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239  On the Cover

Pictured on the cover, at Shoal Creek Country Club, are Birmingham attorney
H. Thomas Wells, Jr. and his family, on
the eve of his taking office as president
of the American Bar Association.

Back row, left to right, are Tommy and
his wife, Jan. Middle row, left to right,
are son-in-law Alan Palmer and son H.
Thomas Wells, III (“Trey”). Front row,
left to right, are daughter Lynlee Wells
Palmer, grandson Mac Palmer and
daughter-in-law Haas Peake Wells.

Photo by Dee Moore

ON THE COVER

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THE ALABAMA LAWYER 233
The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, www.alabar.org/cle.
February 21, 2008, Alabama’s first Professionalism Consortium was held at Cumberland School of Law through the joint work of the Alabama State Bar and the Chief Justice’s Commission on Professionalism. The purpose of the consortium was to discuss and evaluate recommendations regarding improving the professionalism and quality of services delivered by lawyers and judges throughout the state.

Some of the recommendations which came out of the consortium were:

1. Chief Justice Sue Bell Cobb is considering having judges throughout the state re-administer the oath to all attorneys in the state as a reminder of our duties. She also has suggested mandatory continuing judicial education in the area of professionalism.

2. Justice Hugh Maddox recommended that each lawyer who is not currently a member of an Inn of Court consider joining, or founding, a local chapter of the American Inns of Court to further encourage ethics, skills and professionalism.
3. Panelist Tom Methvin encouraged compliance with Rule 6.1 of the Code of Professional Responsibility which states, “A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.”

4. Mobile County Bar President Ian Gaston emphasized that professionalism in the court system starts at the top with the judges. Each judge in Alabama should start court on time, treat the parties and attorneys with respect and enforce standards of conduct in a courtroom.

5. Bar Commissioner Allan Chason encouraged expanding the Alabama State Bar’s Pilot Mentoring Program to include more sole practitioners and lawyers in small firms who do not have mentors in their firms.

6. Judge Randall Cole proposed the adoption of written standards of professional conduct for lawyers which set forth the court’s duties to lawyers and litigants. These standards would be similar to the standards for lawyers reflected in the ASB Code of Professional Courtesy and the Lawyer’s Creed. The standards would be submitted to the Supreme Court of Alabama for adoption.

7. Bar Commissioner Anthony Joseph suggested that every lawyer in the state be required to observe a public reprimand before the Board of Bar Commissioners as a reminder of the lawyer’s professional responsibilities.

8. During the consortium, Professor Carol Andrews reminded those in attendance that in 1887, Thomas Goode Jones, the author of the first Code of Ethics for lawyers and a member of the Alabama State Bar, worried about “the young lawyers who did not have the gentleman’s background and training, and who needed specialized rules to guide them.” According to Professor Andrews, there was a fascinating debate about reports of lawyers who would call the judge “an ass” on one extreme and others who curried favor through “marked hospitality thrust upon judges.”

9. Mobile County Bar President-Elect John Leach encouraged law firms to adopt policies promoting professionalism among their members.

10. President-Elect Mark White mentioned the success of the Bench & Bar Liaison Committee in Jefferson County in addressing the issue of standard pretrial orders, abuse of discovery and promoting professional conduct among judges in the circuit. He encouraged the establishment of such a committee in each judicial circuit.

11. Judge Harold Albritton disseminated the standards for professional conduct adopted in the United States District Court for the Middle District of Alabama on January 8, 1999 and urged the adoption of these standards within the state court system.

Other members of the Chief Justice’s Commission on Professionalism serving with me are:

- District Attorney Nick Abbett
- Leon Ashford
- Judge Sharon Lovelace Blackburn
- Dean John Carroll
- Judge Charles W. Fleming, Jr.
- Sam Frankin
- Leon Garrett
- J. Douglas McEvoy
- J. Anthony McGuire
- Former Chief Justice Drayton Nabers, Jr.
- Dean Charles I. Nelson
- Keith B. Norman
- George Robert Parker
- Dean Kenneth Randall
- Ernestine Sapp
- Judge Greg Shaw
- Bryan A. Stevenson
- Judge William C. Thompson

On May 13, 2008, Alabama became the second state in the country to establish an initiative that has been successful in North Carolina in promoting professionalism and bolstering public confidence in the legal profession. This pilot program, the Professionalism Support Initiative, will...
address unprofessional conduct by lawyers or judges which does not rise to the level of a grievance or judicial inquiry complaint. The program will be administered by Judge Harold Crow, the new director of the commission. Thanks to Phillip McCallum and Jimmy Terrell for their work on this initiative.

