I was reminded of something Judge Pittman told me many years ago. He said, "You know whenever I make a speech, I make three speeches: The one I meant to make. The one I made. And the one I wished I had made." So I am sure tomorrow when I wake I will think of what I should have said. I have repeated this little story many times. It is one of many that will always be with me.

It is one's life that eulogizes a person, far beyond anything we can say. To me, Judge Pittman was the epitome of fairness and honor.

I came to know Judge Virgil Pittman over 60 years ago when I began my law practice in Gadsden. He had been an FBI agent and was teaching business law at the University of

Alabama Extension Center in Gadsden. Ten years my senior, to a young lawyer in his early 20s, Virgil Pittman seemed a wily veteran of the law. When I came back from Korea, he had been appointed circuit judge by the governor. I practiced in his court, and we spent many hours together on civic and other activities. I came to admire and respect him as I would an older brother. He was the mentor I relied upon, and I have viewed him as such over these many years.

Often in one's life an event occurs that is lasting evidence of a man's values. So it was with Judge Pittman. Frye Gaillard, a native Mobilian and writer-in-residence in the History Department at the University of South Alabama, wrote about that event in Judge Pittman's life in his 2004 book, *Cradle of Freedom—Alabama and the Movement that Changed America*.

Professor Gaillard wrote: "In a 1976 ruling in his court, Judge Pittman took note of Mobile's racial polarization and ordered a new mayor-council form of city government, with nine council members elected from districts. Only then, said the judge, would blacks be assured of a place at the table in a city where their interests were trampled roughshod."

Gaillard quoted these words of the judge's in his ruling: "The sad history of lynch mobs, racial discrimination and violence raises specters and fear of legal and social injustice in the minds of blacks." Judge Pittman said it was time for that history to end, Gaillard wrote, but local media denounced the opinion and a white citizens group bought a half-page ad with a banner headline, "Impeach, Appeal, Arrest."

I first read Gaillard's book in 2008 as Judge Pittman was approaching his 92nd birthday and I was so proud of what he had done. Mobile was my birthplace and I knew the courage of that ruling. I wanted to share my feelings with Judge Pittman about his contributions to our community. My wife and I took the book to him. Here are few lines of my letter to him on March 26, 2008.

To Judge Virgil Pittman, my friend and early mentor:

This book, *Cradle of Freedom*, is a story of brutality and courage drawn from the struggle of an oppressed people who sought to speak truth to power and to demand the dignity and freedom to which they were endowed by their Creator and promised by the fundamental documents of their country.

It is a story in which you, Judge, played a vital and essential part.

Your courageous ruling was not without consequence to you and your family, nor was it without consequence to thousands of your fellow citizens who yearned for the dream of which Martin King had so eloquently spoken many years before. On that day, Dr. King had said, "We refuse to believe that the bank of justice is bankrupt." Your ruling was the beginning of a long and tortuous journey for Mobile that ultimately confirmed that optimism for which Dr. King ultimately gave his life.

Much has changed since your ruling almost 40 years ago. Mobile now has a black mayor and African-Americans now serve on the council as a direct result of your ruling, and through their influence others are spread throughout the local governments. Your decision made a positive and lasting difference in our community.

Judge William Steele, chief federal judge in Mobile on the court Judge Pittman served for 40 years, said recently he

"will be remembered as a bright, hardworking and fearless judge who never shied away from making hard decisions. He was called upon to make decisions that were changing the social fabric of Mobile back in the '60s."

Perhaps one of the judge's most important legacies is the men and women who clerked for him, those talented attorneys who served Judge Pittman during his years on the federal bench.

These outstanding men and women are Judge Pittman's progeny. For the rest of their lives they will carry with them the values they learned from this good man.

Judge Pittman introduced me to those same values, and to causes in which I could seek to make their goals reality. In one's life we meet someone who changes our life for good. For me, Judge Pittman was one of these.

Let us all remember and thank the living God for the blessings we have received from knowing this kind and gentle man.

—Lewis Odom | AL

Armstrong, Ralph Lowry
Bessemer
Admitted: 1965
Died: January 4, 2012

Elliott, Edgar Meador, III
Birmingham
Admitted: 1953
Died: February 27, 2012

Hawkins, Mary Douglas
Birmingham
Admitted: 1983
Died: January 5, 2012

Robertson, Hon. William Henry
Eufaula
Admitted: 1969
Died: February 17, 2012

Beals, Willard Russell, Jr.
Birmingham
Admitted: 1985
Died: January 22, 2012

Gaines, Ralph Dewar, Jr.
Talladega
Admitted: 1949
Died: January 24, 2012

Kettler, Charles Joseph, Jr.
Luverne
Admitted: 1958
Died: November 23, 2011

Schell, Fritz Eugene, III
Chatom
Admitted: 1990
Died: February 8, 2012

Bonnett, Robert Earl, Jr.
Birmingham
Admitted: 1982
Died: February 11, 2012

Gladden, Randall Olen
Huntsville
Admitted: 1978
Died: February 9, 2012

Love, Betty Cook
Talladega
Admitted: 1965
Died: January 23, 2012

Smith, Jock Michael
Tuskegee
Admitted: 1976
Died: January 8, 2012

Crosby, Joseph Raymond, III
Montgomery
Admitted: 1979
Died: January 29, 2012

Gleason, George Clifton
Clifton Park, NY
Admitted: 2006
Died: November 20, 2011

Mitchell, Wendell Wilkie
Luverne
Admitted: 1965
Died: February 4, 2012

Swatek, Chace William
Pelham
Admitted: 2004
Died: February 15, 2012

Doss, John Leslie, Jr.
Decatur
Admitted: 1954
Died: November 14, 2011

Grayson, Troy
Theodore
Admitted: 1990
Died: January 8, 2012

Noonan, Hon. Lionel Winston
Fairhope
Admitted: 1953
Died: December 20, 2011

Thorington, Robert Dinning
Montgomery
Admitted: 1957
Died: February 3, 2012



Leadership Forum Update



At the time this issue went to press, the 30 lawyers in the Leadership Forum are mid-way through the program. This class is extremely talented and diverse, selected from a competitive pool of 71 candidates. The 17 men and 13 women come from all parts of the state and practice in a variety of fields of law. While the focus continues to be on servant leadership, the 2012 forum barely resembles the initial 2005 group, and has even changed dramatically from last year. The current focus is the role of the servant leader in days of high stakes, uncertainty and change. Using lectures, workshops, reading assignments and small-group discussions, incorporated are behavioral analysis tools, planning and organization, specific leadership techniques, and leadership skills in a law practice, as well as sessions on the future of the legal profession.

A January orientation in Montgomery included social events at the Alabama Shakespeare Festival and The Conservatory at Wynfield Estates. In February, the forum partnered with the Air University, home of the educational center of the United States Air Force, to aid class members' development into innovative, critical thinkers. This year, a physical and challenging two-hour leadership reaction course was added, designed to test participants' problem-solving skills under pressure using

military officers providing critical analysis and feedback.

Lieutenant General David S. Fadok, commander and president of the Air University, and Colonel Tom Coglitore, commandant of the Officer Training School (OTS), were welcomed to the forum faculty for the first time in its history. Also welcomed were General George W. Casey, Jr., 36th chief of staff of the U.S. Army, and prior commander of the multinational forces in Iraq, and his wife, Sheila, during first CLE weekend retreat at The Grand Hotel.

In March, the Leadership Forum traveled to Birmingham where an impressive group of educators and business leaders highlighted the story of "All Things UAB" by an up-close look at educational, healthcare, research and athletic units. In April, the forum traveled to Auburn University for a similar look at the modern land-grant university and its community, with both sessions highlighting the significant economic and societal impact these institutions have on Alabama.

This month, Balch & Bingham LLP will host the forum for the final session.

During a graduation dinner at the Birmingham Country Club, Class 8 will take its place among a distinguished group of 232 alumni. Applications for Class 2013 will be available at www.alabar.org July 1. | **AL**





Marc A. Starrett

By Marc A. Starrett

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

Decisions of the United States Supreme Court—Criminal

Miranda; Custodial Interrogation

Howes v. Fields, No. 10-680, 2012 WL 538280 (Feb. 21, 2012)

Police officers did not violate the defendant's *Miranda* rights by questioning him regarding alleged criminal activity while the defendant was incarcerated on an unrelated offense at the time of the questioning. The Court noted that it had repeatedly refused to adopt a categorical rule regarding whether the questioning of a prison inmate is "custodial" for purposes of *Miranda*, and the determination of whether the "individual's freedom of movement was curtailed...is simply the first step in the analysis, not the last."

Federal Habeas Corpus Procedure; Review of State Court's Decision

Wetzel v. Lambert, No. 11-38, 2012 WL 538281 (Feb. 21, 2012)

Reversing the granting of habeas relief from the petitioner's state court capital murder conviction, the Court held that the court of appeals had failed to examine each ground supporting the state court's decision. It noted that a retrial of this charge 30 years after the offense would pose "the most daunting difficulties for the prosecution[,]," and that this heavy burden should not be imposed unless each ground supporting the state court's judgment is examined and found to be unreasonable under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Federal Habeas Corpus Procedure; Cause for Procedural Default

Maples v. Thomas, 132 S. Ct. 912 (2012)

The Court held that the habeas petitioner's showing that his post-conviction counsel had effectively abandoned him at the time he could have appealed from the dismissal of his *Ala.R.Crim.P.* Rule 32 petition established cause for the procedural default arising from his failure to appeal.



Rhonda P. Chambers

Federal Habeas Corpus Procedure; Certificate of Appealability; AEDPA Limitations Period Calculation

Gonzalez v. Thayer, 132 S. Ct. 641 (2012)

The Court held that a defect in a certificate of appealability under 28 U.S.C.A. § 2253 (c)(3) is non-jurisdictional, because that rule is “mandatory but non-jurisdictional[.]” It further held that when the habeas petitioner does not seek review in his state’s highest court, the one-year AEDPA limitation period begins to run at the time for seeking such review expires.

Decisions of the Eleventh Circuit Court of Appeals—Criminal

Federal Habeas Corpus Procedure; Actual Innocence Exception to the AEDPA Limitation Period

Rozzelle v. Sec., Fla. Dept. of Corr., No. 10-13595, 2012 WL 630204 (11th Cir. Feb. 29, 2012)

Thoroughly discussing the “actual innocence” exception to the AEDPA limitation period and reaffirming that the exception requires the habeas petitioner to establish “factual innocence” rather than simply “legal insufficiency,” the Court held that the petitioner failed to meet this heavy burden and, thus, affirmed the district court’s dismissal of the time-barred petition.

Designation of Violent Felonies under the “Armed Career Criminal Act”

U.S. v. Owens, No. 09-13118, 2012 WL 603233 (11th Cir. Feb. 27, 2012)

Alabama state court convictions of second-degree rape and second-degree sodomy do not constitute “violent felonies” for purposes of the “Armed Career Criminal Act,” 18 U.S.C. § 924, a federal habitual offender statute requiring a mandatory minimum sentence for prior drug or violent felony offenders found in possession of a firearm or ammunition.

Production of Files to Grand Jury Subject to Fifth Amendment Protection

In re Grand Jury Subpoena Duces Tecum, Nos. 11-122688, 11-15421, 2012 WL 579433 (11th Cir. Feb. 23, 2012)

The Court reversed the district court’s contempt judgment against an individual who, citing the Fifth Amendment privilege against self-incrimination, refused to produce decrypted computer hard drives in a grand jury child pornography investigation. The production of unencrypted hard drives would be testimonial in nature, and the individual properly invoked his Fifth Amendment rights against producing or decrypting the information.

“impressive staff”
“diligent and responsive”
“easy to deal with”

Court Bonds *online*

THE
BAR PLAN
Expedient *bonds*. Excellent *service*.

courtbonds.thebarplan.com

- Speak directly with an underwriter who specializes in bonds.
- 24-hour turnaround time.
- Service is our top priority.
- Dedicated to the legal communities we serve.

Broad Range of Bonds Available:

- Probate
- Court Bonds (Appeal, Replevin, Injunction, etc.)
- Notary Bonds

call our underwriters at
877-553-6376

Federal Habeas Corpus Procedure; Certificate of Appealability

Scales v. Forniss, No. 11-12135, 2012 WL 162126 (11th Cir. Jan. 19, 2012) (unpublished opinion)

Following the district court's denial of federal habeas relief from the petitioner's Alabama state court convictions, the petitioner obtained a certificate of appealability for review of that judgment. However, the petitioner's failure to argue the issues upon which that certificate was granted rendered them abandoned on appeal, resulting in affirmance of the district court's judgment.

Federal Habeas Corpus Procedure; Ineffective Assistance of Counsel

Hunt v. Comm., Dept. of Corr., 666 F. 3d 208 (11th Cir. 2012)

The petitioner failed to show that he was entitled to federal habeas relief under the AEDPA on his ineffective assistance of counsel claims. Contrary to his contentions, he did not show that the Alabama courts required extrinsic proof of prejudice arising from the alleged ineffective assistance, that counsel was ineffective in his cross-examination of his cell-mate, and that counsel was ineffective by not requesting jury instructions regarding intoxication and lesser-included offenses. The court acknowledged the AEDPA requirement that the petitioner first exhaust his claims by "fairly present[ing]" them to the state courts before presenting them to the federal court.

Federal Habeas Corpus Procedure; Interpreters

Jimenez v. Sec., Dept. of Corr., No. 11-12151, 2012 WL 10807 (11th Cir. Jan. 3, 2012) (unpublished opinion)

The state court's denial of the petitioner's request for an interpreter in his native language, Mumm, did not entitle him to federal habeas relief. He failed to show that the state court's rulings regarding the use of interpreters were contrary to clearly established Supreme Court precedent or an unreasonable application of federal law.

Ex parte Pate, No. 1101232, 2012 WL 593224 (Ala. Feb. 24, 2012)

The court held that the inmate's motion for resentencing under *Alabama Code* (1975) § 13A-5-9.1 and *Kirby v. State*, 899 So. 2d 968 (Ala. 2004) was filed separately from his petition for post-conviction relief under *Ala.R.Crim.P.* Rule 32, and therefore was properly before the court of criminal appeals for appellate review.

Decisions of the Alabama Court of Criminal Appeals

Pretrial Publicity; Voluntariness of Statement and *Miranda*; Confrontation Clause; NCIC Records; Prior Bad Acts Evidence

Thompson v. State, CR-05-0073, 2012 WL 520873 (Ala. Crim. App. Feb. 17, 2012)

Among its numerous holdings in affirming the defendant's murder convictions and resulting death sentence, the court held that he failed to show that his trial was prejudiced by pretrial publicity; his age at the time of his statement to police (18) did not make that statement inadmissible; his *Miranda* warnings were not rendered stale by the passage of five hours between their issuance and his statement; "death-qualifying" the jury did not prejudice it toward conviction; the victims' autopsy reports were admissible under the business records hearsay exception and were non-testimonial for purposes of Confrontation Clause analysis; he was not entitled to National Crime Information Center ("NCIC") records pertaining to law-enforcement witnesses; and the admission of evidence showing his acts of burglary on the weekend of the murders was proper to prove motive and intent under *Ala.R.Evid.* Rule 404 (b).

Hearsay; Interplay between Rule of Evidence and Statute

State v. Baker, CR-10-1831, 2012 WL 415461 (Ala. Crim. App. Feb. 10, 2012)

Pursuant to *Ala.R.Crim.P.* Rule 15.7, the state appealed from the trial court's decision to exclude the two-and-a-half-year-old victim's statements to family members regarding the defendant's alleged acts of sodomy at a daycare facility. In its decision the trial court had relied on the court of criminal appeals' holding in *M.L.H. v. State*, CR-09-0649 (Ala. Crim.

Decisions of the Alabama Supreme Court—Criminal

Ala.R.Crim.P. Rule 32; *Kirby* Resentencing Motion

App. Jul. 8, 2011), which was subsequently reversed by the supreme court in *Ex parte State (v. M.L.H.)*, No. 1101398, 2011 WL 6004617 (Ala. Dec. 2, 2011). In accordance with the supreme court's holding in *Ex parte State (v. M.L.H.)* that a witness's statement that does not constitute a hearsay exception under Ala.R.Evid. Rule 801(d)(1)(A) may still be admissible as substantive evidence under Alabama Code (1975) § 15-25-31 (governing admissibility of out-of-court statements by a child under 12 regarding exploitation or physical/sexual abuse), the court of criminal appeals reversed the trial court's exclusion of the victim's statements.

Double Jeopardy

Traylor v. State, CR-10-1392, 2012 WL 415462 (Ala. Crim. App. Feb. 10, 2012)

The defendant's convictions for both felony murder and manslaughter arising from his killing of a single victim constituted a violation of the Double Jeopardy Clause, necessitating a remand for the trial court to vacate one of the those convictions.

Accomplice Testimony

Jackson v. State, CR-10-1269, 2012 WL 415463 (Ala. Crim. App. Feb. 10, 2012)

The court reversed the defendant's felony murder conviction due to the state's failure to present sufficient evidence to corroborate accomplice testimony as required by *Alabama Code* (1975) § 12-21-222.

Revocation of Community Corrections Sentence Not Subject to Probation Revocation "Technical Violation" Statute

Reese v. State, CR-10-1220, 2012 WL 415464 (Ala. Crim. App. Feb. 10, 2012)

The court rejected the defendant's claim that the trial court's revocation of his community corrections sentence violated *Alabama Code* (1975) § 15-22-54.1 (f) (governing probation revocation for "technical violations"), but remanded for a hearing in compliance with the due process requirements of *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and other cases.

Arson; Lesser Included Offenses

Campbell v. State, CR-10-0932, 2012 WL 415467 (Ala. Crim. App. Feb. 10, 2012)

The state's failure to prove actual damage to the building involved in the defendant's first-degree arson charge under

Expedited Process Serving, LLC

"We Serve You by Serving Others"

888-830-5407

expeditedps@aol.com Fax : 205-995-9733

NO MILEAGE FEE!!!

➤ Status Available via Website ◀

➤ Service Throughout Alabama and Beyond ◀

➤ Automated Email Updates for Each Action on Your Case ◀

➤ Member of National Association of Professional Process Servers ◀

Alabama Code (1975) § 13A-7-41 required the court to reverse the defendant's conviction; further, because the trial court did not instruct the jury that attempted first-degree arson was a lesser-included offense, the court rejected the state's request that it render a conviction for that lesser-included offense.

Prior Bad Acts Evidence; Jury Instruction

Marks v. State, CR-10-0819, 2012 WL 415469 (Ala. Crim. App. Feb. 10, 2012)

Reversing the defendant's first-degree rape conviction, the court held that the trial court's jury instructions regarding the purposes for which it could consider the state's *Ala.R.Evid.* Rule 404 (b) evidence of his sexual attacks on other victims was overly broad. Relying upon the supreme court's holding in *Ex parte Billups*, No. 1090554, 2010 WL 53996118 (Ala. Dec. 30, 2010) that the trial court must instruct the jury on the specific purpose or purposes for which the collateral acts evidence was admitted "and not merely instruct the jury with a 'laundry list' of all the theoretical permissible uses" of the evidence, the court held that the trial court's instructions erroneously allowed the jury to consider the evidence for purposes not at issue in the case.

Youthful Offender; Specific Intent Required for Proof in Attempted Murder

Murphy v. State, CR-10-0515, 2012 WL 415471 (Ala. Crim. App. Feb. 10, 2012)

The court found the trial court's denial of the defendant's request for youthful offender status to be within its "almost

absolute discretion,” even if his argument against that decision had been preserved for review. While affirming the defendant’s convictions for burglary, making a terrorist threat and criminal mischief stemming from his shooting into a medical clinic, the court reversed the defendant’s attempted murder conviction because the state’s evidence did not show that he had the specific intent to murder the victim he wounded as he “shot blindly through a closed door[.]”

Ineffective Assistance of Counsel; Conflict of Interest

Coleman v. State, CR-10-0421, 2012 WL 415473 (Ala. Crim. App. Feb. 10, 2012)

The court reversed the defendant’s unlawful possession of a controlled substance conviction because defense counsel’s simultaneous representation of both the defendant and the state’s primary witness—a confidential informant—constituted a conflict of interest.

Possession of Controlled Substances; Retroactive Application of Substantive Change in Statute

Wells v. State, CR-09-1735, 2011 WL 6278300 (Ala. Crim. App. Dec. 16, 2011), on rehearing, 2012 WL 415476 (Ala. Crim. App. Feb. 10, 2012)

In overruling the defendant’s application for rehearing, the court noted that its opinion’s holding—that simultaneous possession of separate, different controlled substances may result in separate convictions of unlawful possession of a controlled substance—was based on a substantive amendment to a statute, and, accordingly, it was properly subject to retroactive application.

Ala.R.Crim.P. Rule 32 Procedure; Findings of Fact

Smith v. State, CR-07-1412, 2012 WL 415477 (Ala. Crim. App. Feb. 10, 2012)

The court remanded for the trial court to issue findings of fact regarding certain claims in the defendant’s Ala.R.Crim.P. Rule 32 petition because it had permitted him to present evidence as to those claims.