Preserving Our Humor, Wisdom and History

During my first year in practice in Baldwin County, two very drunk men wandered in off the street to see me. One of the two men was slightly more sober than the other and was holding up the other to keep him conscious, despite his inebriated state. The two staggered into my office and sat down, almost missing the chairs. More than a bit puzzled, I asked, “What can I do for you?”

The more sober of the two, who was still holding up his friend so he wouldn’t fall face down on our floor, replied, “He wanna’ make a will and leave ever’thin’ to me.”

In spite of myself, I laughed loudly, and with the tears of laughter in my eyes, explained why I could not help them and ushered them out the door. After these men left, I realized I should record other similar events I had either heard about or experienced while practicing law.

This occurrence prompted me to collect funny court stories for 23 years. In 2002, these stories were compiled in the book The Sleeping Juror, which was published by the Alabama Law Foundation (through the kindness of 11 local law firms). All proceeds of book sales have been donated to Kids’ Chance scholarships and civil legal services for the poor. To date, over $1,000 has been raised by this project.

ASB Past President Bill Hairston of Birmingham read this book and decided to videotape senior members of the Birmingham bar telling funny court stories. Watching parts of this videotape, and speaking with Reggie Hamner, encouraged me to appoint a Humor and History Task Force this year. Members of the task force are:

Mary Margaret Bailey, Mobile
Charles Carr, Daphne
Elizabeth A. Citrin, Daphne
R. Scott Colson, III, Birmingham
John M. Ehlehart, Montgomery
R. Graham Edal e, d., Montgomery
T. Charles Fry, d., Birmingham
Christopher R. Hood, Birmingham
Marcus A. Huff, Huntsville
hy Johnson, Montgomery (narrator)

Tara Waller Lockett, Daphne

Thomas J. Methvin, Montgomery
Richard J. R. Raleigh, Huntsville
R. Cooper Shattuck, Tuscaloosa
Patrick Sheehan, Imagination Factory, Birmingham
Ernest Franklin Woodson, Montgomery

The generosity of Freedom Court Reporting, along with the hard work of the task force, enabled us to conduct interviews with senior leaders of the Alabama State Bar. The product of this effort is a three-part DVD which has been produced by the ASB and funded by the donations of three law firms.

The first chapter, Justice Tempered with Humor, preserves funny court stories from throughout the state. The second chapter, Leadership Principles of Alabama Lawyers, preserves the counsel of Alabama lawyers regarding leadership principles. The third chapter, Advice to New Lawyers, contains counsel for new admittees. Each chapter is six minutes long.

This video is posted on the ASB Web site (www.alabar.org) and is available for viewing at no charge. A copy of it has been sent to each local bar president and bar commissioner to be shown at local bar meetings. Also, each interview will be available in its entirety. We hope these efforts will prompt you to videotape interviews with senior lawyers in your circuit to preserve their humor and wisdom for future generations of lawyers and judges.
Partnering with Our Law Schools

On January 25, the first bar commission meeting to ever be held on a law school campus took place at the University of Alabama School of Law. Law students were invited to attend the meeting, and we hope that they will be encouraged to seek leadership roles within the Alabama State Bar.

Also, students from each of the five law schools in Alabama attended bar commission meetings this year. These students were recommended by their law school deans for their leadership potential. They were the guests of Commissioner Joe Fawal, who did an excellent job coordinating this effort.

Our Legislative Efforts

The mission statement of the Alabama State Bar includes improving the administration of justice in Alabama. Before the commencement of the 2008 regular session of the Alabama legislature we met with our lawyer-legislators to discuss promoting the passage of two bills which we believe will help fulfill our mission.

The first bill establishes minimum experience requirements for state court judges (requiring lawyers to have a law license for three years to serve as a district judge, five years to serve as a circuit judge and ten years to serve as an appellate judge). Currently, any lawyer appointed to defend a death penalty case is required to have five years of criminal law experience. On the other hand, the circuit judge hearing the case might only have had a law license for one day.

The second bill protects the integrity of the mediation process by preventing a mediator from being compelled to testify or produce documents about a mediation. The second bill passed both houses and it has been signed into law after eight years of effort by many people.

Diversity and Client Security Fund Task Forces

The Diversity Task Force, chaired by Aldos Vance, Wyndall Ivey and James Hughey, III, and the Client Security Fund Task Force, chaired by Julia Roth, are both continuing their excellent work in these important areas.

50th Law Day Anniversary

Congratulations to Gregg Everett, Tommy Klinner, Marcia Daniel, Brad Carr, the Law Day Committee, Charles Godwin, Ginger Avery, Bob Prince, and many others for their fine work in making this day special.

Thank You

Thank you for giving me the privilege of serving as president of the Alabama State Bar this year. My hope is that we will continue to encourage each other to do justice, love kindness and walk humbly with our God.
H. Thomas Wells, Jr.

PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

H. Thomas Wells Jr., a partner and founding member at Maynard, Cooper & Gale, PC in Birmingham, was elected as the American Bar Association’s president-elect at its August 2007 annual meeting in San Francisco and is to become president in August 2008.

Wells has served on numerous committees and in leadership roles in the Alabama State Bar, the Birmingham Bar Association and the ABA.

Wells has served in the ABA’s policy-making House of Delegates since 1991 and was chair of the House of Delegates, the second highest office in the American Bar Association, from 2002 to 2004. He is a former chair of the ABA Section of Litigation, the largest section in the ABA with more than 75,000 members.

In addition, Wells is co-chair of the ABA’s Special Committee on Disaster Response, which was commissioned after the devastation of Hurricane Katrina. He also has been a member of the ABA’s Commission on the American Jury and the ABA Commission on the Future of the Legal Profession.

Wells earned his B.A. degree with honors from the University of Alabama, where he was president of the Student Government Association and was elected to Phi Beta Kappa. He earned his J.D. degree, Order of the Coif, from the University of Alabama. He also was a member of the Alabama Law Review and Hugo Black Scholar while in law school.

Wells lives in Birmingham with his wife, Jan. The couple’s two children, Lynlee Wells Palmer and H. Thomas “Trey” Wells III, are also lawyers in Birmingham and active ABA members.

Wells is slated to be the ABA’s third president from the state of Alabama. Henry Upson Sims, of Birmingham, was ABA president in 1929-30, and N. Lee Cooper, also a founding member of Maynard, Cooper & Gale, PC in Birmingham, was president in 1996-97 (see the July 1996 issue of The Alabama Lawyer).
Cumberland School of Law is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our continuing legal education seminars during the 2007–08 academic year. We gratefully acknowledge the contributions of the following individuals:

James A. Abernathy II
James G. Adams, Jr. ’86
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Orrin K. Ames III ’69
D. Michael Andrews
David R. Arendall ’75
D. Leon Ashford
Prof. J. Mark Baggett
Mary Margaret Bailey ’94
Tammy Lynn Baker
M. David Barber ’72
Dan E. Batchelor ’78
LaVeeda Morgan Battle
Prof. T. Brad Bishop ’71
Hon. Sharon Lovelace Blackburn ’77
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S. Andrew Kelly
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Woodall
Anne R. Yuengert

Years following names denote Cumberland School of Law alumni.
No, this is not about a new television reality show imitating the *Biggest Loser*. And, it’s not a rewrite of the Merle Travis tune, *Sixteen Tons*, popularized by Tennessee Ernie Ford with his chart-topping version in 1955. Instead, I am reporting that we have finished building out the third floor of the ASB building and refurbishing all three floors. In the process of converting our third-floor storage space into office space, we shredded 15 tons of old files that we longer needed to keep. This included the hard copies of member files that were no longer required after all of those files were scanned into an electronic document management system.

The third-floor build-out included new space for our information technology (IT) staff and a special room for our network servers. The Communications Department moved from the first floor to the third floor and the Lawyers Assistance Program (ALP) moved from its existing offices on the third floor to a new office area with added space for staff. Moving ALP to the other side of the building allows additional space for the Alabama Law Foundation (ALF) and frees up space for the Volunteer Lawyers Program (VLP) to have, for the first time, an in-take clerk. Two unfilled offices in the new area will be used for the time being as storage space.
EXECUTIVE DIRECTOR’S REPORT  
Continued from page 241

the second floor, as on all other floors, the public spaces recently have been repainted. The work space in the Center for Professional Responsibility has been reconfigured to make it more serviceable. New meeting tables have been added in the boardroom and the small kitchen area off the boardroom has been refitted to better accommodate catered functions. The bronze windows on the first floor of the original building have been reworked as have the casements around each window. Additional shelves for filing have been added in the Admissions office and the former file room on the first floor has been converted to general storage. The MCE director and staff, which have been split up, will be moved to the offices formerly occupied by the Communications Department.