By Rhonda P. Chambers

Rhonda P. Chambers is associated with the firm of Taylor & Taylor. She is a graduate of Judson College (1986) and Cumberland School of Law (1989). For more than 20 years, her practice has been focused exclusively on appellate matters. She is the author or co-author of several articles on appellate law topics and has been a frequent lecturer on appellate matters. Chambers has been chair of the Standing Committee on the Alabama Rules of Appellate Procedure for more than ten years. She has been listed in the Alabama Super Lawyers for her appellate practice and was also included among the Top 25 Women in Alabama Super Lawyers, as well as in The Best Lawyers in America in the specialty of appellate law.

Decisions of the United States Supreme Court

Federal Preemption

Kurns v. Railroad Friction Products Corp., No. 10-879 (U.S. Feb. 29, 2012)

Corson worked as a welder and machinist for the railroad. His duties included installing brakeshoes on locomotives. After retirement, Corson was diagnosed with mesothelioma. Corson and his wife filed suit in Pennsylvania state court against several defendants, including Railroad Friction Products and ViadCorp. According to the complaint, Railroad Friction distributed locomotive brakeshoes containing asbestos, and Viad was the successor-in-interest to a company that manufactured and sold locomotives and locomotive engine valves containing asbestos. Corson claimed that he handled this equipment and that he was injured by exposure to the asbestos. Corson alleged state law claims of defective design and failure to warn of the dangers posed by asbestos. The defendants removed the case to federal district court, which granted summary judgment. The Supreme Court held 6-3 that state law design defect and failure-to-warn claims against manufacturers of locomotive products fall within the field of locomotive-equipment regulation pre-empted by the Locomotive Inspection Act.

Qualified Immunity

Messerschmidt v. Millender, No. 10-704 (U.S. Feb. 22, 2012)

In a 6-3 decision written by Chief Justice Roberts, the Court reversed the Ninth Circuit, concluding that police officers were entitled to qualified immunity under the circumstances of their search for firearms and gang-related material at a private home. The police conducted a search of Millender’s home pursuant to a court-approved warrant. The warrant authorized a search for all guns and gang-related material in connection

with the investigation of a domestic assault by a known gang member for shooting at his ex-girlfriend with a black pistol-gripped sawed-off shotgun. Millender was the gang member's former foster mother, and the officers had reason to believe he might be staying at her home. The forced-entry nighttime search did not find the gang member but resulted in the seizure of Millender's own shotgun, a box of .45-caliber ammunition and a letter addressed to the gang member. Millender sued the officers for violation of her civil rights, alleging that the warrant was invalid under the Fourth Amendment. The Supreme Court held that the officers were entitled to qualified immunity because even if the officers erred in executing a search warrant that lacked probable cause, the officers were not "plainly incompetent" so as to be denied qualified immunity.

Arbitration

Marmet Health Care Center, Inc. v. Brown, No. 11-391 (U.S. Feb. 21, 2012)

In a per curiam opinion, the Supreme Court held that state and federal courts must enforce the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, with respect to all arbitration agreements covered by the statute. In the case, three plaintiffs brought actions against a nursing home, claiming that the nursing home's negligence had resulted in the death of a family member. All three decedents had been cared for by the nursing home pursuant to contracts that required the parties to arbitrate all disputes. The trial court dismissed plaintiffs' claims based on the arbitration agreements. The West Virginia Supreme Court reversed, holding that the state's public policy barred a pre-occurrence arbitration agreement in a nursing-home admission contract that required arbitration of a negligence claim that resulted in personal injury or death. The state court rejected the Supreme Court's interpretation of the FAA, holding that Congress could not have intended the FAA to apply to personal injury or wrongful death suits that are only tangentially related to a contract, particularly where a necessary service is involved. The Supreme Court reversed the state court, holding that its interpretation of the FAA was controlling and that the state court was not free to disregard its precedent.

Immigration; Federal Income Tax

Kawashima v. Holder, No. 10-577 (U.S. Feb. 21, 2012)

Two married resident aliens were convicted of willfully making, subscribing and assisting in the preparation of a false income tax return under 26 U.S.C. § 7206. An immigration judge ordered the couple's deportation under 8 U.S.C.

§1101(a)(43)(M)(i), which provides for the removal of aliens convicted of an aggravated felony, defined to include an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." The Board of Immigration Appeals affirmed. The Ninth Circuit also affirmed the Board of Immigration Appeals' decision but remanded the case for the board to determine whether the wife's conviction had caused the government a loss in excess of \$10,000. The Supreme Court affirmed. The Court held that the removal statute requires courts to look at the statute defining the crime of conviction, not the specific facts leading to conviction in a particular case. Although the tax statutes at issue did not include the words "deceit" or "fraud," the statutes include elements that necessarily entail fraudulent or deceitful conduct. The Court also rejected the argument that the government could not be a victim under the statute, holding that tax crimes like those involved in this case are within the scope of the removal statute.

ASB Member Benefit



AirMed International is the country's leading air ambulance company, offering unparalleled medical care and bedside-to-bedside transportation on a worldwide basis. AirMed gets you back home if you're hospitalized while traveling. Find out more about the AirMed membership program and receive the discounted pricing offered through the Alabama State Bar.

www.alabar.org/members/member_benefit/Travel.cfm#airmed2



The dots on the map mark where we've been on some of our 17,000+ missions.

Criminal Procedure

United States v. Jones, No. 10-1259 (U.S. Jan. 23, 2012)

Federal agents placed a global positioning system tracking device on a drug suspect's car and monitored its movements for 28 days. The Court concluded that the GPS violated the defendant's Fourth Amendment rights. The justices divided 5-to-4 on the rationale for the decision, with the majority saying that the problem was the placement of the device on private property. That ruling avoided many difficult questions, including how to treat information gathered from devices installed by the manufacturer and how to treat information held by third parties like cell phone companies.

Federal Jurisdiction; Telephone Consumer Protection Act

Mims v. Arrow Financial Services, LLC, No. 1175 (U.S. Jan. 18, 2012)

The Court held that private suits to enforce the Telephone Consumer Protection Act ("TCPA") may be brought in both federal and state courts, not just state courts. The TCPA authorizes private suits for actual and statutory damages, stating that a person or entity may, if otherwise permitted by the laws or rules of court of a state, bring an action in an appropriate court of that state. Mims alleged that Arrow Financial violated the TCPA by using an automatic dialing machine to call his cell phone without his prior consent and brought suit in federal district court to enforce his rights under the TCPA. The district court dismissed the claim for lack of subject-matter jurisdiction, holding that the TCPA vested jurisdiction exclusively in state courts. The Eleventh Circuit affirmed. The Supreme Court granted review and unanimously reversed, explaining, "We find no convincing reason to read into the TCPA's permissive grant of jurisdiction to state courts any barrier to the U. S. district courts' exercise of the general federal-question jurisdiction they have possessed since 1875." The Court rejected an argument that granting federal jurisdiction over such suits (which carry \$500 per violation in statutory damages) would open the floodgates of litigation in federal courts.

Criminal Procedure

Perry v. New Hampshire, No. 10-8974 (U.S. Jan. 11, 2012)

The Supreme Court held that the due process clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification, when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.

Arbitration

CompuCredit v. Greenwood, No. 10-948 (U.S. Jan. 10, 2012)

The plaintiffs opened credit cards through CompuCredit and later brought a putative class action, alleging that CompuCredit violated the Credit Repair Organizations Act (CROA) by making allegedly misleading representations regarding the credit cards' use to rebuild poor credit. The district court denied CompuCredit's motion to compel arbitration, concluding that CROA claims are not arbitrable. A divided panel of the Ninth Circuit affirmed. The Supreme Court reversed and held that CROA claims may indeed be arbitrated. Federal statutory claims, just like other claims, are subject to the "liberal federal policy favoring arbitration agreements." Under the Federal Arbitration Act ("FAA"), contracts to arbitrate federal claims must be enforced—unless the FAA has been "overridden by a contrary congressional command." Because the CROA is silent on whether such claims can proceed in an arbitrable forum, the FAA requires that the arbitration agreement contained within a credit repair contract to be enforced according to its terms.

Employment Law; Ministerial Exception

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, No. 10-553 (U.S. Jan. 9, 2012)

In a major religious liberty decision, the Court held that the religion clauses of the First Amendment to the U.S. Constitution create a "ministerial exception" that protects a religious organization's choice to hire or fire a minister in a discrimination case. Although the Court declined to set a bright-line test for determining how far the exception extends, it recognized that the exception also applies to more people than just the head of a congregation. The Court held that the exception also applied to a teacher in a religious school.

Decisions of the Alabama Supreme Court

Wrongful Death; Recovery of Emotional Distress Damages

Hamilton v. Scott, No. 1100192 (Ala. Feb. 17, 2012)

The plaintiff filed an action alleging that defendants, doctors and a medical group caused the death of her unborn son, and that his death was wrongful within the meaning of the Alabama

Wrongful Death Act. She also alleged that defendants' negligence caused her to suffer mental anguish and emotional distress. The court found that the recently decided case of *Mack v. Carmack*, [Ms. 1091040, Sept. 9, 2011] ___ So.3d ___ (Ala. 2011), applied to this case even though *Mack* was decided while this case was pending on appeal. The court held that the trial court erred in holding that damages in the wrongful-death case were not recoverable for the death of a pre-viable fetus. The court also held that the mother was not entitled to emotional distress damages for the death of her unborn son under the zone-of-danger test. Justice Parker concurred specially, explaining his view that the viability standard of *Roe v. Wade* was of diminishing influence and was not persuasive.

Summary Judgment Practice

Ex parte Secretary of Veterans Affairs, No. 1101171 (Ala. Feb. 10, 2012)

The Alabama Supreme Court held that at summary judgment, when a party objects to the admissibility of evidence offered in connection with the motion, the objecting party cannot simply rely on a written or oral objection but must also file a motion to strike the objectionable evidence. In this case, the party clearly objected to the admissibility of the subject evidence in a written response to the summary judgment motion, but the responding party did not file a motion to strike. The supreme court acknowledged that prior precedent regarding the issue was confusing but nonetheless held that the responding party waived the objection by failing to file a motion to strike.

Venue; Doing Business by Agent; Corporate Affiliates

Ex parte Wright Bros. Co., Inc., No. 1100937 (Ala. Jan. 13, 2012)

The plaintiff, a resident of Walker County, was involved in a two-vehicle accident at a quarry located in Jefferson County. Both the plaintiff and the driver of the other vehicle were employed by GIBCO Construction, who, along with Wright Brothers Construction, was engaged in a project at the quarry. Wright Brothers and GIBCO are Tennessee corporations. The plaintiff filed a personal-injury lawsuit in Walker County against defendants Wright Brothers and GIBCO. The defendants moved to transfer venue, arguing venue was improper under *Ala. Code* § 6-3-7 because no one did business by agent in Walker County at the time the cause of action accrued. The plaintiff argued that Wright Brothers had a corporate affiliate that did business in Walker County at one time.

In response, Wright Brothers offered an affidavit showing that the affiliate ceased doing business years before the accident. The trial court denied transfer, but the supreme court granted mandamus relief, holding that venue was improper because there was insufficient evidence that Wright Brothers was doing business by agent at the time the cause of action arose. The court noted that the actions of an affiliate corporation will not necessarily suffice to render venue proper as to an affiliate for doing business purposes.

Personal Jurisdiction

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

A Perry County plaintiff had his vehicle repaired and tires replaced by City Boy's Tires in Florida, where the tire company's business is located. The plaintiff had an accident in Perry County allegedly caused by tire separation. The plaintiff sued the tire company in Perry County, claiming that warranties associated with tire replacement in Florida created a continuing obligation to an Alabama resident, thus subjecting the tire

Alabama DUI, Traffic, and Driver License Law Handbook

A Guide to Alabama DUI, Traffic, and Driver License Law with Practitioner Notes

Over 500 Pages of Text and Notes

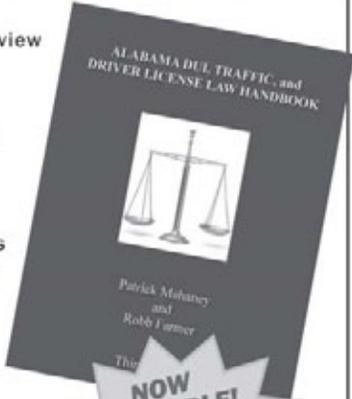
Available Now!!! The most comprehensive text on DUI, traffic, and driver license law in Alabama.

Order online at www.mahaneylaw.com.

Cost only \$93.50 (\$85 + S&H).

Topics:

- Introduction & Overview
- Statutes
- Jeopardy
- Forfeiture
- Juvenile & Youthful Offender Issues
- Arrest
- Roadblock
- Searches & Seizures
- Field Sobriety Tests
- UTTC Procedure
- Chemical Tests
- Evidence
- Trial
- Sentence
- Appeals
- Police Civil Liability
- Civil/Criminal Offenses
- Driver License Law
- Alabama Breath Test Instrumentation



ALABAMA DUI, TRAFFIC, and DRIVER LICENSE LAW HANDBOOK

Patrick Mahaney and Robb Farmer

This **NOW AVAILABLE! THIRD EDITION** includes Special Insert with 2011 DUI Related Legislation Completely Revised & Edited! Over 40 Pages of New Material!

company to personal jurisdiction in Alabama despite the fact that the actual transaction took place in Florida. The trial court denied dismissal, and the tire company petitioned for mandamus. The supreme court granted the writ, reasoning that the transaction was an “isolated occurrence” that was not sufficient to cause the tire company to “reasonably anticipate being hauled into court” in Alabama.

Effect of Bankruptcy on Other Defendants

Bradbury v. Carrier Corp., No. 1100994 (Ala. Dec. 16, 2011)

The plaintiffs sued a number of defendants for asbestos-related wrongful death. While the action was pending, a number of defendants filed for bankruptcy. The solvent defendants filed motions for summary judgment. The plaintiffs argued that they could not respond to the solvent defendants’ motions for summary judgment because of the bankruptcy. The trial court held that the automatic stay provision of 11 U.S.C. § 362 did not extend to nonparty solvent defendants, and, thus, it could proceed to consider the summary judgment motions and require plaintiffs to respond. The plaintiffs filed a response, contesting the trial court’s authority to require a substantive response and contending that forcing a response was, in effect, splitting plaintiffs’ causes of action in violation of Alabama law. The trial court granted summary judgment, and the plaintiffs appealed. The supreme court unanimously affirmed, citing and discussing a number of federal cases, holding that the automatic stay did not extend to non-debtors absent extraordinary circumstances, which were not present in this case.

Insurance; “Direct Action” against Tortfeasor’s Insurer; Late Notice

Traveler’s Indemnity Co. v. Miller, No. 110619 (Ala. Dec. 2, 2011)

A house-moving company was hired to move a house. While in transit, the house was damaged and placed on a bad foundation. The owner of the house sued the moving company, but the moving company failed to answer and the owner obtained a default judgment. Within 60 days, the owner contacted the moving company’s insurer to inquire about payment of the default judgment. The house-owner sued the insurer under the direct action statute, *Ala. Code*, 1975 § 27-23-2. The insurer defended based on late notice, and after a bench trial, the trial court found in favor of the house-owner, entering judgment for about \$250,000.

On appeal, the supreme court reversed, based largely on a 2008 decision that suggested that a judgment creditor of an insured cannot collect on its judgment under the direct action statute where the prerequisites for the insurance coverage, such as notice, are not met. The court overruled *Haston v. Transamerica Ins. Servs.*, 662 So.2d 1138 (Ala. 1995), which held that a judgment creditor has an interest in the proceeds of the policy and can notify the insurer after a default is entered.

Medical Liability; Expert Qualification

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

Critopoulos involved medical malpractice claims relating to development of a pressure ulcer following cardiac artery bypass and grafting. Defendants were nurses in the cardiac-recovery unit of Springhill Hospital. The plaintiff’s expert witness was a registered nurse who was very experienced in wound-care management. The trial court denied the defendants’ motion to exclude the nurse’s testimony, and the jury returned a \$300,000 verdict in the plaintiff’s favor. The Alabama Supreme Court held on appeal that the trial court erred in allowing the expert to testify as she had not practiced as an intensive care cardiac nurse and had never provided direct, hands-on care as a staff nurse to patients recovering in a cardiac unit. In addition, the court rejected the plaintiff’s argument that the witness should have been allowed to testify based upon the “highly qualified” exception to the general requirements of the Alabama Medical Liability Act. The court noted that the witness was highly qualified with regard to general wound-care treatment and the prevention of pressure ulcers, though she was not shown to be highly qualified with regard to the prevention of pressure ulcers in post-cardiac artery bypass graft patients in a cardiac recovery unit. Because the only evidence of breach of the standard of care offered by the plaintiff in *Critopoulos* was the nurse’s testimony, the court not only reversed the trial court’s ruling that the referenced testimony was admissible but also remanded the case for entry of a judgment as a matter of law in favor of the defendants.

Class Certification; Home Insurance

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

The plaintiff brought a putative class action against a home insurer, contending that the insurer breached its contracts

of insurance with homeowners in denying coverage for a general contractor's "overhead and profit" in situations in which damage to a home necessitated the work of multiple trades to make repairs. The plaintiff's claim was that under industry standards, a general contractor was necessary when three or more trades are needed to make the repairs; the insurer contended that it made the determination as to whether it would pay for a general service on a case-by-case basis. The trial court certified the class, and the insurer appealed. The supreme court reversed. The court held that the plaintiff failed to show that common questions of law or fact predominated over questions affecting individual class members. In finding that common questions of law or fact did not predominate, the court noted that the insurer paid general contractor's overhead profit when it was reasonably foreseeable that a contractor would be necessary which was a decision made on a case-by-case basis.

Venue; Unincorporated DBA; Fictitious Party Practice

Ex parte Hampton Ins. Agency, No. 1101211 (Ala. Nov. 18, 2011)

A Hale County business retained a Tuscaloosa County insurance agency to procure insurance for the business. The insurance agency was an unincorporated proprietorship. The business suffered an uncovered loss and brought suit against the agency in Hale County for failure to procure insurance. The agency moved to dismiss or transfer, claiming improper venue. After the motion was filed, the business amended its complaint to assert claims against additional defendants purportedly in an attempt to cure the improper venue. The trial court denied the venue motion, holding that venue was proper under § 6-3-6 because the agency had written at least five policies in Hale County. The supreme court granted mandamus relief, holding that venue was improper at the time of filing under § 6-3-2, and that subsequent amendment could

THE BLOOM GROUP INC



The Best Just Got Better



The Bloom Group, Inc. proudly welcomes
Perry C. Roquemore, Jr.
as its new Associate

This year marks the 25th anniversary of The Bloom Group, and for a quarter of a century, the state's premier governmental relations firm has been tirelessly advocating for its clients, including many Alabama municipalities, and reaping real results. Now, with the addition of former Alabama League of Municipalities Executive Director Perry C. Roquemore, our team of experienced professionals has gotten even stronger.

Learn more about all we do, and what we can do for you and your city
at www.thebloomgroup.com. Or call 334.244.8948.

not cure the defect because propriety of venue is determined at the time of filing. As to the latter issue, the court noted that the original complaint specifically mentioned the insurer who was added by amendment, and, thus, the substitution of that defendant for a fictitious party was not the proper use of a fictitious party because the plaintiff was not unaware of the party's identity.

Decisions of the Alabama Court of Civil Appeals

Workers' Compensation; False Answers in Employment Application

G.A. West & Co. v. Johnson, No. 2100980 (Ala. Civ. App. Feb. 10, 2012)

An employee did not disclose all of his prior injuries on his employer's questionnaire when he was hired. The employee admittedly failed to reveal that he had hip replacement surgeries in 2002 and 2005. The employee subsequently claimed workers' compensation benefits after an on-the-job accident. The employer denied the claim based on misrepresentations in the questionnaire. *Ala. Code*, 1975 § 25-5-51. The employee filed suit and the trial court awarded him permanent-total benefits. The court of civil appeals affirmed, reasoning that the employer failed to meet the test established in *Hornaday Truck Lines, Inc. v. Howard*, 985 So.2d 469 (Ala. Civ. App. 2007) to bar the employee's claim. The prior instances of the employee's back pain were too few over a 20-plus-year period to meet the standard of a knowing misrepresentation. There was also insufficient evidence to establish a causal connection between the hip-replacement surgeries and the injury which rendered him entitled to permanent-total benefits.

Workers' Compensation; Effect of Receiving Unemployment Benefits

White Tiger Graphics, Inc. v. Clemons, No. 2100482 (Ala. Civ. App. Jan. 13, 2012)

Under the Workers' Compensation Act, an application for and receipt of unemployment compensation benefits will not estop a claim for permanent and total disability. The court of civil appeals held that the worker's assertion to the Department of Industrial Relations that he was willing and able to work was not totally inconsistent with a claim for permanent-total benefits under the Act.

Punitive Damages; Excessiveness

Tanner v. Ebbole, No. 2091121 (Ala. Civ. App. Dec. 30, 3011)

Punitive damages were imposed against the defendants for their defamatory conduct toward one of their competitors. The competitor claimed that the defendants maliciously stated that nasty needles were used at the competitor's tattoo and piercing business. The compensatory damage awards were *de minimis*. In a plurality opinion (two judges joining the main opinion, two judges concurring in the result without opinion and one judge dissenting), the court upheld some of the punitive damage awards but remitted other awards under the Small Business Cap. *Ala. Code*, 1975 § 6-11-21. Both the plurality opinion and dissenting opinion agreed that the mere lack of proportionality between the compensatory and punitive damages did not spawn a constitutional excessiveness problem under *Gore* and other cases because of the unique nature of damages in defamation cases.

Sales Taxation

Magee v. The Home Depot USA, Inc., No. 2100715 (Ala. Civ. App. Nov. 4, 2011)

The court held that the statutory and regulatory provision for refunds of sales taxes on credit sales where the debt is uncollectible extends only to traditional "credit sales," i.e., where the retailer remitting the tax finances the transaction and carries the debt which is determined to be uncollectible.

Decisions of the Eleventh Circuit Court of Appeals

Class Actions; Adequacy of Notice; Common Fund Attorneys' Fees

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

The Eleventh Circuit affirmed the district court's approval of a class-action settlement of an action by home warranty consumers against the warrantor concerning alleged systematic denials of home warranty claims. The settlement provided for new procedures for claims review, review of previously denied claims and other non-monetary relief. Four objectors appealed. The Court held: (1) the class notice was adequate even though it did not contain every detail of the history of the litigation and competing class litigation in California; (2) the substance of the

settlement was adequate; and (3) the class counsel's attorneys' fees were reasonable in relation to the 25 percent benchmark for common fund fees (the 12 *Johnson* factors for analyzing fees do not need to be applied unless the requested fee exceeds the 25 percent benchmark).

Labor; Arbitration

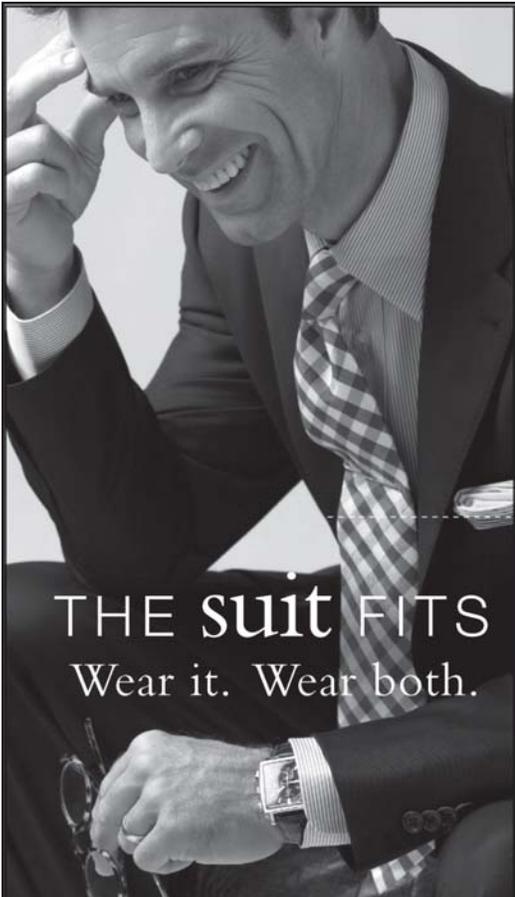
Jim Walter Resources, Inc. v. UMW, No. 10-10486 (11th Cir. Dec. 6, 2011)

Jim Walter sued UMW for damages allegedly caused by a work stoppage which was alleged to have violated the CBA between the parties. UMW moved to compel arbitration under the "settlement of disputes" section in the CBA, which did not use the word "arbitration." The district court granted the motion. The Eleventh Circuit reversed, holding that the CBA's "settlement of disputes" section was for employee complaints, not one of the employer, and that it did not contemplate or provide for any claim or grievance, or the arbitration of any claim or grievance, asserted by the employer.

Diversity Jurisdiction; Fraudulent Joinder

Stillwell v. Allstate Ins. Co., No. 11-10422 (11th Cir. Dec. 7, 2011)

An insured sued his insurer in a Georgia state court for water damage under a policy, then sued for failure to pay for a fire and alleged that the defendant insurance agency negligently procured the policy. The district court denied the insured's motion to remand the fire case, dismissed the agent for fraudulent joinder and granted the insurer summary judgment. In denying the remand, the district court concluded that the claims against the agent were subject to dismissal under Rule 12(b)(6) for failure to state a claim. The insured appealed. The Eleventh Circuit reversed, holding that the Rule 12 standard is more exacting than the fraudulent joinder standard, which the plaintiff can avoid by alleging a plausible theory on which there is any possibility of stating a cause of action. The case contains a good discussion of the current fraudulent joinder law. | [AL](#)



Two EXPERTLY
FITTED Suits \$799

Two tropical-weight wool suits from our extensive collection. Made with outstanding quality and detail, ideal for year-round wear. **SAVE OVER \$390**

Nothing compares to the look and feel of quality clothing and nothing compares to the style and affordability of the best suit package we have ever offered at The Locker Room.

TLR

THE LOCKER ROOM
TLRCLOTHIERS.COM

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

127 E MAGNOLIA
AUBURN 334.321.4962
MON-SAT 10AM-6PM

THE **suit** FITS
Wear it. Wear both.

Well dressed. Well informed. Follow us on **facebook**.



Birmingham Bar Foundation Honors 2012 Inaugural Fellows Class

Mobile, Baldwin County Bars Honor Bedsole



The 2012 members of the Birmingham Bar Foundation's Inaugural Fellows Class includes, front row, left to right: Bruce Rogers, Jim Lloyd, Paul DeMarco, Jerry Durward, Marda Sydnor, Bill Clarke, Lee Benton, Anthony Joseph, J. Mason Davis, Carol Ann Smith, and Steve Heninger. Middle row, left to right, includes Mike Freeman, Jim Ward, Anne Durward, Britt Coleman, Leslie Barineau, Jack Neal, Maibeth Porter, Scott Ford, William Wahlheim, and Ferris Ritchey. Back row, left to right, are Shay Samples and Lee Thuston. Not pictured are Clay Alspaugh, Boots Gale, Greg Hawley, Hon. Caryl Privett, and Bill Rose.

Birmingham Bar Foundation Honors 2012 Inaugural Fellows Class

The Birmingham Bar Foundation recognized the accomplishments and charitable work of those in the legal community at its 2012 Fellows Dinner.

More than 60 people attended the black-tie event February 12, and **Belle Howe Stoddard**, Cumberland Law School assistant professor, served as the guest speaker for the evening. Foundation board members and association Executive Committee members were among the guests, along with ASB President (and Birmingham attorney) Jim Pratt.

The Foundation's Inaugural Fellows Class was comprised of past presidents of the Birmingham Bar Foundation and the Birmingham Bar Association. The dinner allowed the Foundation an opportunity to demonstrate its appreciation to this group of lawyers for their generosity and continued support of the Foundation. Funds raised through the Fellows Program will be used to support legally-related charitable purposes of the Foundation.

"The Inaugural Fellows Class's combined commitment to the Fellows Program totals \$30,000, and already over half of that amount has been received by the Foundation. Given such an impressive pace set by the 2012 Inaugural Fellows Class, the Fellows Program promises to deliver great returns for the Foundation and its mission, in the long term, as future Fellows Classes are formed," **Georgia Sullivan Haggerty**, Foundation president, said.

The 2012 Inaugural Fellows Class members are:

M. Clay Alspaugh	James S. Lloyd
Leslie R. Barineau	George M. "Jack" Neal, Jr.
Lee R. Benton	Ray O. Noojin, Jr.*
William N. Clark	Maibeth J. Porter
Brittin T. Coleman	Hon. Caryl P. Privett
J. Mason Davis	Ferris S. Ritchey, III
Hon. Paul J. DeMarco	Bruce F. Rogers
Anne Lamkin Durward	J. William Rose, Jr.
Gerard J. Durward	S. Shay Samples
Scott W. Ford	Carol Ann Smith
Michael D. Freeman	Marda W. Sydnor
Edward M. Friend, Jr.*	W. Lee Thuston
Fournier J. "Boots" Gale, III	William B. Wahlheim, Jr.
Gregory H. Hawley	James S. Ward
Stephen D. Heninger	<i>*Posthumous Recognition</i>
Anthony A. Joseph	

Mobile, Baldwin County Bars Honor Bedsole

Every year since 2002, the Mobile and Baldwin County Bar associations have awarded the Howell T. Heflin Award at the Bench and Bar Conference. This award goes to an attorney or judge selected for having brought honor and integrity to the legal profession during his or her practice and service in Mobile and Baldwin counties.

The 2011 recipient of the award, **Billy C. Bedsole**, has practiced law in Mobile since 1963. He has been active in the Mobile Bar Association, serving on numerous committees and, for two years, as chair of the Grievance Committee.

He has been a member of the Alabama State Bar Executive Council on three separate occasions and as vice



Pictured with Howell T. Heflin Award recipient Billy C. Bedsole (second from right) are Barry Friedman, Wes Pipes and David Daniell.

president in 2010. Bedsole has also served as a bar commissioner from the 13th Judicial Circuit almost continuously since 1993 and as a member of the Disciplinary Commission since 1995. In addition, he is a member of the Judicial Inquiry Commission.

Bedsole has a 35-year history as a football and basketball coach in the Mobile youth football conference. During that time, his football record is 325-9-1. He has been recognized as Coach of the Year in the City of Mobile 13 times and has the distinction of having had a city street named for him in Municipal Park.

Billy and Mamie Bedsole have been married for 45 years and he has practiced law with Sam Stockman for 50 years.

Prior award recipients include Justice Janie L. Shores (2003), Justice J. Gorman Houston, Jr. and Judge Robert G. Kendall, III (2004), T. Massey Bedsole (2005), Judge T. Virgil Pittman and D. Richard Bounds (2006), Norborne C. Stone, Jr. (2007), Judge Emmett R. Cox (2008), Justice Hugh Maddox (2009), and Judge Edward B. McDermott (2010). | AL

Notice

Reinstatement

Transfer to Disability Inactive Status

Disbarments

Suspensions

Notice

- **Kristin Elizabeth Johnson**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 30, 2012 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2010-729, before the Disciplinary Board of the Alabama State Bar.

Reinstatement

- On January 16, 2012, the Supreme Court of Alabama entered an order reinstating former Cullman attorney **Victor Benjamin Griffin** to the practice of law in Alabama, with conditions, based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Griffin had been on disability inactive status since June 8, 2000. [Pet. No. 2011-1520]

Transfer to Disability Inactive Status

- Birmingham attorney **Christopher Shawn Linton** was transferred to disability inactive status, pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective January 24, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2012-218]

Disbarments

- Montgomery attorney **Walter Mark Anderson, IV** was disbarred from the practice of law in Alabama, effective November 29, 2011, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 20, 2011 order of Panel I of the Disciplinary Board of the Alabama State Bar. In ASB No. 2009-1443(A), Anderson was determined to be guilty of having violated rules 1.3, 1.4(a), 1.15(a), 1.15(b), 3.4(c), 8.1(b), 8.4(a), and 8.4(g), *Alabama Rules of Professional Conduct*. After Anderson failed to file an answer to formal charges filed against him in the matter, a hearing to determine discipline was conducted by the Disciplinary Board on October 19, 2011. Anderson failed to appear at this hearing. Following the hearing to determine discipline, the board ordered that Anderson be disbarred. [ASB No. 2009-1443(A)]

- Former Birmingham attorney **Temo Lopez** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective January 14, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar finding Lopez guilty of violating rules 5.5 and 8.4(a), (c), (d) and (g), *Ala. R. Prof. Co.* The Disciplinary Board's finding of guilt was based upon Lopez's failure to answer the formal charges filed against him, alleging that while suspended from the practice of law, he accepted \$750 from a potential client, agreeing to represent her. Prior to her court date, the client called Lopez to check on the status of her case. During that conversation, Lopez told her everything was fine, but never told her he could not represent her because his license was suspended. Lopez did not appear for court. Therefore, the formal charges were deemed admitted. [ASB No. 10-855]

Suspensions

- Birmingham attorney **Janice Y. Pierce Groce** was suspended from the practice of law in Alabama for 90 days retroactive to March 2, 2007, the effective date of Groce's summary suspension. On November 16, 2011, Panel II of the Disciplinary Board accepted Groce's conditional guilty plea to a violation of Rule 8.1(b), *Ala. R. Prof. C.* Pursuant to the plea, Groce's license was reinstated and she was placed on probation for a minimum of six months conditioned upon her making restitution and paying costs. [ASB No. 07-31(A) *et al*]
- Gadsden attorney **David Keith McWhorter** was suspended from the practice of law in Alabama for one year, effective February 7, 2012, the imposition of which was deferred pending a two-year probationary period. On

RECOMMENDED BY OVER 60 BAR ASSOCIATIONS!

The Easiest Way to Get Paid!

- ✓ Save up to 25% off standard fees
- ✓ Control cash flow & increase business
- ✓ Accept credit cards for retainers
- ✓ Avoid commingling client funds

LawPay's unique processing program correctly separates earned and unearned transactions keeping your firm compliant. The process is simple. Begin accepting payments today!



LAWPAY.COM

866.376.0950

CREDIT CARD PROCESSING

AffiniPay ISO is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL

February 7, 2012, Panel I of the Disciplinary Board accepted McWhorter’s conditional guilty plea to violations of rules 1.4(b) and 1.15(a), (b), (d) and (j), *Ala. R. Prof. C.* McWhorter admitted that he failed to properly manage his trust account, comingled trust and attorney funds and failed to keep complete and accurate trust account records. He further admitted that he failed to reasonably communicate and follow up with his clients concerning their legal matters. [ASB nos. 04-152(A), 08-243(A), 10-257, 10-1030, 11-518, 11-1417, and 11-1756 and Rule 20(a), Pet. No. 11-1418]

- Mobile attorney **Barry Carlton Prine** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective January 25, 2012. The supreme court entered its order based upon the Disciplinary Commission’s acceptance of Prine’s conditional guilty plea wherein he pled guilty to violations of rules 1.3, 1.16, 3.4, 5.5, 8.4(a), 8.4(d), and 8.4(g), *Ala. R.*

Prof. C. In ASB No. 2011-678, Prine represented the heirs of an estate in the sale of property. In October 2010, the complainant purchased a piece of property from the estate. After the sale, Prine failed to record the original deed with the probate court. Further, Prine did not open the estate until April 8, 2011, shortly before his suspension in an unrelated matter. In ASB No. 2011-963, Prine was suspended from the practice of law in Alabama for 180 days, effective April 22, 2011. After his suspension, Prine continued to file legal documents on behalf of his clients and used the electronic signature and bar number of another attorney to electronically file the pleadings. In Prine’s response to the bar, he stated that he asked the other attorney for his bar number; however, the other attorney stated that he was not aware that Prine had filed anything using his name as attorney of record, and stated that he never gave permission to Prine to file anything using his name. [ASB nos. 2011-678 and 963] | [AL](#)



Upchurch Watson White & Max Mediation Group is the leading alternative dispute resolution firm in the Southeast.

Led by Rodney Max, the firm’s experienced local team includes Mike Walls, Brad Wash and former Circuit Court Judge Art Hanes.

This team of outstanding mediators serves to assist law firms and their clients in every phase of dispute resolution and has acquired a national reputation for settling major litigation in the state of Alabama and beyond.

Visit us at: uww-adr.com



Upchurch Watson White & Max
MEDIATION GROUP

uww-adr.com

Daytona Beach

Maitland/Orlando

Miami

Birmingham

CLOUD BACKUP, RECOVERY AND HOSTING FOR ATTORNEYS

Secure, Off-Site Data Protection
Recommended to More Than 450,000 Attorneys

Member Benefit



COREVAULT™
Secure Cloud Solutions for your Business

Visit us online today! corevault.com/ASB

blog.corevault.com



Improving Jury Service

On the fourth day of a jury trial

between two businesses involved in a commercial lease dispute, a juror sends a note asking to speak to the judge. When the juror is brought into chambers with the lawyers and the reporter, the juror states that she has just learned that her boss will not pay her for the time she will lose while serving on the jury. She did not receive orientation materials about jury service prior to reporting nor when she arrived at the courthouse at the start of the week. She explains that she works part-time for hourly wages at a fast-food restaurant. It is unclear whether some of the lawyers knew this information. During the voir dire

process, which had lasted over two hours, one lawyer spent his time expressing pleasantries and posing vague, hypothetical, “would you agree” philosophical questions. Very little had been asked by this lawyer about the prospective jurors themselves or about matters seemingly connected to the case. The juror learns that only “full-time” workers must be paid during jury service.¹ She is informed, however, that the state will give her \$10 per day at the conclusion of the case. The trial reconvenes, and the presentation of the evidence ends after eight days. After closing arguments, the juror hears for the first time the elements of the claims and defenses of the parties. She is not given a copy of the instructions

By Judge Scott Donaldson

to take with her to the jury room. And because she served as a juror and performed this valuable civic duty, she lost her rent money for the month.

The jury system is an integral, vital component of the way we resolve disputes. The collective benefits to society as a whole of having a jury system are invaluable, but we need to remind ourselves that for the individuals who serve, they are at best sacrificing only their time. For many, including the self-employed and part-time workers, it can be financially devastating. We have an outstanding system of justice in our state, but everything can be improved. We should periodically re-examine the process to ensure that we are serving our citizens in the most effective, efficient, and fairest manner possible. The failure to do so could threaten the future of the system.²

Jury improvement efforts have been underway for years in many states.³

At times, jury “improvement” or “reform” has been a euphemism for political or policy changes. When honestly applied without a pre-determined agenda, though, improvement efforts have strengthened the right to a jury trial and re-focused the process on how best to serve society as a whole.⁴ Alabama has addressed some of these efforts, most notably the “Plain English” jury charge.⁵ And, while many of our circuit judges have individually implemented improvement techniques, we have not kept pace from a statewide perspective.

There are many, many resources and studies available to provide information on this topic.⁶ This brief article does not address all of the proposals being advanced, nor is it intended to advocate on behalf of any particular proposal. It does suggest, however, that it is time to examine whether at least some of the changes should be implemented. We may find that we do not want to adopt a particular change, but we owe it to our citizens to examine the issues. This effort will require coordination between the civil and criminal rules and procedures.⁷ In some states, commissions have been established to examine and recommend any changes.⁸

Jury Orientation Materials

Numerous studies show that jurors understand more about the process and are more satisfied with their service when they have received substantive orientation

For many, including the self-employed and part-time workers, it can be financially devastating.

materials in advance. The materials should include not only education about the proper role of the jury and the trial process, but practical information such as parking, concessions, food, breaks, courtroom maps, etc. Many of our circuits have created excellent juror handbooks, lists of frequently-asked questions, and/or orientation videos to help explain the system to the prospective jurors.⁹ Some of our circuits provide little information and/or are forced to use outdated materials.¹⁰ Consideration should be given to developing a uniform juror handbook and video which could be supplemented with local information.

Juror Name/Address Confidentiality

A fairly recent issue of concern across the country is whether juror information can or should be kept confidential. There is both a statutory and common law right to inspect court records in Alabama, which presumably would include juror information.¹¹ The public may have the right to know the names of jurors who serve in our taxpayer supported system of justice, and permanent anonymity is generally not favored. A question that may arise, however, is whether the names or identifying information must be released before the trial is concluded. One judge expressed the concern as follows:

Jurors are entitled to be treated with respectful regard for their privacy and dignity.... Most people dread jury duty—partly because of privacy concerns. A degree of anonymity safeguards jurors from intimidation during trial, promotes vigorous debate in the jury room, allows jurors to focus on the facts rather than on how the public might receive their verdict, reduces jurors’ anxiety (which may improve jury deliberations), and makes people less reluctant to serve on juries.¹²

Generally, parties are entitled to complete information about prospective jurors for selection purposes, including their names and addresses and other biographical information.¹³ In most trials, there are no privacy concerns, but in the “high-profile” criminal case, for example, jurors may express reservations about service due to safety issues. Does the trial court have the authority to limit public access to the names and addresses of jurors? If so, how should that be implemented? Can the court restrict the defendant’s access to identifying information to prevent harassment or improper contacts? Are juror questionnaire answers public records? Consideration should be given to addressing these issues in Alabama by rule or policy rather than on an ad hoc basis.

Mini-Openings before Voir Dire

The purpose of the voir dire process is clearly expressed in *A.R.Crim.P.* 18.4(d): “Voir dire examination of prospective jurors shall be limited to inquiries directed to basis for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their strikes.” To paraphrase Credence Clearwater Revival, “somewhere [we] lost connections.”¹⁴ Whether it is in response to seminar speeches or jury consultant sales presentations, voir dire occasionally turns into an exercise of posturing and meaningless indoctrination, all seemingly unconnected to the case to be tried.¹⁵ Some of this is completely understandable. The process awkwardly asks people who don’t know us or each other to bare their souls in front of everyone, and that just won’t happen naturally. We don’t tell them much about the case, so the questions often seem completely disconnected from any reference point. The process can occasionally turn into a performance of sorts, with counsel attempting to ingratiate themselves to an often bewildered



Looking *for a* Mediator?

The most up-to-date Alabama listing for trained neutrals is located at www.alabamaadr.org. Click on "Find a Mediator" or "Find an Arbitrator."