The first build-out of the bar building’s third floor occurred in 1998. In ten years, our membership has grown 32 percent, from 11,800 to 15,600 attorneys. The VLP, ALAP and Practice Management Program (PMAP), among others, have matured as their services have broadened. In addition, we have created staff positions that did not exist ten years ago: IT, Web site administrator and scanning technician. Fortunately, the Board of Bar Commissioners had the vision in 1989 to construct an addition to the bar building that has accommodated our membership’s growth and the increase in services for bar members. Although there is no more interior space available for future expansion, I am confident that the Board of Bar Commissioners will address the state bar’s future space needs with the same wisdom and vision that has guided it in the past.

ASB Foundation Assistant Ann Rittenour was designated “clerk of the works” to oversee this project. These photos offer a glimpse at the different phases of construction from framing the office and storage space to wiring the electrical to finishing the walls.
Patricia Yeager Fuhrmeister

Patricia Yeager Fuhrmeister, a member of the Shelby County Bar Association for more than 27 years, died February 9, 2008. She graduated from Auburn University in 1977 and received her law degree from the University of Alabama School of Law in 1980.

Fuhrmeister practiced law in Shelby County from 1980 until 1994, when she was elected the first female probate judge in that county. She served with honor, dignity and integrity in that capacity from 1994 until 2008.

Fuhrmeister served as president of the Shelby County Bar Association, as chair of the Committee on Continuing Education of the Alabama Probate Judges’ Association and as chair of the Alabama Electronic Voting Committee.

She is survived by her husband, James, and her two sons, Chris and Will.

– Lara L. McCauley, president, Shelby County Bar Association

Alvin F. Harris, Sr.

Alvin F. Harris, Sr., a member of the Mobile Bar Association, died January 15, 2008.

Alvin Harris was born September 23, 1945 in Monroe County, but later moved to Mobile County, where he was a resident for more than 30 years. Before entering the practice of law, he was a bank vice president in Shorter and then served as Birmingham’s Director of Housing.

Harris went to the University of South Alabama and received a bachelor’s degree. After graduation, he attended Jones Law School and began his practice September 10, 1993 in Saraland with Johnny M. Lane. His law practice consisted of criminal law and domestic law. Harris also served as the municipal judge of Mt. Vernon.

He practiced law with Lane & Harris until his death.

Harris was member of three Mardi Gras organizations, the Mobile Botanical Gardens and other organizations. He also enjoyed bird hunting and fishing. He was active in several animal rights groups and gardening clubs, as a result of his love of animals and gardening.

Alvin F. Harris, Sr. is survived by his wife, Bna Harris; his children, Jennifer Nikolov, Al Harris, Jr., Jessica Moree and George Harris; his grandchildren, Harris, Kam den, Konnor, Parker, and Mary Lois; his sister, Alyce Snow; and other family members. He had a gentleness of heart and was respected by all who knew him. He was a wonderful husband, an incredible father and a trusted friend to all, who is truly missed.

– Ian Gaston, president, Mobile Bar Association
Windell Clifton Owens

On February 20, 2008, the Alabama State Bar and the legal community lost highly respected, longtime member Windell Clifton Owens of Monroeville. Windell practiced law in the southern part of the state and maintained his office in Monroeville for 60 years, having just recently retired from practice August 2007, at the age of 85.

Although a successful businessman and local politician, the practice of law was Windell’s greatest passion, particularly criminal law. With the reputation as an excellent trial attorney throughout the region, he was best known for his participation in many criminal cases before the bar.

In the early 1940s, Windell attended the University of Alabama and was a Golden Gloves boxer for the university, participating in many well-known bouts of the time. Like many men of the “Greatest Generation,” World War II interrupted his education. In 1943 he was commissioned as a 2nd Lieutenant in the United States Air Force, serving as a bombardier aboard a B-17 Liberator.

Following the war, Windell returned to the university and received his bachelor’s degree and later his juris doctorate degree from the University of Alabama School of Law, where he was a Farrah Law Society member.

On a local level, Windell served as a city councilman and later as mayor of Monroeville (1968-1972), during one of the city’s most prosperous periods. He also served as Monroe County attorney and as an assistant attorney general for four state administrations, and on the state Democratic Executive Committee and the Alabama State Bar. He served as commander of the Monroe County National Guard Unit stationed in Monroeville for many years, until his retirement from the armed services. From a business prospective, Windell was a founding partner of Crown Investment Corporation, one of the largest nursing home entities in the state, the First Citizen’s Bank of Monroeville and several other local business ventures. However, it was his love of the law for which he is best known.