Alabama Center for
Dispute Resolution

P.O. Box 671
Montgomery, AL 36101
(334) 269-0409

audience.¹⁶ Some jurisdictions have found the "mini-opening" to be particularly helpful in many respects in improving the voir dire process. Prior to asking questions, the lawyer gives a brief, perhaps five-minute, opening statement to the venire.¹⁷ Voir dire questions follow. The process has certain obvious benefits, as "[m]ini-opening statements have the potential to bring issues and relevant factors into focus for potential jurors and the parties, eliciting better informed and more candid responses to questions and hence helping to uncover biases."¹⁸ The prospective jurors should also have a better understanding of why certain questions are being asked, thereby improving their perspective on the process. Furthermore, the questions from counsel should now be more directed to the issues in the case since the focus is directed specifically to the case at hand. Overall, more structure is provided.

Many lawyers may also find that the mini-opening enhances the effectiveness of their subsequent opening statement since the seated jurors already will have a good basis for understanding the issues. The amount of time necessary for an effective opening should also decrease, which is particularly helpful in view of diminishing attention spans.

Preliminary Jury Instructions

Both the Civil and Criminal rules provide that the charge to the jury shall generally occur after the closing arguments.¹⁹ One reason is that the complete charge cannot be given until all of the evidence has been presented and all rulings have been made on which claims, defenses or counts will be submitted to the jury. But this means that the jurors, non-trained in law and legal concepts, are not aware of the very things they should be thinking about when they hear the evidence. More and more courts are giving more substantive preliminary jury instructions to help jurors understand more about their roles in advance. The concept is that jurors need substantive instructions on legal theories and claims before hearing the evidence because they do not know what to look for in the evidence without familiarity with the issues. They need a reference point in advance. Preliminary instructions "provide jurors with a legal context in which to consider the evidence,

helping them better understand and evaluate evidence as they hear it and remember evidence more accurately."²⁰ These instructions can include "such matters as introducing the parties and their claims, indicating which issues are not in dispute, presenting a brief statement of the basic legal principles in the case, and telling the jury about their duties and the trial process."²¹ For example, preliminary instructions in tort cases can include concepts of fault and damages, while in criminal cases the elements of the charged crimes can be explained.²²

Numerous studies show that giving substantive preliminary instructions in advance of the evidence increases the jurors' understanding of their roles and the issues being tried. Preliminary or pre-trial jury instructions are not substitutes for the complete charge given at the conclusion of the case. But many states now also give the trial judge the option of giving all or some of the charge either immediately before or after closing arguments.²³

Increased Involvement of Jurors during Trial

Many improvement projects discuss ways to increase the comprehension of the jurors of the issues. Most include encouraging courts to provide materials for jurors to take notes, and encouraging lawyers to consider utilizing trial notebooks for certain exhibits or records that will be admitted.²⁴ Many states also address whether jurors should be permitted to ask questions to witnesses. The Alabama Supreme Court has addressed this issue.²⁵ It may be advisable to have this issue re-examined by circuit judges and lawyers who are engaged in jury trials so that the practical application of the principles expressed could be thoroughly discussed and barriers to implementation addressed.²⁶

Providing Jurors with a Copy of Written Jury Instructions during Deliberations

As currently written, both the Civil and Criminal rules generally contemplate that jurors will not be given the charges in writing to use during their deliberations.²⁷ If the jurors need an instruction repeated, it is expected that they will be brought back to the courtroom to be reinstructed

verbally.²⁸ One reason is the belief that providing written charges may tend to over-emphasize certain portions, or be incomplete. A practical reason is that prior to computers, it would have been difficult to type, handwrite or transcribe the entire charge without unduly delaying the proceedings.

We all know, though, that jurors cannot completely comprehend an oral charge on unfamiliar terms, particularly today where charges are much more complex. Thus, many Alabama judges are already providing the jurors with at least a portion of the charge in writing.²⁹ In civil trials, counsel may agree for the charges to be reduced to writing and to be to the jury room (or not object to the process if initiated by the judge) and no error is presented. But agreements are not as readily reached in criminal trials, and objections are more likely to be raised. Criminal Rule 21.1 provides that the charge can be sent to the jury room in a “complex” case. Some criminal defendants never consent to this process, either because the defendant does not believe it to be in his/her best interest to have the charges in the jury room and/or it provides yet another ground for an allegation of ineffective assistance of counsel in the perfunctory, perpetual post-conviction Rule 32 petitions. Further, trial courts may be reluctant to provide the jury with written charges as this provides another ground for appeal as to whether the case will be considered sufficiently “complex” under Rule 21.1.³⁰ Consideration should be given to removing any barriers to giving written charges to the jury and to encouraging the practice in both rules.³¹

Reduced Number of Civil Jurors

Some jurisdictions have reduced the number of jurors for certain types of cases (usually civil and/or misdemeanor) as part of jury improvement efforts. Theoretically, reducing the number of jurors serving in a civil case would save time and money by reducing the number of citizens called for service, the time for selection, and the amount of juror pay. Smaller groups can sometimes reach a consensus more readily. There are questions whether such savings are material and whether reducing the size dilutes representation from the community, but the issue is worthy of consideration.³²

Consideration should be given to removing any barriers to giving written charges to the jury and to encouraging the practice in both rules.

Requiring Counsel to Be Qualified to Try Cases

We have the best lawyers in the United States, but here’s an observation based on being the trial judge in well over 100 jury trials following 18 years of litigation practice: Lawyers who are actively engaged in trial work will effectively present the evidence and arguments to the jury in the most efficient manner which saves time and money to the system and to our jurors. Their clients are better served and are more satisfied with the process.³³ Conversely, lawyers who dabble in trial work or have no experience and no mentor to consult or assist are often incompetent to try a case, resulting in enormous wastes of time and resources and dissatisfied clients. I am firmly convinced that lawyers who took a meaningful trial advocacy course in school or engaged in trial competitions or who regularly try cases (bench or jury), are more effective, more informed about the *Rules of*

Evidence and Procedure, more confident, and more efficient in utilization of limited resources. Our law schools are doing a fantastic job of educating lawyers, but even the broad scope of that education over the traditional three-year model understandably cannot address all aspects of law practice. Someone can graduate from a law school, pass the bar exam and represent a client in court without any indicia that he/she is competent to do so.³⁴ Perhaps this deficiency was remedied in the past when newly-admitted lawyers were promptly sent to trial, often under the tutelage of a more experienced lawyer. Experience taught lessons that improved the quality. Times have changed, though. Today, even lawyers with a “litigation practice” can go years without trying a case for various reasons.³⁵ It may be time to consider a bifurcated certification process, requiring more training, education or experience than simply a law license to obtain or maintain the privilege of representing clients in court.



STEVEN H. EMERSON, CPA,
CGFM, CGAP, CFE, CITP

Litigation Support Services

- ★ Fraud Examinations
- ★ Accounting Assistance
- ★ Forensic Engagements
- ★ Expert Witness
- ★ Tax Compliance Case Assistance
- ★ Case Construction Assistance

1107 Colonial Drive, Alabaster, AL 35007-9309
P.O. Box 834, Helena, AL 35080-0834
<http://www.shecpc.com>

(205) 807-4466
(205) 449-8666 (Fax)
steve@shecpc.com

Conclusion

There are many other areas that could be addressed in a comprehensive review, such as inadequate juror pay, exemptions from service and technology needs. If any modifications or changes are deemed to be appropriate, they should be designed to strengthen the jury trial process and promote confidence in it from our citizens. | AL

ENDNOTES

1. *Ala. Code* §12-16-8(c). See *Juneman Electric, Inc. v. Cross*, 414 So.2d 108 (Ala. Civ. App. 1982) (discussing the "full-time employee" requirement). Hourly workers must be paid if they are "full-time employees." Opinion to Robert L. Hodges, 219 Ala. Op. Atty. Gen. 19, 1990 WL 605581 (April 20, 1990); Opinion to John B. Green, 203 Ala. Op. Atty. Gen. 28, 1986 WL 80071 (June 30, 1986) (referencing by analogy "full-time" to a standard full workday or week.)
2. It has been said that the "rule of law can be wiped out in one misguided, however well-intentioned, generation." Attributed to William T. Gossett, ABA President, August 1969 speech. The same could be said of the right to jury trial if threats or misunderstandings are not addressed.
3. For an overview, see Mize, Hannaford-Agor and Waters, *The State of the State Survey of Jury Improvement Efforts—A Compendium Report*, National Center for State Courts (April 2007).
4. See, e.g., Cohen, "Better, Happier Juries," 39 *Tenn. Bar. J.* 16 (2003).
5. The Alabama Civil Pattern Jury Committee is a nationally recognized leader in this area. See Hanes, Nettles, Watson, "The Plain English Project of the Alabama Pattern Jury Instructions Committee—Civil," 68 *The Alabama Lawyer* 369 (2007); Vowell, "Alabama Pattern Jury Instructions: Instructing Juries in Plain Language," 29 *Amer. J. of Trial Advocacy* 137 (2005).
6. In addition to state specific resources, several organizations have on-going projects on jury system improvement, including the National Center for State Courts, the American Judicature Society, the Federal Judicial Center and the American Bar Association.
7. There will be times where there should be differences in the criminal and civil procedures, but there may be more times where they should be consistent. For example, it may be that the criminal petit jury must be sworn both at the organizational session and again before voir dire. *A.R.Crim.P* 12.1(c) and 18.4(b). If this is not a requirement for civil jury trials, the difference should be recognized and explained.
8. For a description of the Tennessee jury reform efforts, see Cohen and Cohen, "Jury Reform in Tennessee," 34 *U.Mem.L.Rev.* 1 (2003).
9. Baldwin County, for example, has produced its own juror orientation video. Examples of other state's orientation videos can be found on the American Judicature Society website at http://www.ajs.org/jc/jc_jurorvideos.asp.
10. The only material available for some courts is a VHS video prepared during former Chief Justice Hooper's term.
11. *Holland v. Eads*, 614 So.2d 1012 (Ala. 1993); See also *Ex parte Birmingham News Co.*, 624 So.2d 1117, 1132-1133 (Ala. Crim. App. 1993) (analyzing the types of materials that can be sealed in a criminal trial and noting that "neither our rules of criminal procedure nor our case law clearly sets forth procedures to be followed when the issue of closure arises.")
12. *United States v. Blagojevich*, 614 F.3d 287, 292-293 (7th Cir. 2010) (Posner, J., dissenting). See also the discussion of the issues from the trial judge's perspective in *United States v. Blagojevich*, Slip Copy 2011 WL 812116 (N. D. Ill. 2011) (noting that some jurors "have been physically pursued with questions,

THE SWIFT HAND OF JUSTICE HOLDS A SMARTPHONE.

Being able to consult with your colleagues on the go gives you a resource beyond any law book. Real-life experience and knowledge of the law is invaluable in the pursuit of justice. And Verizon gives you access to that support system from your main office or your mobile one.

Alabama State Bar Association Members who belong to **NPP** may receive **up to 22% off** monthly access on Verizon Wireless. One- or two-year line term on eligible Calling Plans \$34.99 or higher required.*

Join today by visiting www.mynpp.com and click on "Join Now." Select "Legal" then "Alabama State Bar Association". Complete the form and information will be sent to your email.

Contact NPP-Legal Customer Service for more information.
1.800.810.3909 | customerservice@mynpp.com | www.mynpp.com



* Five wireless lines required. Activation fee/line: up to \$35. Subject to Corporate Agreement, Calling Plan and credit approval. Coverage, varying by service, not available everywhere; see vzw.com. ©2011 Verizon Wireless.

- filmed while attempting to eat, telephoned at home, approached at their homes, followed by camera crews, and forced to deal with the press camped outside their homes.”]
13. *E.g.*, *A.R.Crim.P.* 18.2. A 1987 opinion from the attorney general indicates that the addresses of prospective jurors may be withheld, but the opinion pre-dates Rule 18.2. Opinion to Ferrill D. McRae, 87-00166 (May 6, 1987).
 14. J. Fogerty, *Lodi*, from the album *Green River* (September 1969).
 15. In post-trial informal surveys of jurors conducted by someone other than counsel, voir dire questioning is often mentioned as one of the least positive aspects of their service.
 16. How much argument and indoctrination is permitted in voir dire varies widely from judge to judge. I'm convinced most lawyers just want to know what is permitted and what is not, and for each side to be treated the same.
 17. Tennessee provides that counsel shall be entitled to make “brief, non-argumentative remarks that inform the potential jurors of the general nature of the case” prior to jury selection. *Tennessee Rule of Civil Procedure* 47.01; *Rule of Criminal Procedure* 24(a)(2).
 18. *Jury Selection Strategy and Science*, 3d. ed. §15.4 (December 2011).
 19. “The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.” *A.R.Civ.* 51. “[T]he court shall instruct the jury after the arguments are completed. However, in the sentencing phase of the trial of a capital case, the court may, in its discretion, instruct the jury at the beginning of the proceeding. If the trial court elects to do so, it shall not be required to instruct the jury again after the arguments are completed, but it may if the court believes the interest of justice so requires.” *A.R.Crim.P.* 21.1.
 20. *State of the State Survey*, *supra* note iii, p. 36.
 21. *Jury Reform in Tennessee*, *supra* note viii, p. 49.
 22. *Id.* at 50. *Tennessee Criminal Rule* 30(d) and *Civil Rule* 51.03 require the court to give a preliminary instruction to the jury concerning “elementary legal principles.”
 23. *E.g.*, *Tennessee Criminal Rule* 30(d) and *Civil Rule* 51.03.
 24. The Civil Pattern Jury Committee again led the way in promulgating a charge on the issue of note-taking. APJI 1.15.
 25. *Ex parte Malone*, 12 So.3d 60 (Ala. 2008).
 26. Tennessee has both a civil and criminal rule addressing the issue of questions from jurors. *Tennessee Civil Procedure Rule* 43A.03; *Criminal Rule* 24.1.
 27. “Neither the pleadings nor “given” written instructions shall go into the jury room.” *A.R.Civ.P.* 51. “Neither a copy of the charges against the defendant nor the ‘given’ written instructions shall go to the jury room; provided, however, that the court may, in its discretion, submit the written charges to the jury in a complex case.” *A.R.Crim.P.* 21.1. Previously, “given” charges were to be taken to the jury room. *Ala. Code* §12-16-13, superseded by the *Rules*.
 28. See *A.R.Crim.P.* 22.2.
 29. One study, however, estimated that over-all Alabama is almost last in the percentage of trials where jurors receive a copy of the written instructions. State Rankings of Attorney and Judge Survey Results, National Center for State Courts Center for Jury Studies, http://www.ncsconline.org/D_Research/cjs/state-survey.html.
 30. The standard for review is apparently abuse of discretion which presumably will be deferential to the trial court and rarely reversible, but it presents yet another issue for the criminal appeal. *E.g.*, *Doster v. State*, 72 So.3d 50 (Ala. Crim. App. 2010) (discussing the issue under plain error review in a capital case.)
 31. In some states, providing jurors with written charges is mandatory. For example, *Tennessee Criminal Rule* 30 provides: “In the trial of all felonies...every word of the judge’s instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations.” See also *Tennessee Civil Rule* 51.04 (apparently requiring a written charge to be given to the jury upon request).
 32. See, e.g., *Waters*, *Does Jury Size Matter—A Review of the Literature*, *The National Center for State Courts* (August 2004) available at <http://www.ncsconline.org/juries/CAJURYREP.pdf>.
 33. This view is based on experiences on the Bar Disciplinary Commission as well as calls, letters and visits to court staff from family members of parties who have not been satisfied with their representation.
 34. Some of our circuits have already attempted to ensure better representation by developing their own additional training/education certification requirement before appointing lawyers to indigent criminal or juvenile cases.
 35. Criminal law practice may be an exception. Generally, almost 80 percent of the jury trials in Alabama each year are criminal. Prosecutors and criminal defense lawyers often have extensive trial experience.



Willoughby Consulting, LLC

Expert Banking Specialist Lending and Credit

Willoughby Consulting provides expert services related to bank lending matters for the legal profession to support civil litigation. Consults also on litigation strategy, and provides advice to Bank Managements/Boards through its counsel.

- Over Thirty Five Years Experience in Financial Services Industry
- Focus - Lending and Credit
- Recently Held Positions as Director of Credit Risk and Chief Credit Officer at \$140 Billion Regional Bank



Michael J. Willoughby, Principal
mike@mjwilloughby.com—www.mjwilloughby.com
1-888-669-0270



J. FORRESTER DeBUYS, III
(de-bweez)

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

INDIVIDUAL AND BUSINESS INSURANCE PRODUCTS AND CONCEPTS

FOR INDIVIDUALS

- Life Insurance
- Fixed Annuities *
- Disability Insurance **
- Long Term Care Insurance

FOR BUSINESSES

- Key Person Coverage
- Buy-Sell Agreement Funding
- Deferred Compensation
- Group Life and Disability Insurance **

* Issued by New York Life Insurance and Annuity Corporation (A Delaware Corporation)

** Products available through one or more carriers 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



An Overview of Alabama's New *Daubert*-Based Admissibility Standard

By Professor Robert J. Goodwin

For several years there has been disagreement

and debate over what admissibility standard Alabama courts should use for determining the admissibility of expert testimony. The central issue in this debate was whether Alabama should maintain its allegiance to the common law's *Frye* general acceptance test or abandon *Frye* and replace it with the *Daubert* test used by federal courts.

The *Frye* versus *Daubert* debate has ended. Recent amendments to § 12-21-160, Ala. Code (1975), and Rule 702 of the Alabama Rules of Evidence adopt a *Daubert*-based admissibility standard for determining the admissibility of scientific evidence. The Alabama Legislature acted first when it passed Act No. 2011-629 which amended § 12-21-160, Ala. Code (1975).¹ Thereafter, on November 29, 2011, the Alabama Supreme Court amended Rule 702 of the Alabama Rules of Evidence to make the evidence rule “consistent” with § 12-21-160.² Both amendments became effective January 1, 2012.

The move to a *Daubert*-based admissibility standard is significant and understandably presents questions about how

the new test will be interpreted and applied. Additional issues are raised because Alabama's version of the *Daubert* test is not identical to the test used in federal courts. This article will examine admissibility requirements imposed by Alabama's new *Daubert* test and issues courts are likely to encounter as *Daubert*-related case law evolves. The first part of the article will focus on the amendment to Rule 702 that adopted the *Daubert* standard and how it changes Alabama evidence law in general. The second part is focused on requirements imposed by the *Daubert* standard.

As noted, *Daubert*'s basic principles have been incorporated into an Alabama statute and Rule 702 of the Alabama Rules of Evidence. To promote readability and avoid confusion, this article will focus on amendment to Rule 702, however, provisions in the *Daubert* statute (i.e., the amendment to Ala. Code § 12-21-160) will be noted where appropriate. The *Daubert* statute and Rule 702, as amended, are set out side by side at the end of this article.

The Amendment to Rule 702 and the *Daubert* Statute

As a preliminary matter, the congruity of the *Daubert* statute Rule 702 should be noted. Rule 702 was amended after the *Daubert* statute was signed into law and clearly adopts the same *Daubert*-based admissibility standard for scientific evidence.³ Although there are minor differences in wording and organization, none appear significant.⁴ The most notable difference is not in the text of either amendment. The amendment to Rule 702 includes Advisory Committee's Notes and a Court Comment which provide guidance in interpreting and applying the new admissibility standard and its exceptions.⁵

As amended, Rule 702 provides:

Rule 702. Testimony by Experts

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify there-to in the form of an opinion or otherwise.
- (b) in addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
 - (1) The testimony is based on sufficient facts or data;
 - (2) The testimony is the product of reliable principles and methods; and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to non-juvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under *Ala. Code* 1975, § 36-18-30.

- (c) Nothing in this rule is intended to modify, supersede or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

The *Daubert* standard does not apply to domestic relations cases, child-support cases, juvenile cases or cases in the probate court, and in criminal actions, the *Daubert* standard applies “only to non-juvenile felony proceedings.”

1. Rule 702(a): Nonscientific Experts and Evidence

The text of the former Rule 702 has not been amended. It is merely moved to a new section (a). The division of Rule 702 into separate sections helps distinguish Rule 702(a)'s admissibility requirements—which are applicable generally to all experts—from the *Daubert*-based requirements in Rule 702(b)—which are only applicable to scientific experts and evidence.⁶ Because there have been no changes to the former Rule 702, pre-existing judicial authority construing Rule 702 remains applicable for interpreting and applying Rule 702(a).⁷

Three points related to preexisting judicial authority are worth emphasizing. First, requirements formerly imposed by Rule 702 (now Rule 702(a)) apply to all expert testimony as a precondition to admissibility—irrespective of whether the expert's testimony is based upon scientific, technical or other specialized knowledge.⁸ Second, Rule 702(a) imposes just two admissibility hurdles. The testifying witness must: (1) be “qualified as an expert,” and (2) provide tes-

timony that will “assist the trier of fact.”⁹ Third, for non-scientific experts, these are the only admissibility requirements imposed by Rule 702(a).¹⁰

2. Rule 702(b): Scientific Experts Must Satisfy *Daubert* instead of *Frye*

Rule 702(b) defines the new admissibility standard. Although non-scientific experts and evidence must only satisfy the traditional admissibility requirements that now reside in Rule 702(a), scientific evidence must satisfy the requirements of Rule 702(a) and the additional admissibility hurdles set forth in Rule 702(b)(1)–(3). The imposition of additional admissibility requirements on scientific evidence beyond those imposed by Rule 702 (now Rule 702(a)) is not new to Alabama law. For decades Alabama courts imposed additional admissibility requirements on scientific evidence by application of the *Frye* general acceptance test.¹¹ Rule 702(b) merely codifies this long-standing common law practice, but with one very significant change—a *Daubert*-based admissibility standard is substituted for the *Frye* standard.¹²

3. Rule 702(b): Exceptions (cases where the *Daubert* standard does not apply)

The provisions of Rule 702(b) (*i.e.*, the *Daubert* admissibility criteria) do not apply in certain cases. The *Daubert* standard does not apply to domestic relations cases, child-support cases, juvenile cases or cases in the probate court, and in criminal actions, the *Daubert* standard applies “only to non-juvenile felony proceedings.”¹³

The provision regarding the application of Rule 702(b) in criminal actions is oddly worded. Presumably, the phrase, “In

criminal actions, this section [702(b)] shall apply only to non-juvenile felony proceedings,” means that the *Daubert* admissibility standard only applies in proceedings where an *adult* is charged with a *felony*. A question arises as to whether and how the *Daubert* standard may be used in a criminal proceeding where an adult faces *both* felony and misdemeanor charges.

In sum, the list of exclusions—cases where Rule 702(b) and its *Daubert*-based admissibility criteria do *not* apply for determining the admissibility of scientific evidence—include:

1. domestic relations cases;
2. child support cases;
3. juvenile cases;
4. probate cases, and
5. criminal proceedings where an adult is charged with a misdemeanor.

If the provisions of Rule 702(b) do not apply in one of the above listed cases or proceedings, the *Frye* standard has not been supplanted, and, presumably, will continue to apply to determine the admissibility of scientific evidence.¹⁴

Finally, it should be noted that Rule 702(b) contains an exception to the exceptions for scientific expert testimony based on DNA analysis. Since 1994, expert testimony regarding DNA analysis has been governed by the *Daubert* standard pursuant to *Ala. Code* § 36-18-30.¹⁵ Rule 702(b) provides that § 36-18-30 continues to apply when the admissibility of DNA evidence is at issue in one of the excluded cases or proceedings.¹⁶ The *Daubert* statute does not address the admissibility of DNA evidence pursuant to § 36-18-30.

Issues Presented by the Amendment to Rule 702

What is “scientific” evidence?

Application of Rule 702 will require Alabama courts to distinguish “scientific” experts and evidence from “non-scientific” experts and evidence. This is a critical determination because scientific evidence is the only species of expert testimony subjected to scrutiny under Rule 702(b) and the *Daubert* test. Stated differently, it is the proffer of purported scientific evidence that “triggers” a *Daubert* inquiry.

As amended, Rule 702 requires courts to make two separate but related determinations regarding scientific evidence. First, pursuant to the first sentence in Rule 702(b), the trial court must determine whether proffered expert testimony purports to be scientific.¹⁷ If so, a *Daubert* admissibility inquiry is triggered, and the trial court then must determine whether the purportedly scientific evidence is “reliable”—that is, meets the three-pronged admissibility standard imposed by Rule 702(b)(1)-(3). Neither the *Daubert* opinion nor Federal Rule of Evidence 702 provides guidance in drawing the line between scientific and non-scientific evidence for these purposes. The *Daubert* opinion focused on the second issue; whether purportedly scientific evidence was reliable and admissible. Federal Rule 702 does not address the distinction between scientific and non-scientific evidence because it was unnecessary; at the time

Federal Rule 702 was amended federal courts applied *Daubert*’s admissibility principles to all Rule 702 experts.

Fortunately, this task is not new to Alabama courts. Because the *Frye* general acceptance test also applies to scientific evidence only, Alabama courts were required to make this same distinction under *Frye*. Accordingly, a well-developed line of Alabama judicial authority exists that address whether a specific type of expert or evidence is considered “scientific” for purposes of applying the *Frye* standard.¹⁸ Previous Alabama case law developed under the *Frye* standard will remain instructive—if not controlling—for determining whether expert testimony is scientific and subject to Rule 702(b)’s *Daubert*-based admissibility standard. The language used in Rule 702(b) to describe scientific evidence subject to the *Daubert* standard—“expert testimony based on a scientific theory, principle, methodology, or procedure”—is the same language Alabama courts have used when describing scientific testimony subject to the *Frye* standard.¹⁹

In addition to Alabama precedent, guidance in distinguishing “scientific” evidence from non-scientific evidence may be found in other *Daubert* jurisdictions that, like Alabama, have drawn a line between scientific and non-scientific evidence for purposes of applying *Daubert* admissibility criteria. First, several *Daubert* states, like Alabama, only apply *Daubert* to scientific evidence.²⁰ Second, it should be remembered that the *Daubert* opinion only addressed the admissibility of scientific evidence,²¹ and prior to the Supreme Court’s opinion in *Kumho Tire Co., Ltd. v. Carmichael*²², federal courts were divided over whether the *Daubert* test applied to nonscientific experts and evidence.²³ Accordingly, many decisions issued by federal courts prior to *Kumho Tire* distinguish scientific experts and evidence from non-scientific experts for purposes of applying the *Daubert* test.²⁴ As a general proposition, the determination of what is scientific in other *Daubert* states (and in pre-*Kumho Tire* federal court decisions) is guided by precedent and principles developed under the *Frye* standard, and distinguish between specialized and technical knowledge, which is not considered scientific and subject to the *Daubert* test, and scientific evidence, which, of course, is subject to *Daubert*.²⁵

What is “scientific” evidence? Criminal Cases

Because the *Frye* test was rarely applied in civil cases, most of the case law defining what is—or is not—“scientific” for purposes of applying the *Frye* standard developed in criminal cases. Many forensic techniques used in criminal prosecutions have been found non-scientific, and not subject to scrutiny under *Frye*. For example, expert opinion testimony based on fingerprint and crime scene analysis and a comparison of tool marks, bite marks and shoeprints has been found non-scientific.²⁶ In criminal cases involving forensic techniques Alabama courts have often stated that the *Frye* standard does not apply to expert opinion based on an expert’s specialized knowledge or experience,²⁷ or to evidence in the nature of a physical comparison.²⁸

The point is this: Any civil case refinement or expansion of what is considered “scientific” for purposes of determining whether the *Daubert* test should be applied may have an unexpected impact on the admissibility of forensic techniques commonly used in criminal cases. Although such techniques may

ultimately be found reliable under *Daubert*, this possibility should be noted.

Rule 702(c): The Alabama Medical Liability Act (AMLA)

Rule 702(c) and the *Daubert* statute are consistent insofar as they both express an intention not to modify, supersede or amend the AMLA or any judicial interpretation of the AMLA. Here is the pertinent language from Rule 702(c):

Nothing in this rule is intended to modify, supersede or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.²⁹

The issue here concerns whether the incorporation of the *Daubert* test into Rule 702 of the *Alabama Rules of Evidence* 702 makes the test applicable in medical malpractice actions brought under the AMLA.³⁰

The starting point is the relationship between Rule 702 and the AMLA described in *Holcomb v. Carraway*.³¹ In *Holcomb* it was undisputed that plaintiff's expert satisfied the similarly situated health-care provider requirements of the AMLA.³² Defendants argued, however, that the AMLA did not displace Rule 702, and the trial court retained discretion to exclude plaintiff's expert if the trial court found that expert was not qualified as under Rule 702.³³ The Alabama Supreme Court agreed.

[W]e conclude that, in a medical-malpractice action, the *Alabama Rules of Evidence* continue to apply to the trial court's determination of who is allowed to testify as an expert witness. Even when the proffered expert witness meets the requirements of a "similarly situated health care provider," ... a trial court retains the discretion provided in Rule 702, *Ala. R. Evid.*, to determine whether a witness's testimony will assist the trier of fact.³⁴

Since Rule 702(c) provides that nothing in the amended Rule 702 "is intended to modify, supersede, or amend ... any judicial interpretation [of the AMLA]," the holding in *Holcomb* should not be impacted. Because *Holcomb* held that "the *Alabama Rules of Evidence* continue to apply to the trial court's determination of who is allowed to testify as an expert witness," one might conclude that the *Daubert* admissibility criteria in Rule 702(b) applies to scientific opinions from an otherwise qualified physician in an AMLA action.³⁵

Here is the rub. The *Daubert* test was added to Rule 702 by amendment, and the amendment also provides that, "Nothing in this rule is intended to modify, supersede, or amend any provisions of the [AMLA]."³⁶ That is, although the holding in *Holcomb* may still support the argument that Rule 702(a) continues to apply in medical malpractice actions—because Rule 702(a) is the former Rule 702—Rule 702(c) appears to preclude the imposition of the *Daubert* test in any AMLA actions because to do so would constitute a modification or amendment of the AMLA, and is prohibited by the language of the amendment itself.

Other Statutes

As noted, the both the amendment to Rule 702 and the *Daubert* statute contain specific provisions providing that the

AMLA is to remain unaffected by the amendments. In addition, Rule 702(b) recognizes the viability of *Ala. Code* § 36-18-30 (1975) with regard to the admissibility of DNA evidence.

No similar provisions in Rule 702 or the *Daubert* statute address the continued viability of other Alabama statutes that regulate the admissibility of scientific evidence. Moreover, Rule 702(b) states that "expert testimony based on a scientific theory, principle, methodology, or procedure is admissible *only* if [the *Daubert* admissibility criteria is satisfied]."³⁷ Accordingly, the courts may be asked to consider whether scientific evidence admitted pursuant to a provision in an existing Alabama statute, or previously found to be generally accepted under the *Frye* standard, will have to satisfy the *Daubert* admissibility criteria in Rule 702(b).³⁸

The *Daubert* Admissibility Standard

Rule 702(b) and the *Daubert* Admissibility Criteria

The new *Daubert*-based admissibility criteria are in Rule 702(b). Scientific evidence must satisfy the three requirements specified in subsections (b)(1), (b)(2) and (b)(3):

- (b) In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:
 - (1) The testimony is based on sufficient facts or data,
 - (2) The testimony is the product of reliable principles and methods, and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

The admissibility criteria in subsections (b)(1), (b)(2) and (b)(3) are identical to the criteria that was added to Federal Rule 702 in 2000 in response to the United States Supreme Court's decisions in the so-called "*Daubert* trilogy"—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁹ *General Electric Co. v. Joiner*⁴⁰ and *Kumho Tire Co., Ltd. v. Carmichael*.⁴¹ Accordingly, even though Rule 702 does not mention the *Daubert* case or the *Daubert* test, it is clear that the intent was to adopt a *Daubert*-based admissibility test patterned after the test used in federal courts to replace the *Frye* general acceptance test in all Alabama cases and actions where Rule 702(b) applies.⁴² On the other hand, it is also clear that Alabama's version of the *Daubert* test is not identical to the test used in federal courts. By limiting application of the *Daubert* standard to only scientific evidence, Rule 702(b) rejects the primary holding of the *Kumho Tire* case, which was incorporated into the 2000 amendment to Federal Rule 702.⁴³

Although *Daubert* principles have unquestionably arrived in Alabama, the exact parameters of the new admissibility standard will be defined as interpretive case law evolves. It should be remembered that the *Daubert* test used by federal courts incorporates the collective holdings of the three cases in the *Daubert* trilogy, which were handed down over a six-year period beginning with the *Daubert* decision in 1993. Several states have adopted an

admissibility test for scientific evidence patterned after the test announced in *Daubert*, but, like Alabama, reject one or more of the holdings of the other cases in the *Daubert* trilogy.⁴⁴ *Daubert* states simply do not agree on what the *Daubert* test requires⁴⁵ or how rigorously it should be applied.⁴⁶

The Trial Court as “Gatekeeper”

The “gatekeeper” requirement is a central feature of the *Daubert* test generally embraced by all *Daubert* states. Under *Daubert*, the trial court as “gatekeeper” is required to determine the reliability and admissibility of scientific evidence.⁴⁷ By contrast, when presented with a challenge to scientific evidence under the *Frye* standard, the trial court is asked to determine whether *scientists* in the relevant scientific fields “generally accept” the science underlying an expert’s opinion as reliable.⁴⁸ Adoption of *Daubert* means that trial courts can no longer defer to the scientific consensus on questions of scientific validity and reliability. Instead, as gatekeeper, the trial court must independently determine whether proffered scientific evidence is: (1) based on sufficient facts or data, (2) the product of reliable principles and methods and whether (3) the witness has applied the principles and methods reliably to the facts of the case.

The *Daubert* Test

As explained in *Daubert*, Rule 702 of the *Federal Rules of Evidence* permits the admission of “scientific knowledge” that will “assist the trier of fact.”⁴⁹ From these two phrases the *Daubert* Court fashioned a two-part test for the admissibility of scientific evidence. If an expert is purporting to offer scientific evidence (*i.e.* purporting to offer “scientific knowledge”), the trial court, as gatekeeper, must determine whether (1) the “reasoning or methodology underlying the testimony is scientifically valid” and (2) “properly can be applied to the facts in issue.”⁵⁰ The test is sometimes referred to as requiring scientific evidence to be reliable and relevant.⁵¹

The “scientific validity” prong of the *Daubert* test requires the trial court to determine whether the expert’s testimony is grounded in the “methods and procedures of science”—that is, derived by the scientific method.⁵² The reliability, or scientific validity, prong is directly represented in Alabama’s Rule 702(b)(2). In determining whether an expert’s conclusion was derived by the scientific method, the *Daubert* court offered a non-exclusive list of factors that might help in determining whether the expert’s opinion is based on the scientific method and not merely unsupported conjecture wrapped in the cloak of science.

1. Whether the theory or technique can be—and has been—empirically tested;
2. Whether the theory or technique has been subjected to peer review and to publication;

Under *Daubert*, the trial court as “gatekeeper” is required to determine the reliability and admissibility of scientific evidence.

3. Whether the technique has a known or potential error rate when applied;
4. Whether recognized standards exist that control the technique’s operation, and
5. General acceptance within the pertinent scientific community.⁵³

The second prong of the test goes to a specific aspect of relevancy the court termed “fit.” As described by the *Daubert* court, “Fit is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”⁵⁴

Rule 702(b)’s Three Admissibility Requirements

Alabama courts are not writing on a blank slate. The admissibility of scientific expert testimony based on DNA analysis has been governed by the *Daubert* standard pursuant to statute—§ 36-18-30—since 1994.⁵⁵ The Advisory Committee’s Notes accompanying Alabama’s Rule 702 state that the *Daubert* admissibility criteria in Rule 702(b) and § 36-18-30 are the same.⁵⁶ Accordingly, the line of Alabama cases that have applied and interpreted the *Daubert* test in DNA cases should provide guidance in applying Rule 702(b)’s admissibility criteria.

1. Subsection (b)(1): Scientific testimony must be “based on sufficient facts or data”

Subsection (b)(1) requires expert scientific testimony to be “based on sufficient facts or data.” The advisory committee’s note accompanying the 2000 amendment to Federal Rule 702 state that a “quantitative” analysis is required.

Subpart (1) of Rule 702 calls for a *quantitative rather than qualitative analysis*.

* * *

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.⁵⁷

Federal courts have held that expert testimony that fails to satisfy the Federal Rule’s “sufficient facts or data” requirement amounts to no more than speculation or conjecture.⁵⁸ This standard reflects prior law in the sense that courts have always had the ability to reject testimony that was speculative and lacked a sufficient factual basis. If Alabama courts construe Rule 702(b)(1) in like fashion existing Alabama case law will be instructive.⁵⁹

2. Subsection (b)(2): Scientific Testimony Must be “the Product of Reliable Principles and Methods”

Subsection (b)(2) requires “reliable principles and methods” and embodies the reliability, or scientific validity, requirement

that lies at the heart of the holding in *Daubert*. In fact, of the three admissibility requirements in Rule 702(b), it is the one that is most clearly and directly tied to holding in the *Daubert* case.

The Alabama Supreme Court discussed application of *Daubert*'s reliability requirement in a case involving the admissibility of DNA evidence.

The “reliability” prong of the *Daubert* admissibility test requires the party proffering the scientific evidence to establish that the evidence constitutes “scientific knowledge.” The evidence need not represent immutable scientific fact, but, rather, it must be derived by use of the “scientific method.” The trial court should focus its inquiry on the expert’s “principles and methodology, not on the conclusions that they generate.” Thus, the reliability inquiry should address the “scientific validity” of the principle asserted, that is, whether the “principle support[s] what it purports to show.”

In assessing reliability, trial courts should look to several guiding factors, including: (1) whether the “theory or technique ... has been ... tested”; (2) whether the “theory or technique has been subjected to peer review and publication”; (3) whether the technique’s “known or potential rate of error ... and ... standards controlling the technique’s operation” are acceptable; and (4) whether the theory or technique has gained “general acceptance” in the relevant scientific community.⁶⁰

3. Subsection (b)(3): “The Witness Has Applied the Principles and Methods Reliably to the Facts of the Case”

In *Turner v. State* the Alabama Supreme Court commented on proper test application under *Daubert* in the context of determining the admissibility of DNA evidence. The court found it to be primarily—although not exclusively—a weight consideration.

Whether otherwise reliable testing procedures were performed without error in a particular case goes to the weight of the evidence, not its admissibility. Only if a party challenges the performance of a reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible.⁶¹

The *Turner* case was decided before Federal Rule of Evidence 702 was amended to incorporate *Daubert* related admissibility criteria that have, in turn, been incorporated into Rule 702(b). Arguably, the passage in the excerpt above that suggests it is the expert’s opponent who must challenge the performance of an otherwise reliable and relevant technique is at odds with Rule 702(b)(3) insofar as proper test application is now an admissibility requirement and part of the trial court’s gatekeeper duties. In

The Alabama Supreme Court discussed application of *Daubert*’s reliability requirement in a case involving the admissibility of DNA evidence.

sum, the trial court’s gatekeeper obligation requires the trial court to determine that the reliable application requirement imposed by Rule 702(b)(3) has been satisfied, but a misapplication that does not “render [] the analysis unreliable” should not require exclusion.⁶²

Relevant Considerations Regarding the Admissibility of Expert and Scientific Evidence under Rule 702

Rule 702(a)

1. Whether the witness is “qualified as an expert”;
2. Whether the proffered scientific, technical or other specialized knowledge will “assist the trier of fact” and
3. Whether the evidence is, or is not, “scientific.” (if “scientific,” another aspect of relevancy should be considered; does the scientific methodology “fit”—that is, even if the underlying methodology is scientifically valid, can it properly be applied to the facts in issue?

If the trial court determines that the evidence at issue is *not* “scientific” the Rule 702 inquiry is over (although *Ala. R. Evid.* Rule 403 and other exclusionary rules or doctrines may still be considered). If the trial court determines that the evidence at issue is “scientific” additional inquiries are mandated by *Ala. R. Evid.* 702(b).

Rule 702(b)’s Exclusions

4. If “scientific” evidence is at issue, consider whether the litigation concerns one of Rule 702(b)’s excluded cases or proceedings where Rule 702(b) does not apply. If so, the applicability of the *Frye* general acceptance test should be considered.

Rule 702(b)’s *Daubert* Criteria

5. If “scientific” evidence is at issue, and the litigation does not concern one of Rule 702(b)’s excluded cases or proceedings, apply the *Daubert* admissibility criteria in Rule 702(b). The trial court as “gatekeeper” must determine whether:
 - (a) the testimony is based on sufficient facts or data,
 - (b) the testimony is the product of reliable principles and methods, and
 - (c) the witness has applied the underlying principles and methods reliability to the facts of the case. | AL

The “*Daubert* statute”

§ 12-21-160 (as amended and codified, effective Jan. 1, 2012)

§ 12-21-160 Expert witnesses.

- (a) Generally.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- (b) Scientific evidence.** In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:
- (1) The testimony is based on sufficient facts or data,
 - (2) The testimony is the product of reliable principles and methods, and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.
- (c)** Nothing in this section shall modify, amend, or supersede any provisions of the Alabama Medical Liability Act of 1987 and the Alabama Medical Liability Act of 1996, commencing with Section 6-5-540, *et seq.*, or any judicial interpretation thereof.
- (d)** This section shall apply to all civil state court actions commenced on or after January 1, 2012. In criminal actions, this section shall only apply to non-juvenile felony proceedings in which the defendant that is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. This section shall not apply to domestic relations, child support, juvenile, or probate cases.
- (e)** The provisions of this section, where inconsistent with any *Alabama Rule of Civil Procedure*, *Alabama Rule of Criminal Procedure* or *Alabama Rule of Evidence*, including, but not limited to, *Ala. R. Evid. 702*, shall supersede such rule or parts of rules.

Rule 702 (as amended, effective Jan. 1, 2012)

Rule 702. Testimony by Experts

- (a)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
- (b)** In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
- (1) The testimony is based on sufficient facts or data;
 - (2) The testimony is the product of reliable principles and methods; and
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to non-juvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under *Ala. Code*. 1975, § 36-18-30.

- (c)** Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996, or any judicial interpretation of those acts.

Endnotes

1. Prior to this amendment § 12-21-160 provided:

The opinions of experts on any question of science, skill, trade or like questions are always admissible, and such opinions may be given on the facts as proved by other witnesses.

Ala. Code § 12-21-160 (1975) (amended effective January 1, 2012).
 2. The court's order of November 29, 2011 indicates that the purpose for the amendment was to make Rule 702 "consistent" with § 12-21-160:

WHEREAS, the Alabama Legislature at its most recent session enacted Act No. 2011-629, which amended § 12-21-160, effective January 1, 2012, to adopt, with some exceptions, the standard for scientific expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and

WHEREAS, this Court *wanted Rule 702 ... to be consistent with § 12-21-160.*"]

Order of Alabama Supreme Court Amending Rule 702, *Alabama Rules of Evidence* (November 29, 2011) (emphasis added).
 3. See *Ala. R. Evid.* 702 Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012 ("To promote uniformity and avoid confusion, Rule 702 has been amended to adopt the admissibility standard for scientific evidence set forth in Section 1 of Act No. 2011-629, amending § 12-21-160.").
 4. Three differences are worth noting. First, although the *Daubert* statute and Rule 702 contain identical exceptions (cases where the *Daubert*-based admissibility standard does not apply), they are placed in different sections. Rule 702 locates exceptions in section (b) with the *Daubert* standard. The *Daubert* statute sets out exceptions separately in section (d). *Ala. Code* § 12-21-160(d) (1975) (as amended, effective January 1, 2012). Second, Rule 702 includes a sentence at the end of section (b) to clarify that Alabama's pre-existing statute mandating the use of the *Daubert* test for DNA evidence, *Ala. Code* § 36-18-30 (1975), continues to apply—even in the excepted cases. The *Daubert* statute contains no provision on this subject. Third, the *Daubert* statute includes a section (e) stating that the *Daubert* statute supersedes any inconsistent provision of the *Alabama Rules of Evidence*, *Civil Procedure* or *Criminal Procedure*. *Ala. Code* § 12-21-160(e) (1975) ("The provisions of this section, where inconsistent with any *Alabama Rule of Civil Procedure*, *Alabama Rule of Criminal Procedure* or *Alabama Rule of Evidence*, including, but not limited to, *Ala. R. Evid.* 702, shall supersede such rule or parts of rules.").
 5. The Alabama Supreme Court adopted the Advisory Committee's Notes and Court Comment in its November 29, 2011 order amending Rule 702.
 6. See *Ala. R. Evid.* 702 Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012 ("To promote clarity, this amendment divides Rule 702 into subsections. The text of Rule 702, as it read before the amendment, has been placed unchanged in section (a), and the new admissibility standard for scientific evidence is set forth in section (b).").
 7. See *Ala. R. Evid.* 702 Advisory Committee's Notes to Amendment to Rule 702 effective January 1, 2012 ("The amendment merely places the text of the former rule in a separate section. *No changes have been made to the text, and preexisting judicial authority interpreting Rule 702 remains applicable to Rule 702(a).*") (emphasis added). See also *Ala. R. Evid.* 702 Court Comment to Amendment to Rule 702 Effective January 1, 2012. ("The provisions of section (a) apply in all cases where Rule 702 was previously applied.").
 8. See *Bagley v. Mazda Motor Corp.*, 846 So. 2d 301, 311 (Ala. 2003) ("All expert testimony must satisfy the requirements of Rule 702, *Ala. R. Evid.*").
 9. See *W. R. C. v. State*, 69 So. 3d 933, 939 (Ala. Crim. App. 2010) ("non-scientific expert testimony regarding fingerprint examination 'satisfied the requirements of Rule 702' when (1) the witness was qualified as an expert in the field and (2) the testimony assisted the jury in determining a fact in issue, i.e. the defendant's guilt." (quoting *Barber v. State*, 952 So.2d 393, 417 (Ala. Crim. App. 2005))).
- Of course, other exclusionary rules may apply. See, e.g., *Bagley v. Mazda Motor Corp.*, 864 So. 2d 301, 313 (Ala. 2003) ("Even if [the expert's] testimony satisfied the requirements of Rule 702, the trial judge could have excluded his testimony under Rule 403."). In addition, Alabama courts have long held that the opinions of an expert may not rest on mere speculation and conjecture. See *Dixon v. Bd. of Water & Sewer Comm'rs*, 865 So. 2d 1161, 1166 (Ala. 2003); *Millry Mill Co. v. Manuel*, 999 So. 2d 508, 518 (Ala. Civ. App. 2008).
10. See *Courtland Fibers, Inc., v. Long*, 779 So. 2d 198, 202 (Ala. 2000) ("Rule 702 does not require an expert to have scientific literature to support an opinion...[The expert's] opinions derive from knowledge, skill, and training he has received through years of experience. That is all that is required under Rule 702."); *W.R.C. v. State*, 69 So. 3d 933, 938-39 (Ala. Crim. App. 2010) ("Rule 702 alone, and not *Daubert*, *Kumho* or *Frye v. United States* govern[s] the admissibility of nonscientific expert testimony. Rule 702 contains no requirement that the expected testimony be reliable under *Daubert*; it requires only that the testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue'").
 11. See *Adams v. State*, 484 So. 2d 1160, 1162 (Ala. Crim. App. 1985) ("Alabama follows the rule in *Frye v. United States* for safeguarding against admission into evidence of facts gleaned from an unreliable scientific test.").
- As explained in Rule 702's original advisory committee's note:
- Experts often base their opinions and other testimony upon the results of scientific tests. Rule 702 does not undertake to answer the question whether such tests possess sufficient reliability to be admissible. The standard applied in *Frye v. United States* has become the standard adopted by Alabama.
- Ala. R. Evid.* 702 Advisory Committee's Notes.
12. *Ala. R. Evid.* 702 Advisory Committee's Notes to Amendment to Rule 702 effective January 1, 2012 ("The amendment adopts the approach taken in *Daubert* for determining the admissibility of scientific evidence. Consequently, the *Frye v. United States*, 293 F. 1013 [D.C. Cir. 1923], general-acceptance test has been supplanted, with few exceptions.").
 13. *Ala. R. Evid.* 702(b). The exceptions in Rule 702(b) are the same as exceptions found in Section (d) of the *Daubert* statute. See *Ala. R. Evid.* 702 Court Comment to Amendment to Rule 702 Effective January 1, 2012. ("The Advisory Committee recommended to the court that the legislative exceptions set out in Section 3 of Act No. 2011-629, Ala. Acts 2011[codified as § 12-21-160(d)], not be incorporated into the amendment to Rule 702. The court, however, disagreed and incorporated those exceptions into Rule 702(b).").

14. The Advisory Committee's Notes appears to anticipate just such a result. See *Ala. R. Evid.* 702 Advisory Committee's Notes to Amendment to Rule 702 effective January 1, 2012 ("The amendment adopts the approach taken in *Daubert* for determining the admissibility of scientific evidence. Consequently, the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), general-acceptance test has been supplanted, with few exceptions.") (emphasis added).
15. Section 36-18-30 provides:
- § 36-18-30. Admissibility of evidence relating to use of genetic markers
- Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in *Daubert, et. ux., et. al., v. Merrell Dow Pharmaceuticals, Inc.*, decided on June 28, 1993.
16. *Ala. R. Evid.* 702(b) ("Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under *Ala. Code*. 1975, § 36-18-30.")
- The Court Comment to the Rule 702 amendment explains:
- The Court... incorporated ... exceptions into Rule 702(b). By doing so, the Court did not intend to affect the applicability of *Ala. Code* 1975, § 36-18-30, which provides that the admissibility of scientific expert testimony based on DNA analysis is governed by the test set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and added a sentence to clarify that § 36-18-30 still governs the admissibility of scientific expert testimony based on DNA analysis, even in domestic-relations cases, child-support cases, juvenile cases and cases pending in the probate courts.
- ***
- [E]xcept as to expert testimony governed by § 36-18-30, the provisions of section (b) do not apply to testimony in domestic-relations cases, child-support cases, juvenile cases or cases in the probate court.
- Ala. R. Evid.* 702 Court Comment to Amendment to Rule 702 Effective January 1, 2012.
17. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), [observing that the *Federal Rules of Evidence* place limits on the admissibility of "purportedly scientific evidence."] (emphasis added). Cf. *Swanstrom v. Teledyne Cont'l Motors, Inc.*, 43 So. 3d 564, 580 (Ala. 2009) ("[A] person who offers an opinion as a scientific expert must prove that he relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the expert is testifying." (quoting *Slay v. Keller Indus., Inc.*, 823 So. 2d 623, 626 (Ala. 2001))) (emphasis added).
18. See, e.g., 2 C. Gamble & R. Goodwin, McELROY'S ALABAMA EVIDENCE, § 490.01(1)(b) (6th ed. 2009) (discussing guidelines used by Alabama courts for distinguishing scientific evidence from nonscientific evidence); *Id.* at § 490.01(2) (discussing specific categories of experts and evidence not considered "scientific" and subject to scrutiny under the *Frye* general acceptance test); Robert J. Goodwin, "Fifty Years of *Frye* in Alabama: The Continuing Debate Over Adopting the Test Established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*," 35 CUMB. L. REV. 231, 253-66 (2004-2005) (survey of Alabama cases).
19. See, e.g., *Swanstrom v. Teledyne Cont'l Motors, Inc.*, 43 So. 3d 564, 580 (Ala. 2009) ("[A] person who offers an opinion as a scientific expert must prove that he relied on scientific principles, methods, or procedures that have gained general acceptance in the field in which the expert is testifying." (quoting *Slay v. Keller Indus., Inc.*, 823 So. 2d 623, 626 (Ala. 2001))) (emphasis added); *Minor v. State*, 914 So. 2d 372, 400 (Ala. Crim. App. 2004) (holding expert's testimony not subject to *Frye* because it "was not a scientific theory, but was merely [the expert's] opinion based on his experience and training as a pediatric trauma surgeon") (emphasis added).
20. In addition to Alabama, at least eight *Daubert* states limit the application of *Daubert* to scientific evidence or a category of scientific evidence. First, Indiana, like Alabama, adopted an evidence rule that reflects this limitation. See *Ind. R. Evid.* 702(b) ("Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert rests are reliable.") (emphasis added); *Malinski v. State*, 794 N.E.2d 1071, 1085 (Ind. 2003) (holding expert testimony based on expert's specialized knowledge was not scientific testimony subject to *Ind. R. Evid.* 702(b)). Other states include Alaska, Connecticut, Iowa, Montana, New Mexico, Vermont, and West Virginia. See *Marron v. Stromstad*, 123 P.3d 992, 1004, 1014 (Alaska 2005) ("[W]e have never adopted *Kumho Tire's* extension of *Daubert* to all expert testimony, and we now explicitly decline to do so."); *Sullivan v. Metro-North Commuter R.R. Co.*, 971 A.2d 676, 682 n.5 (Conn. 2009) (noting the different standard of admissibility for scientific evidence); *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 686 (Iowa 2010) (*Daubert* factors are considered when "scientific evidence is particularly novel or complex" but "application of *Daubert* considerations is not appropriate in cases involving 'technical[] or other specialized knowledge'"); *State v. Clark*, 198 P.3d 809, 819 (Mont. 2008) (limiting application of Montana's version of the *Daubert* test to "novel scientific evidence"); *Banks v. IMC Kalium Carlsbad Potash Co.*, 77 P.3d 1014, 1018 (N.M. 2003) (observing that in New Mexico, "we [have] limited the requirements of *Daubert/Alberico* to testimony that requires scientific knowledge"); *985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 945 A.2d 381, 385 (Vt. 2008) ("[T]he trial court's inquiry into expert testimony should primarily focus on excluding 'junk science'—because of its potential to confuse or mislead the trier of fact"); *Watson v. Inco Alloys Int'l., Inc.*, 545 S.E.2d 294, 299 (W.Va. 2001) ("[A]dmissibility under *Daubert* ... only arises if it is first established that the expert testimony deals with 'scientific knowledge.'" (quoting *Gentry v. Mangum*, 466 S.E.2d 171, 185-86 (W.Va. 1995))).
21. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 590 U.S. 579, 590 n. 8 (1993) ("Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here.").
22. 526 U.S. 137, 149 (1999) ("We conclude that *Daubert's* general principles apply to the expert matters described in Rule 702.").
23. *Lauria v. Nat'l R.R. Passenger Corp.*, 145 F.3d 593, 599 n.7 (3d Cir. 1998) ("Whether *Daubert* even applies outside the scientific context remains in dispute."); *United States v. Webb*, 115 F.3d 711, 716 (9th Cir. 1997) (*Daubert's* standards "simply do not apply" to experts with specialized knowledge).
24. See, e.g., *Lauria v. Nat'l R.R. Passenger Corp.*, 145 F.3d 593, 599 (3d Cir. 1998) ("'specialized' knowledge ... is not the same as 'scientific' and 'technical' knowledge, as these terms are used in the disjunctive in Rule 702. To be 'specialized,' knowledge can be based on sufficient practical or work experience in the field about which the witness is testifying, and it

- need not be based on testing or experiments beyond common understanding.”); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (*Daubert* governs the admission of scientific evidence and does not apply to a witness who testified on the basis of specialized knowledge regarding the modus operandi of narcotics traffickers); *Compton v. Subaru of America, Inc.* 82 F.3d 1513, 1518 (10th Cir. 1996) (application of *Daubert* unwarranted in cases where expert testimony is based solely upon experience or training); *Michigan Millers Mutual Insurance Corp. v. Benfield*, 140 F.3d 915, 920 (11th Cir. 1998) (holding expert testimony was science-based rather than experience-based because expert “held himself out as an expert in fire sciences”) (emphasis in opinion).
25. See, e.g., *United States v. Webb*, 115 F.3d 711, 716 (9th Cir.1997) (*Daubert*’s standards “simply do not apply” to experts with specialized knowledge); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (*Daubert* does not apply to a witness who testified on the basis of specialized knowledge regarding the modus operandi of narcotics traffickers); *Compton v. Subaru of America, Inc.* 82 F.3d 1513, 1518 (10th Cir. 1996) (application of *Daubert* unwarranted in cases where expert testimony is based solely upon experience or training); *Michigan Millers Mutual Insurance Corp. v. Benfield*, 140 F.3d 915, 920 (11th Cir. 1998) (holding expert testimony was science-based rather than experience-based because expert “held himself out as an expert in fire sciences”) (emphasis in opinion). *State v. Griffin*, 869 A.2d 640, 647 (Conn. 2005) (applying analysis state used under *Frye* standard to determine whether expert evidence is scientific); *Malinski v. State*, 794 N.E.2d 1071, 1085 (Ind. 2003) (holding expert testimony based on expert’s specialized knowledge was not scientific testimony subject to *Ind. R. Evid.* 702(b)); *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 686 (Iowa 2010) (“application of *Daubert* considerations is not appropriate in cases involving ‘technical[] or other specialized knowledge’”); *State v. Clark*, 198 P.3d 809, 819 (Mont. 2008) (limiting application of state’s version of the *Daubert* test to “novel scientific evidence”).
 26. See *Barber v. State*, 953 So. 2d 393, 416-17 (Ala. Crim. App. 2005) (listing cases where the *Frye* test was held not applicable). See generally 2 C. Gamble and R. Goodwin, McELROY’S ALABAMA EVIDENCE, § 490.01(2) (6th ed. 2009) (discussing categories of experts not considered “scientific” and therefore not subject to the *Frye* general acceptance test); Robert J. Goodwin, “Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,” 35 CUMB. L. REV. 231, 253-66 (2004-2005) (survey of cases).
 27. See, e.g. *Barber v. State*, 953 So. 2d 393, 417 (Ala. Crim. App. 2005) (“[B]ecause print identification involves subjective observations and comparisons based on the expert’s training, skill, or experience, we conclude that it does not constitute scientific evidence and that, therefore *Frye* does not apply.”); *Minor v. State*, 914 So. 2d 372, 400 (Ala. Crim. App. 2004) (holding expert’s testimony not subject to *Frye* because it “was not a scientific theory, but was merely [the expert’s] opinion based on his experience and training as a pediatric trauma surgeon”); *Simmons v. State*, 914 So. 2d 1134, 1151 (Ala. Crim. App. 1999) (*Frye* test inapplicable to expert testimony in crime-scene analysis and victimology based on specialized knowledge).
 28. See, e.g., *Calhoun v. State*, 932 So. 2d 923, 952-53 (Ala. Crim. App. 2005) (bite marks).
 29. *Ala. R. Evid.* 702(c). The language used in the *Daubert* statute and Rule 702(c) differ slightly. The *Daubert* statute provides,

“Nothing in this section shall modify, amend, or supersede any provisions of the [AMLA].” *Ala. Code* § 12-21-160(c) (1975) (as amended, effective January 1, 2012) (emphasis added).
 30. Cf. *Martin v. Dyas*, 896 So. 2d 436, 441(Ala. 2004) (finding it unnecessary to decide whether a similarly situated health-care provider must also satisfy the *Daubert* test).
 31. *Holcomb v. Carraway*, 945 So. 2d 1009 (Ala. 2006).
 32. *Id.* at 1017.
 33. *Id.* at 1016-17.
 34. *Id.* at 1020.
 35. As a general proposition, Alabama courts have not considered a physician’s opinion to be “scientific” and subject to scrutiny under the *Frye* standard. However, there are exceptions. In *ArvinMeritor, Inc. v. Johnson*, 1 So.3d 77, 91-92 (Ala. Civ. App. 2008) the court of civil appeals discussed this issue.

Generally, a physician’s opinion is not subject to the *Frye* test because it is “opinion testimony, not scientific evidence, and thus [it does] not have to meet the admissibility requirements for scientific evidence.” ... Accordingly, Rule 702 [now Rule 702(a)], *Ala. R. Evid.*, generally states the standard by which the admissibility of a physician’s opinion is judged.

When, however, a physician addresses a topic about which there is a generally accepted method or procedure for assessing the facts, the physician’s testimony addressed to that topic is governed by *Frye*. See *Kimberly-Clark Corp. v. Sawyer*, 901 So.2d 738 (Ala.Civ.App.2004) (holding, in a workers’ compensation case, that a doctor’s report assessing only three of six factors included in a generally accepted diagnostic standard for asbestosis did not meet the *Frye* standard and was, therefore, inadmissible).
 36. *Ala. R. Evid.* 702(c) (emphasis added).
 37. *Ala. R. Evid.* 702(b) (emphasis added).
 38. See, e.g., *Ala. Code* § 32-5A-194 (1975) (providing that in a trial involving allegations of driving under influence of alcohol or a controlled substance that evidence of the amount of alcohol or controlled substance in a person’s blood, as determined by various methods of chemical analysis, “shall be admissible” when such analyses were performed according to methods approved by the Department of Forensic Sciences).
 39. 509 U.S. 579 (1993).
 40. 522 U.S. 136 (1997).
 41. 526 U.S. 137 (1999).
 42. Rule 702’s Advisory Committee’s Note makes this explicit:

Section (b) Scientific Evidence. The language in subsections (b)(1), (b)(2), and (b)(3) is identical to language added to Rule 702 of the *Federal Rules of Evidence* in response to the United States Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The amendment adopts the approach taken in *Daubert* for determining the admissibility of scientific evidence. Consequently, the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), general-acceptance test has been supplanted, with few exceptions. The amendment requires trial judges to act as “gatekeepers” and determine whether the scientific evidence is both “relevant and reliable.” See *Daubert*, 509 U.S. at 597.

Ala. R. Evid. 702 Advisory Committee’s Notes to Amendment to Rule 702 Effective January 1, 2012.

43. See *Kumho Tire*, 526 U.S. at 149 (“We conclude that *Daubert*’s general principles apply to the expert matters described in Rule 702.”); *Fed. R. Evid. 702* advisory committee’s note–2000 amendment (“Consistently with *Kumho*, [Federal Rule 702] as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.”).
44. See David E. Bernstein and Jeffrey D. Jackson, *The Daubert Trilogy In The States*, 44 *Jurimetrics J.* 351, 355–57 (spring 2004) [by mid-2003, 27 states had adopted a test “consistent with” *Daubert*, but only nine states had adopted all of the holdings of the three cases in the *Daubert* trilogy].
45. See, e.g., *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 104 (Ky. 2008) (citing several state and federal court decisions applying the *Daubert* standard to causation experts and concluding, “we view those cases ... as incorrectly requiring scientific certainty, which was not intended by *Daubert*”); *State v. Langill*, 945 A.2d 1, 8 (N.H. 2008) (construing a state statute which adopted the *Daubert* admissibility criteria in Fed. R. Evid. 702; concluding “it is not clear that section [702(3)] ... merely codifies principles outlined in *Daubert*.”); *State v. Clifford*, 121 P.3d 489, 495 (Mont. 2005) (“The *Daubert* test does not require a district court to determine whether the expert reliably applied expert methods to the facts.”).
46. Compare *Sears Roebuck and Co. v. Manuilov*, 742 N.E.2d 453, 460 (Ind. 2001) (“[T]he adoption of [Indiana] Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence. ... This is analogous to the liberalizing of the *Frye* rule achieved by the United States Supreme Court in *Daubert*.”) and *State v. Leep*, 569 S.E.2d 133, (W.Va. 2002) (the prior “general acceptance standard espoused in *Frye* is obsolete and has been replaced by the more liberal determinative criteria enunciated in *Daubert*”) (emphasis added). With *Mississippi Transp. Comm’n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (“[T]here is universal agreement that the *Daubert* test has effectively tightened, not loosened, the allowance of expert testimony.”).
47. See generally 3 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE, § 7:10, at 821 (3d ed. 2007) (“In place of that single criterion [general acceptance] *Daubert* held that federal courts applying *Fed. R. Evid. 702* should consider multiple factors ... in assessing reliability. In net effect, *Daubert* invites courts to look closely and directly at the evidence and to consider a wide range of factors bearing on reliability... The crux of *Daubert* is that courts are to act as gatekeepers when it comes to scientific ... evidence, and are to look directly at the proffered evidence and assess its validity and reliability.”).
48. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (“The judge’s task under *Frye* is relatively simple: to determine whether the method employed by the experts is generally accepted in the scientific community.”).
49. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–90 (1993).
50. *Id.* at 592–93.
51. *Id.* at 597. ([T]he trial judge [is assigned] the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands”).
52. *Id.* at 590.
53. *Id.* at 593–94.
54. *Id.* at 591. The *Daubert* Court provided the following example of “fit.”
- The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However [absent credible grounds supporting such a link], evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. *Id.*
55. *Ala. Code* § 36-18-30 (1975).
56. *Ala. R. Evid. 702(b)* Advisory Committee’s Note to Amendment to Rule 702 effective January 1, 2012 (“The admissibility criteria imposed generally on all scientific evidence by Rule 702(b) is the same *Daubert* criteria imposed on DNA evidence by § 36-18-30.”).
57. *Fed. R. Evid. 702* advisory committee’s note–2000 amendment (emphasis added).
58. See *United States v. Day*, 524 F.3d 1361, 1370 (D. C. Cir. 2008) (holding trial court did not abuse discretion in excluding expert testimony under Federal Rule 702 where trial court found that the expert “does nothing more than surmise or speculate”); *Hathaway v. Bazany*, 507 F.3d 312, 318–19 (5th Cir. 2007) (trial court well within its discretion when it excluded proffered expert testimony for not being based on sufficient facts where expert “relie[d] on a host of unsupported conjectures”). See generally 4 Joseph M. McLaughlin, WEINSTEIN’S FEDERAL EVIDENCE, § 702.05[2][b] (2d ed. 2011) (discussing the “sufficient facts of data” requirement in Federal Rule 702).
59. See, e.g., *Slay v. Keller Indus. Inc.*, 823 So.2d 623, 626 (Ala. 2001) (“Mere assertions of belief, without any supporting research, testing, or experiments, cannot qualify as proper expert scientific testimony under either the ‘general-acceptance’ standard enunciated in *Frye* or the ‘scientifically reliable’ standard of *Daubert*.”); *Townsend v. General Motors Corp.*, 642 So. 2d 411, 423 (Ala. 1994) (“An expert witness’s testimony cannot be based on speculation and conjecture”).
60. *Turner v. State*, 746 So.2d 355, 358–59 (Ala. 1998) (quoting *Daubert*; citations omitted).
61. *Turner v. State*, 746 So. 2d 355, 361 (Ala. 1998). Accord *State v. Langill*, 945 A.2d 1, 10–11 (N.H. 2008) (construing provision in state statute that adopted verbatim *Fed. R. Evid. 702*’s *Daubert* admissibility criteria; holding the requirement that the witness must have “applied the principles and methods reliably to the facts of the case” required the trial court to examine “whether a witness has in actuality reliably applied the methodology to the facts of the case,” but “[w]here errors do not rise to the level of negating the basis for the reliability of the principle itself the adversary process is available to highlight the errors and permit the fact-finder to assess the weight and credibility of the expert’s conclusions.”) (citations omitted).
62. The Advisory Committee’s Note that accompanied the 2000 amendment to Federal Rule 702 appears to endorse a standard similar to that described in the *Turner* decision:
- The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), “any step that renders the analysis unreliable... renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies the methodology.”
- Fed. R. Evid. 702* Advisory Committee’s Note to 2000 amendment (emphasis added).



Are We the Problem?

By Michael E. Upchurch

There is constant hand-wringing

these days about the state of the profession. All agree that something is wrong—bad wrong. Maybe we should ask ourselves whether we are part of the problem.

There was a time when we Alabama lawyers were a more unified and cohesive group than we are now. It is true that there always have been tensions in our complicated relationships with each other. The practice of law was never a Disney movie. Nonetheless, there was a collegiality and a mutual respect among advocates. We understood that we shared the profession and, in many ways, were on the same team—not anymore. The world has changed, and we have changed with it. The social and political conversation has turned

toxic. Cooler heads no longer prevail. It is the extreme edges that dominate the conversation. Some of us populate those fringes, but most of us do not. Even though we live in the middle, we have allowed ourselves to be co-opted by the special interests we represent. It has happened to plaintiff lawyers and defense lawyers, prosecutors and criminal defense lawyers, and transactional lawyers and consumer advocates.

In recent years, we have drifted away from the common purpose of a unified bar and sidled up to our client groups. We have adopted their agendas and their biases. We have embraced their sometimes distorted or myopic view of the world. We now think of ourselves primarily as plaintiff lawyers or defense lawyers, prosecutors



or criminal defense attorneys. The healthy separation between us as lawyers and the clients we represent has disappeared, and so has our common identity as “lawyers.”

In some ways, we are our own worst enemy. There is so much anger between counsel that sometimes it is hard to tell who is the client and who is the lawyer. All the faces are red. Slowly, but surely, we have divided ourselves into warring camps. We work against each other on legislation and public relations. We fight bitterly in state elections, especially judicial races. We have become unyielding and intolerant of one another.

Professional courtesy has eroded to the point that personal trust is the exception now, not the rule. Discovery is trench warfare. Raised voices and accusations of misconduct infect almost every case.

Many of us left law school willing to advocate for anyone who would have us. We found a job with a firm, the government or a company, or we went solo. Then we started acting as if magic dust had been sprinkled on us that opened our eyes to the one truth: the truth of whoever our

clients are. Do we really believe that undertaking a career representing plaintiffs, or representing defendants, or working for the state, or for the accused, somehow mystically enlightened us? It is natural for clients embroiled in a legal dispute to believe that they wear halos, and their adversaries have horns. Our role as advocates and professionals is supposed to include a certain degree of detachment from the white-hot emotions of our clients.

Our clients are not enmeshed in the machinery of the justice system every day. They drop in for a visit, work through the system in varying degrees of aggravation, puzzlement and occasionally satisfaction, and then depart. To our clients, legal matters are a trouble to be avoided if possible and endured when necessary. Litigants are not objective. They do not trust the system, and many misunderstand it. They have a narrow view of what justice means.

We are not the ones in the caption suing and being sued. We are not the accused or the victim. The law is our profession and our livelihood. Our experience with, respect for and dedication to the justice

system gives us a different perspective than that of the litigants we represent. Or at least it should. When we lose our independence, and identify too closely and completely with the client, we lose our perspective.

As we have become polarized, we have felt pressured to overreach. In the past several decades, the civil liability laws in Alabama have swung wildly from one extreme to the other. It started with minuscule compensatory damage claims producing multi-million dollar verdicts that were routinely upheld on appeal. The *Rules of Evidence* were applied with appalling inconsistency. We kept pressing for larger and larger paydays based on flimsier and flimsier facts. There was a feeding frenzy among lawyers (including defense lawyers who had plaintiff cases) trying to get rich on one case while the getting was good. The often-outrageous results made the entire system look broken and, in some eyes, even corrupt. We were out of control, and it could not last.

It did not last. There was a backlash against what were believed to be abuses occurring regularly in courts that favored

plaintiffs. We are now at the other end of the arc. Entire categories of claims are on the endangered species list. This is not a situation unique to Alabama. In Mississippi and Texas, medical malpractice defense lawyers collaborated with their clients to usher in sweeping tort reform bills. Their celebration was brief. The lawyers awoke to empty file cabinets, silent telephones and the realization that they had engineered their own undoing.

Most would agree that there is value to society in empowering injured parties to maintain a legitimate fraud case, for example, to discourage cheating and dishonesty. When used appropriately, class actions are an effective tool to compensate large groups of individuals who believe they have been injured and share an essential commonality. Plaintiff lawyers no longer have many of these cases to file. Defense lawyers no longer have them to defend. If the middle ground was the target in correcting the excesses of past years, we have missed it by a mile.

In Alabama, there continue to be pushes for even more lawsuit reform. Some of the proponents have insatiable appetites. One example would be the efforts to limit the

fees charged by plaintiff lawyers. If defense lawyers think that this is not their fight, they are mistaken. The independence of all lawyers and the ability of the citizens of Alabama to access the justice system are jeopardized by this type of interference.

We have seen what happens when we retreat to our separate corners and spend our money and time lobbying for extreme rules and laws and statutes and regulations that serve only our clientele. Sure enough, one selfish version eventually triumphs over the other. There are winners and there are losers. The winners do not feel secure, though, because the next electoral shift could lead to a new upheaval and a reversal of fortunes.

The depressed economy adds to the challenges. Times are tough. We are inundated with letters from law school graduates who cannot find jobs. Reckless cuts in the funding of the court system could make civil jury trials a quaint memory of more prosperous times. Competition for clients and cases is fierce.

Continuing down the current path will lead to even worse problems. The situation is not hopeless, however. There are things we can do—that we *must* do.

plaintiff and defense lawyers worked side by side to hammer out proposals that were rational and fair. They listened to each other, compromised and ultimately agreed on draft legislation. They maintained control of these important issues, and the results were positive. Alabama State Bar President Jim Pratt and his recent predecessors have made cooperative efforts in legislative matters a priority. It works.

3. Protect Court Funding

The depressed economy and epidemic lack of revenue is threatening the vitality—even the basic operation—of the courts in Alabama. Our representatives appear to be treating judicial system funding as just another line item to be slashed. They do not realize the catastrophic consequences of further cuts to the budgets of our courts. We and our judges must convince our representatives that the deprivations that they seem to believe are tolerable actually will cripple the justice system and wreak havoc with the social order. Our courts cannot function without competent people to operate them. Cancelling a highway project is not a constitutional issue. Depriving citizens of access to the courts is.

4. Work Together to Put Good Judges on the Bench

We also must change our ways as to judicial elections and appointments. Judicial elections have turned into embarrassing circuses and expensive ones at that. The unpleasantness and hostility of the process scare off many qualified people. Still, some well-respected lawyers hold their noses and wade into the swamp. Even when they do, we have often backed less-qualified candidates because they were the pro-business or pro-plaintiff standard bearer. We had to get as many of “our” people elected or appointed as possible, to offset those who were controlled by or loyal to “the other side.”

We need to move away from the totally dysfunctional practice of having the defense bar sponsor a candidate and the plaintiff’s bar sponsor a candidate. Each camp pours vast amounts of money into the campaign of its respective candidate. One or the other gets elected. The losing side has little respect for or trust or faith in the new incumbent. The individual elected—no matter how fair-minded—is

1. Seek Legislative Office

Lawyers must once again seek legislative office. The state house used to be filled with lawyers. They valued, understood and protected the legal system. Our voice was heard when laws were written and policy decided. There are not many lawyers left in the legislature. We need to return to public service. This means encouraging each other to seek public office, and supporting worthy candidates who are lawyers.

2. Work Together for Fair Legislation

Until our representation in Montgomery improves, we have to work from the outside. To be effective, we must speak with one voice. Divided, we dilute our influence. We, as plaintiff lawyers and defense lawyers and prosecutors and criminal defense lawyers, must join forces. We must work for legislation that is fair, reasonable and serves the public as a whole, rather than just one constituency. This has been done with significant success in recent new legislation on expert witness testimony, venue and post-judgment interest. Civil

**Restaurant
Expert Witness** .com

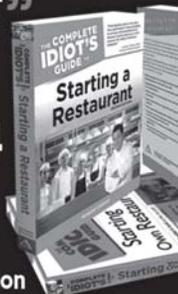
Experienced in State & Federal Cases

“Attorneys, Insurance
Companies, Judges & Juries
respect our expertise and
recognize our famous books
found in bookstores across
America and in 76 countries
around the world.”

800-300-5764

FREE - No Obligation -
Confidential Consultation
RestaurantExpertWitness.com

"Unbiased opinions, reports,
testimony and consultation since 1987"



labeled a plaintiff's judge or a defense judge. The campaign disclosures revealing huge contributions from the sponsoring group destroy the appearance of impartiality that is so essential to public confidence in the judicial system.

We need to collaborate, not compete, when it comes to judicial elections and appointments. We know better than anyone the integrity, intellect and character of prospective candidates. We must let go of the idea that only a zealot will do. In fact, we need to get in the habit of eliminating the zealots and professional politicians from consideration. The citizens of Alabama want trial and appellate judges who are even-handed, fair and independent— beholden to no one. Our energies and money should be spent on putting *those* individuals on the district and circuit court benches to make rulings and on the appellate courts to author opinions. When there is a vacancy on the local bench, we need to talk to each other. We should persuade independent-minded people to seek the position and support them overwhelmingly.

We also must protect good local judges who happen to be in the party that is out of favor at the moment. (See non-partisan elections, below). They can be vulnerable to even an unqualified opportunistic candidate from the dominant party. It is up to us to discourage these types from running and to do all we can to help the good incumbent judges defeat them when they do run.

We mediate cases and disputes all the time. Now we need to mediate ourselves. Compromise here is good. If we join together in supporting a worthy candidate, one who will make decisions based on merit, not ideology or favoritism, everyone wins.

5. Work for Non-Partisan Elections

Many believe that non-partisan judicial elections would be an improvement. Actually, everybody seems to agree on this, just not at the same time. In the 1970s and early 1980s, Republicans proposed it. The Democrats scoffed—they had the upper hand. Now, when the Democrats suggest it, the Republicans, happy to finally be in control, aren't interested. On this issue, maybe we should take a stand based on the long-term well-being of our profession and our state, rather than party politics. Why not,

together, work toward removing party affiliation from the judicial ballot box? No, this will not eliminate politics from the process. If it would diminish the noxious influence of politics, however, it would be an improvement. As bad as things have been in the last 20 years, non-partisan elections certainly couldn't hurt.

6. Quit Demonizing Each Other

The problem is not that we are unable to work together. We do it all the time. We are constantly negotiating and coordinating with each other in our cases and transactions. It is not that we lack empathy or sympathy for each other. Nobody knows more about the pressures and burdens of being a lawyer than another lawyer. Many plaintiff's lawyers and defense lawyers are close friends. Many prosecutors and criminal defense lawyers share enormous mutual admiration. What *is* the problem then? It is our inclination to be friendly and sociable on an individual level, while demonizing each other collectively to the public and within our own cliques. We are much too quick to attribute bad motives and deceitful behavior to each other. We may be occasional adversaries, but we are not enemies. The constant undertone of distrust and hostility between counsel is part of the reason the public has such a negative opinion of us. If we do not respect each other, why should the people in our communities respect any of us? Perhaps if we gave each other the benefit of the doubt more often, our relations and image would improve.

7. Embrace Our Common Interest

We simply are not going to get along any better until we start thinking of ourselves as one group with a common interest, rather than a confederacy of hostile tribes. We are in this together. For us to prosper, we need to cooperate, instead of pitching our tents beside our clients and pretending we are they.

We must change our ways on the most fundamental level, as individuals, one on one. We must also get involved in our state and local bars. (No pained expressions here, please—this is not high school student government.) We Alabama lawyers belong to many groups, but most separate us. There have been summers

when our plaintiff's bar's Alabama Association for Justice and the Alabama Defense Lawyer's Association were meeting at the same time in Sandestin, across the highway from one another. So close, but yet so far. The Alabama State Bar and our hometown bar associations give us a rare opportunity to connect as one group—a single, undivided membership. We need to participate in these opportunities. And when we do, we should not shy away from confronting the hard issues. We should try to solve them as fellow lawyers who all share a stake in the outcome. Attending a meeting and serving on a committee with lawyers who normally are across the table is a constructive way to improve collegiality and keep open the lines of direct communication. Everyone is busy. Those who have taken the time to get involved in serious bar projects and initiatives, however, are almost always glad they did.

Our problems are real and difficult. They cannot be solved in an article. Too many of us have hunkered down in opposing camps for too long. Letting that go requires trust and commitment. Perhaps we are ready. | [AL](#)

CHILD SUPPORT CALCULATION SOFTWARE

For Alabama

Alabama Support Master™

Uses 2009 Guidelines
Prepares and prints forms
CS-41, CS-42, CS-43, and CS-47

Includes Interest and Arrearage
Calculator

Since 1989
Professional Software
Corporation

POB 716 Mount Vernon, IN 47620
812-781-1422

marc.edwin.hawley@gmail.com

www.SupportMasterSoftware.com

FREE DEMO



J. Anthony McLain



Twenty Years Later— It Is Still the Rule

Law Firm Cannot Represent Client in Matter Adverse to Present Client Absent Consultation/Consent of Present Client

QUESTION:

“I wanted to receive a written opinion on the following set of facts in order to determine whether our firm has a conflict in representing one long-time client of the firm against another for whom we have also provided representation.

Lawyer A is presently representing a corporation in a personal injury matter. He has represented that corporation in the past in other personal injury cases and also in front of the Public Service Commission. For purposes of this letter, I will refer to this particular client as Client One. Lawyer A has also represented another corporation, involved in the same business as Client One. He has represented this client in personal injury matters, as well as in business matters. Additionally, he represented this client, whom I will call Client Two, in matters before the Public Service Commission. Both Lawyer B and

Lawyer C have represented Client Two on various business matters and personal matters of the president of that corporation.

“Lawyer A is currently representing Client One in a personal injury case. Client One is a corporate defendant being sued for injuries sustained allegedly as a result of Client One’s negligence. Because of Client One’s financial situation, it is in Chapter 11. Client One’s personal injury matter has been stayed.

“Client Two has contacted this firm about representing it in an anti-trust matter against Client One. I would be lead counsel in that matter and Lawyer A would not necessarily participate in the prosecution of that anti-trust case. I would probably work with Lawyer D, as we have worked on an anti-trust matter together in the past. In communicating with lead counsel for Client

Two in the anti-trust case, he stated that he felt we may have a problem representing Client Two in an anti-trust case against Client One. He stated that he felt we would be required to receive the consent of Client One to our handling of Client Two's anti-trust matter against it. The problem with revealing this matter to Client One, however, is that Client Two does not wish Client One to know about the pendency of the suit. Client Two does not want Client One to know that the suit is being considered and Client Two is afraid that we would be required under the Canons of Ethics to reveal to Client One the nature of the suit and the fact that we are considering taking it. Client Two's lead counsel also feels that we would be required to seek permission from Client One to represent Client Two in the matter.

"I would like an opinion as to whether or not we would be able to represent Client Two in an anti-trust matter against Client One. The anti-trust case would not be related to any type of litigation we had handled for Client One in the past,

nor would it have any relation to the litigation Lawyer A is presently handling for Client One which has been stayed in bankruptcy. I can conceive of no information that we would have received in representing Client One which would be used against Client One in the anti-trust matter.

"Is this a situation in which we can simply withdraw from representation of Client One, without explanation, and proceed to represent Client Two without Client's One's knowledge or consent? Would it be necessary to even withdraw from the personal injury matter prior to representing Client Two in the anti-trust matter?"

ANSWER:

You may not represent a client in a matter if the representation of that client would be directly adverse to another client unless you reasonably believe the representation would not adversely affect the relationship with the other client, and each client consents after consultation.

MASTERS OF OUR DOMAIN

QUALIFIED BY

G7[®]

MASTER

IDEALLIANCE

 **d a v i s d i r e c t**

 You don't have to take our word for it. We have the certification to prove it. IDEAlliance[®] recently certified Davis Direct as the only G7 Master printer in Alabama. This means your print job is produced according to the highest color standards in the industry, with the same crisp, clear, consistent quality from proof to finished piece when you print with Davis Direct.

Call us at 334.277.0878 or visit us online at davisdirect.com.

The underlying concept of the conflicts rules is the duty of loyalty owed by an attorney to his client. This duty is canonized in Rule 1.7, *Alabama Rules of Professional Conduct*, which states as follows:

“Rule 1.7 Conflict of Interest: General Rule

* * *

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”

The Comment to Rule 1.7 states that “... loyalty is the essential element in the lawyer’s relationship to a client.”

Therefore, you would be prohibited from representing Client Two in the anti-trust litigation against Client One. In RO-90-81, the Disciplinary Commission of the Alabama State Bar analyzed Rule 1.7, both Section (a) and Section (b). The opinion request in that matter dealt with the dual representation by a law firm of two insurance companies. A potential witness in separate, unrelated lawsuits involving the two insurance companies would present favorable testimony for

“A man who stops advertising to save money, is like a man who stops a clock to save time.”

— Henry Ford.



THE FINKLEA GROUP

INC

Creative solutions for your marketing strategies

Design and Marketing Services

- | | |
|------------------------|-------------------------|
| Logos | Trade Show Exhibits |
| Websites | Publication Design |
| Brochures | Media Kits |
| Product Catalogs | Billboards |
| Print Ads | P.O.P. Displays |
| Product Packaging | Professional Portfolios |
| Sales Support Material | |

P.O. Box 231596 | Montgomery, AL 36123 | 334.273.9926

www.taplink.com

one of the clients and put disfavorable testimony to the other. The Disciplinary Commission, in assessing the situation, found that such a conflict existed as to the firm's possible representation of these two clients that they could not undertake representation of both in the two separate lawsuits. The commission did note that the clients, after full disclosure, could waive any conflicts.

However, in your inquiry, you state that such a disclosure would be contrary to the request of Client Two. This shows the obvious inherent conflict in that Client Two requests that you take a course of action contrary to the best interests of Client One who is presently being represented by your firm.

Therefore, you would be prohibited from undertaking representation of Client Two since that would, by necessity, adversely affect your ability to represent Client One by refusing to disclose to him information essential to representation of him.

With regard to your proposition that you could withdraw from representation of Client One, "without explanation," and

then proceed to represent Client Two without Client One's knowledge or consent, in RO-91-08, the Disciplinary Commission again dealt with the conflicts principles enunciated under Rule 1.7. The Commission, also addressing the mandates of Rule 1.9, stated that the firm in that matter could not, by discontinuing representation of a client, take advantage of a less stringent conflict rule regarding former clients and thereby continue to represent a more advantageous client.

Based on the facts disclosed in your inquiry, your ability to represent Client One is obviously impaired by the request and/or concerns of Client Two. Since you are already representing Client One in pending matters, withdrawal, without explanation, as to this representation, would appear to frustrate the loyalty concept of the conflicts rules. The employment proffered by Client Two should therefore be refused, thereby eliminating any further conflicting positions which could further impede your representation of these respective clients. [RO-1992-21] | [AL](#)



A Record-Breaking 2011!

Congratulations to Alabama Law graduates who exceeded the goal to bring participation in the Law School's alumni society to 15%. The generosity of more than 1100 members generated more than \$450,000 in essential unrestricted funds. Thank you for your support!



Join or renew your membership at www.law.ua.edu/farrah.

• WWW.LAW.UA.EDU •



Othni J. Lathram

olathram@law.ua.edu

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

As of the date that this article is being written, the 2012 legislative session has completed its 8th legislative day. Much of the early work and discussion has been focused on the economy and its impact. While the recent economic indicators in Alabama have shown improvement, the outlook for the budgets next year is troubling at best. Furthermore, there continues to be a need to focus on legislation to create an environment to encourage investment in Alabama business and foster job creation. In these early days of the session, legislators have been hard at work on this task.

2013 Budgets

Due to legislation passed during in 2011, fiscal year (“FY”) 2013 is the first in which the education budget will be based upon a rolling average of years past. The result is that the education budget will be fairly steady this year and in years to come. The governor’s recently revealed proposal for the Education Trust Fund Budget is based upon a figure of \$5,441,810,446 which is only down a modest three percent from the 2012 fiscal year. The fact that this budget is strong compared to the General Fund has caused a number of suggestions regarding how to reallocate the resources from each fund. While in reality it is unlikely that any of these suggestions will make it very far, it will be interesting to watch as the budgeting process plays out.

Likewise, the earmarked portions of the General Fund Budget for 2013 appear to be at a relatively steady level of \$12,105,461,010. This figure is statistically even to FY 2012.

The major concern lurks in how to balance the remainder of the General Fund budget that is predicted to be nearly 20 percent lower than FY 2012. The figure used for the governor’s 2013 budget proposal was \$1,400,244,000 compared to total appropriations of \$1,710,347,968 in FY 2012. A decrease this drastic is sure to require a number of tough choices, painful cuts and reductions in state services. This is particularly true given the ever-increasing percentage of the budget which must be dedicated to the Department of Corrections and Medicaid. To attempt to satisfy these issues, the governor’s proposal included cuts to the legislative branch of approximately 35 percent and to the judicial branch of more than 25 percent.

While it is unlikely that the legislature will end up passing the governor’s proposed budgets without significant changes, they did serve as a stark reminder of where things stand. It appears certain that our elected leaders understand the situation with which they are faced and are committed to being good stewards of the money entrusted to them by the citizens of Alabama.

Economic Development Agenda

Two core agenda items for nearly all factions of the legislature coming into the 2012 Session were economic development and job creation. These agenda items have been an early priority during the session, and a number of such matters are on track for quick passage, including the following bills:

HB150 (Representative Weaver); SB222 (Senator Holtzclaw)

This bill, known as the “Small Business Regulatory Flexibility Act,” would require each state agency to prepare an economic impact analysis as well as a regulatory flexibility analysis prior to the adoption of any proposed regulation that may have an adverse impact on small businesses.

HB151 (Representative Baker)

Among other things, this bill would change the name of the Alabama Development Office to the Commerce Department and its director to Secretary of Commerce. This change is significant to recruiting businesses to locate in Alabama.

HB152 (Representative Bridges); SB163 (Senator Whatley)

This bill, known as the “Heroes for Hire Act,” provides for a \$1,000 tax credit for the hiring of unemployed veterans who have recently returned from war. The bill also provides for a \$2,000 credit to veterans who start their own business.

HB 154 (Representative Dan Williams)

This bill would expand the scope of certain ad valorem tax credits and construction-related tax abatements to focus on recruiting data-processing centers to Alabama. These centers usually have high average wages and require a significant investment of capital to build.

HB39 (Representative Lee); SB83 (Senator Brooks)

This bill would exempt certain parts used in the conversion, reconfiguration and maintenance of aircraft from sales tax. Alabama has a number of companies that specialize in this type of aircraft work.

HB160 (Representative Mask); SB271 (Senator Williams)

This bill and accompanying constitutional amendment would allow the state to offer temporary incentives to offset construction for new or expanded facilities within Alabama which would create or retain jobs in Alabama. Employers who undertake qualifying projects would be allowed to retain a portion of their employees’ income tax withholdings to offset their investment.

These are just a few of the many bills likely to be presented this session which will be focused on trying to improve economic and employment prospects in Alabama. Additional information on these bills and their current status can be found at <http://alisondb.legislature.state.al.us/acas/> or by following the appropriate links on the Alabama Law Institute website.

New Law Institute Projects

The Alabama Law Institute Executive Committee has decided to undertake two new projects for consideration. The first is the Uniform Certificate of Title for Vessels Act. The second is a study committee to consider whether Alabama should adopt a statutory scheme to address restrictive covenants in employment and commercial contracts. As with other Institute projects, these potential acts will be advanced by a committee of lawyers interested in these topics which will study these areas and potentially draft Alabama-appropriate proposed legislation. | [AL](#)



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

About Members

Jonathan S. Cross announces the opening of **Jonathan S. Cross Attorney at Law** at 2100 SouthBridge Pkwy, Ste. 650, Birmingham 35209. Phone (205) 414-7428.

Craig B. Morris announces the opening of **Morris Law Firm PC** at 7626 Spanish Fort Blvd., Spanish Fort 36527. Phone (251) 626-8890.

Daniel S. Wolter announces the opening of **Daniel Wolter Law Firm LLC** at 402 Office Park Dr., Ste. 100, Birmingham 35223.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **D. J. Simonetti** has returned to the firm as a shareholder.

Benton & Centeno LLP announces that **Jamie A. Wilson** has become a partner.

Bradley Arant Boult Cummings LLP announces that **G. Bartley Loftin, III** and **George A. Smith, II** joined as partners, **David Vance Lucas** joined as counsel and **Kathleen T. Milam** joined as an associate.

Butler Pappas Weihmuller Katz Craig LLP announces that **Michael Montgomery** has become a partner.

Carr Allison announces that **Sara Beth DeLisle** has joined the firm.

Sabrina L. Comer and **Amy D. Gundlach** announce the opening of **Comer & Gundlach PLLC** at 325 N. Hull St., Montgomery 36104. Phone (334) 265-7133.

Cusimano, Keener, Roberts, Knowles & Raley announces that **Brynn T. Crain** has joined the firm.

Donahue & Associates LLC announces that **Timothy P. Donahue, Jr.** has joined as an associate.

Hale Sides LLC announces that **Richard D. Whitaker** has joined as an associate and that **Catherine Glaze** is its new administrator.

Among Firms

Acosta Sales & Marketing announces that **Reece Alford** has joined as general counsel and secretary.

The Secretary of the **Air Force** announces that **Gordon O. Tanner** has become the principal deputy general counsel of the Air Force.

Armbrecht Jackson LLP announces that **Christopher G. Hume, III** has joined as a partner.

The **United States Attorneys Office** for the Northern District of Alabama announces that **Jeremy P. Sherer** is the new community outreach coordinator.

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

About Members

This section announces the opening of new solo firms.

Among Firms

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

Hand Arendall LLC announces that **Kelly Thrasher Fox** has been named a member.

Hatcher, Stubbs, Land, Hollis & Rothschild LLP announces the addition of **Edward P. Hudson** as partner and **D. Nicholas Stutzman** as associate.

Haygood, Cleveland, Pierce, Mattson & Thompson LLP announces that **Samantha L. Burt** has joined as an associate.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **April Willis McKay** has become a partner.

Huie, Fernambucq & Stewart LLP announces that **Jacob Crawford** has joined as an associate.

Johnston Barton Proctor & Rose LLP announces that **Justin A. Barkley, Lindan J. Hill, David R. Kinman** and **John H. McEniry, IV** are now partners.

Preston S. Trousdale, Jr., Nathan A. Ryan and **Mitchell S. Ryan** announce the formation of **Jones Trousdale Ryan & Ryan PC** in Florence and Muscle Shoals. Phone (256) 767-0333.

Jones Walker announces that **Kathryn W. Drey** and **Jason R. Watkins** have joined as special counsel, and **Christopher H. Ezell** has joined as an associate.

Martinson & Beason PC announces that **Morris Lilienthal** has joined as a shareholder.

Eric J. Artrip, Teri Ryder Mastando and **D. Anthony Mastando** announce the opening of

Mastando & Artrip LLC at 301 Washington St., Ste. 302, Huntsville 35801. Phone (256) 532-2222.

Maynard, Cooper & Gale PC announces that **Robert H. Fowlkes, Christopher C. Frost** and **Barry A. Staples** have been named shareholders.

McMickle, Kurey & Branch LLP announces that **Jon M. Hughes** has joined of counsel.

Philip E. Miles and **Jonathan M. Welch** announce the opening of **Miles & Welch LLC** at 309 Broad St., Gadsden. Phone (256) 543-9777.

Moses & Moses PC announces that **Jason A. Stuckey** has joined as an associate.

Pat Nelson, Bob Bryan and **Allison Jones** announce the formation of **Nelson, Bryan & Jones** at 1807 Corona Ave., Jasper 35501. Phone (205) 387-7777.

Brian O. Noble and **Joshua A. Wrady** announce the opening of **Noble & Wrady LLC** at 1623 Second Ave., N., Ste. 100, Bessemer 35202. Phone (205) 434-2890.

Penn & Seaborn LLC announces that **John William Partin** has become a partner.

Rumberger, Kirk & Caldwell announces that **E. Berton Spence** has been named partner.

Leonard M. Schwartz and **Karen Schwartz McClure** announce the formation of **Schwartz & McClure** at 1609 Richard Arrington Jr. Blvd., S., Birmingham 35203. Phone (205) 933-9451.

W. Scott Simpson, Ann McMahan, Howard K. Glick, Steve R. Burford, and **Kay S. Kelly** announce the formation of **Simpson, McMahan, Glick & Burford PLLC**, with offices at The Mountain Brook Center, 2700 Hwy. 280, Ste. 203W, Birmingham 35223. They are joined by **Charles D. Cole**, who is of counsel, and **Hunter C. Sartin** and **Christina M. Saunders**, who are associates. Phone (205) 876-1600.

Smith, Spires & Peddy PC announces that **Douglas H. Bryant** has joined as an associate.

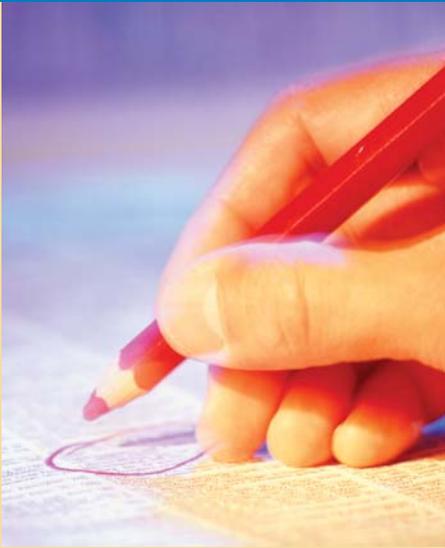
Starnes Davis Florie LLP announces that **William P. Blanton; Bryan G. Hale; G. Matthew Keenan; Tabor R. Novak, III; Stephen W. Still, Jr.;** and **H. Thomas Wells, III** have become partners.

Taylor Ritter PC announces that **Natalie Ann Daugherty** has become associated with the firm.

Townes, Woods & Roberts PC announces that **Vincent Swiney** has joined the firm.

Whitaker, Mudd, Simms, Luke & Wells LLC announces that **Mark E. Hoffman** is of counsel.

Thomas P. Willingham announces the formation of **Law Offices of Thomas P. Willingham PC** and that **Mary Leah Miller** will continue to practice with him as an associate. Offices are located at 1400 Urban Center Dr., Ste. 475, Birmingham 35242. Phone (205) 298-1011. | [AL](#)



Positions Available

Positions Wanted

For Rent

For Sale

Positions Available

Legal Assistant–Montgomery

Well-established small law firm in Montgomery seeking legal assistant (entry level). Experience is a plus. Must be computer-proficient, type at least 60 wpm and have good computer skills. Fax resume to (334) 263-2428, or mail to Legal Assistant Position, P.O. Box 2247, Montgomery 36102.

Legal Assistant–Birmingham

Small Birmingham plaintiff's firm looking for full- or part-time legal assistant. Send resumes to (205) 822-6197 or mdm@mitchell-lawfirm.com.

Positions Wanted

Experienced Litigator

Am semi-retired, having tried many civil cases of all types in state and federal courts to verdict. Would like to help with compliance on discovery issues, trial preparation and even second chair in trials. Am open to flexible arrangements. AV Premium Martindale, Best Lawyers, etc. for many years. Contact lbc803@gmail.com or (205) 542-0600.

P₂ Legal - Alabama's Premier Legal Search Firm

Serving law firms and corporate legal departments
with permanent and contract placements:



- Partners, Associates, In-House & General Counsel
- Paralegals & Secretaries
- Litigation Support Personnel

Michael J. Murphy, Esq.

3595 Grandview Parkway, Ste 450
Birmingham, AL 35242
205.380.5649
mmurphy@pangeatwo.com



P₂ Legal is a division of PANGEATWO

Older Attorney

Elderly attorney looking for non-integral position, minimal income required, to help with "grunt" work. Contact Thomas Rimmer at (334) 872-0825.

Social Security/Disability Lawyer

Social security/disability attorney seeks full-time position with benefits. Passionate about this area of law and willing to relocate to pursue this career path. Travel is welcomed and have had hundreds of hearings before ALJs with claimants with varied impairments. Contact Melissa Tapp at (205) 276-4877.

Trial Lawyer

In short two years working for district attorney's office, have tried 32 solo jury trials, with 14 as co-counsel, including two capital murder trials. Am looking for any full-time litigation position. Have personal injury background as well. Contact Andy Robinson at (205) 246-4791.

Bankruptcy/Consumer Law Attorney

Attorney with 3 1/2 years' experience with Legal Services Alabama seeking associate position. Position eliminated due to budget cutbacks and am seeking employment in Montgomery. Comfortable with high caseloads and have good performance track record. Worked without support staff and learned areas of law in short time, with little training. Experienced in housing, foreclosure, consumer and bankruptcy law. Call for resume and references. Contact Makesha Nowell at (334) 322-2911.

Mobile/Baldwin County

Admitted to practice in Alabama in April 2011 and have been practicing mostly criminal work in Mobile and Baldwin County. Am interested in opportunity to join firm in south Alabama region. Contact (251) 424-7650 or jdhawkejd@gmail.com.

Experienced Litigator

Experienced litigator of insurance and tort claims with over 20 years' experience, seeks position with firm or attorney needing lawyer with real courtroom experience, to assist in discovery and trial preparation or any other litigation role in either plaintiff's or insurance defense matters. Contact alabamainsuranceattorney@gmail.com.

For Rent

Huntsville Office Space

Executive office for rent in Park Plaza near downtown. Great setup for sole practitioner. Contact Brian Monroe at (256) 534-6789.

For Sale

Tuscaloosa Condo

Condo at Stafford Plaza in Tuscaloosa—just blocks from courthouses, UA campus and Bryant-Denny Stadium. Recently remodeled, 2 BR/2Bath with deeded, covered parking slot—great value for one or more students attending UA. Call (205) 345-1515 for appt. | [AL](#)

MEDIATION SERVICES

Appellate – General Civil
Domestic Relations
Domestic & Family Violence

Larry E. Darby
Alabama Mediation Center
29 Carol Villa Drive
Montgomery, Alabama 36109
Tel. 334-356-3593

EXPERT WITNESS

Occupational Safety & Industrial Hygiene

Michael Findley, PhD, CIH, CSP

Barksdale & Associates, Inc

105 South G Street
Pensacola, Florida 32502
Office 850 470-0705
Cell 865 250 9325

michael@barksdaleandassociates.com

Just One Look

 <p>Just One Look ON-DEMAND Trial Court Records</p> <p>www.AlacourtAccess.com</p>  <p>Alabama Administrative Office of Courts</p>	ON DEMAND Access to Alabama's Trial Court Records... One Case at a Time				
	Type of Searches	Alabama Court Records Available		Report Information	
Name Case Number	Criminal Records Civil Records Small Claims Records	State Traffic Records Domestic Relations Child Support	Setting Dates Court Action Party Information	Summary Financial Info Images	
<p>"Just One Look"</p> <p>Case Detail Report includes basic court information, court action, case status, setting dates, party information, financial history and a detailed case action summary.</p> <p>Case Monitoring allows a subscriber to monitor future changes in a case record. The subscriber receives an email notification anytime a change is entered into the state system. The notification email shows the old information, along with the change.</p>			<p>Just One Look is an application that allows attorneys and the general public to monitor and track case filings and details.</p> <p>The general public, most of whom will not subscribe to Alacourt.com on a monthly basis, are able to electronically access State Court documents through this On DEMAND website.</p> <p>A flat fee is charged per case instead of the monthly fee that Alacourt.com subscribers pay for access to court documents.</p> <p>The Just One Look link can be accessed from the Administrative Office of Courts website at www.AlaCourt.gov or directly at www.AlacourtAccess.com.</p>		

Do you know what this is?



These futuristic images are called QR Codes. You see them in magazines, on billboards, on packages as a way to further explain an article or to get more information.

In order to read a QR code you need to have a smartphone or tablet equipped with a camera. It also has to have a code-reading app. Newer models of Android and BlackBerry phones come with an app pre-installed. iPhone, iPad and other smartphone and tablet owners can download one of the many apps available free at the Apple App Store, the Android Market, BlackBerry App World or other app stores online. To scan, simply open the app and hold your device's camera up to the QR code. Keep your hand steady and try to center the image of the QR code on your phone or tablet screen. Once the camera locks onto the QR, the Web page, video or other data linked to the QR should automatically open up.

ALABAMA STATE BAR

415 Dexter Avenue • Montgomery, Alabama 36104

FREEDOM CONGRATULATES THE 2012 ALABAMA STATE BAR LEADERSHIP FORUM CLASS 8

The Alabama State Bar places great value on the qualities of leadership, ethics, and professionalism. We congratulate Class 8 of the Leadership Forum for their servant leadership and embodiment of these core values.



Alabama State Bar's Leadership Forum Class 8

Front Row (left to right): Rob Johnston, Trey Wells, Allison Dearing, Monet Gaines, Katya Gill, Clint Maze, Tameka Wren, Tim Wasyluka, and Ginny Grimes Second Row: Chuck Price, Bill Hankins, Kelly Pate, Kitty Brown, Carolyn Lam, Brett King, and Matt LeDuke Third Row: Carlen Williams, Jessica Ventiere, Sela Blanton, Larken Peters, Jamie Wilson, Ben McArthur, and Chad Bryan Back Row: Harrison Bishop, Edward Sledge, Ethan Tidmore, Josh Hayes, Kevin Gray, Joe Hubbard, and Houston Smith



FREEDOM
FREEDOMREPORTING.COM
Feel the Freedom Difference

www.freedomreporting.com
205-397-2397
Fax: 205-397-2398

Over the past year

Alabama Attorneys Have Switched to Gilsbar.

It's your turn.

Over 600 attorneys in the state of Alabama have made the switch to GilsbarPRO and CNA since last year. Maybe it's time you take a look and consider the switch.

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.

- Premium estimate during your first phone call.
- Custom quote delivered within six working hours.
- CNA policy on your desk within one business day.

**Call the PROs today.
don't be the last to make the switch.**

800.906.9654 • gilsbarpro.com

 GILSBARPRO  CNA

Follow us:



One or more of the CNA insurance companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes only. CNA is a registered trademark of CNA Financial Corporation. Copyright (c) 2012 CNA. All rights reserved.