Equally at home in and out of the courtroom, Windell served as a mentor to two generations of aspiring young lawyers in the 35th Judicial Circuit, some of whom were associates or partners of his law firm during a period spanning 60 years. Before the new Monroe County Courthouse was built in the 1970s, he tried many of his cases in the old county courthouse, now a museum and where the trial scene in the 1961 movie “To Kill a Mocking Bird” was filmed. Known by many who had made his acquaintance at various local bar functions and around the Monroe and Conecuh County courthouses, he was described as a master storyteller and to possess a uniqueness of character and presence unlike any other. Windell attended law school with the former Alabama Supreme Court Justice and late United States Senator Howell Heflin and when the Senator visited Monroeville, locals noted that he always visited Windell’s law office, located just across the street from the courthouse.

Windell was a country gentleman who loved a good cigar, hunting, fishing, golf, an occasional poker game, and the device members of the Monroe-Conecuh County Bar Association affectionately refer to as the “sandbox.” He was a friend and counselor to many and a champion for his fellow citizens seeking equal access to the law.

He is survived by wife Elaine Owens; two daughters, Lynn Franklin of Dothan and Denise Mounger of Vicksburg; and two sons, George Owens of Monroeville and Windell Richard Owens of Birmingham.

—Windell Richard Owens
• The Alabama Center for Foreign Investment LLC announces that its general counsel, Boyd Campbell, has been appointed to serve as vice chair of the Investors (EB-5) Committee of the American Immigration Lawyers Association.

• Stephen W. Still has been reappointed to the Lawyers Council of the Financial Services Roundtable. Still is the only attorney from Alabama in the private practice of law who is a member of the Lawyers Council. The Roundtable is a trade association in Washington, D.C. and is limited to 100 of the largest integrated financial services companies in the country.

• James D. Harris, Jr. has been named to the Executive Council of the Association of Defense Trial Attorneys (ADTA). The ADTA is an association of defense trial attorneys established to advance the principles of courtroom fairness, justice and fellowship.

• Samford University’s Cumberland School of Law honored Birmingham attorneys Scott A. Powell and Bruce F. Rogers during alumni weekend activities. Powell, a 1978 graduate and partner in the Birmingham firm of Hare, Wynn, Newell & Newton, was named Volunteer of the Year. He was cited for his service as chair of the Cumberland Advisory Board and his leadership to create the newly-dedicated Martha F. and Albert P. Brewer Plaza at Samford. Rogers, a partner in the Birmingham firm of Bainbridge, Mims, Rogers & Smith, was named Friend of the Law School. He was cited for his service in Cumberland’s interview process and other programs, such as annual visits by the Alabama Supreme Court and Court of Appeals to the Samford campus for oral arguments.

• Edgar M. Elliott, III, of counsel with Christian & Small, received the 2008 Nina Miglionico “Paving the Way” Leadership Award in April. The award was established in 2005 by the Women Lawyers’ Section of the Birmingham Bar Association to recognize and honor individuals who have achieved professional excellence and actively paved the way to success and advancement for women lawyers.
Applications for the 2009 sessions of the ASB Leadership Forum are now available at www.alabar.org/members/leadership-update.cfm or by calling 334-269-1515, ext. 2166. Class 5 will consist of no more than 30 participants. Successful applicants are notified on or before November 15, 2008.

Applicants must have practiced law for not less than five years and for not more than 15 years (based upon first admission to any state bar). Attendance at all five sessions (January through May) is mandatory.

For more information, contact Kimberly T. Powell (205-226-8769, ktpowell@balch.com) or Sam David Knight (205-874-7961, sdknight@gattorney.com).

“Leadership can be thought of as a capacity to define oneself to others in a way that clarifies and expands a vision of the future.” Edwin H. Friedman
Reinstatements

- On February 6, 2008, Birmingham attorney Robert Lee Kreitlein was suspended from the practice of law in Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On March 7, 2008, Kreitlein came into compliance with the MCLE Rules. On April 18, 2008, the Supreme Court of Alabama made entry on the roll of attorneys dismissing the order of suspension against Kreitlein and reinstating him to the practice of law. [CLE No. 07-31]

- The Supreme Court of Alabama entered an order reinstating former Carbon Hill attorney Dennis Michael Sawyer to the practice of law in Alabama, effective April 7, 2008, based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar. Sawyer had been on disability inactive status since February 1994. [Pet. No. 06-06]

Disbarments

- Mississippi attorney Timothy Reese Balducci, who was also licensed in Alabama, was disbarred from the practice of law in Alabama effective January 9, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order based upon Balducci’s consent to disbarment. Balducci consented to disbarment based upon an ongoing federal felony criminal investigation being conducted in the United States District Court for the Northern District of Mississippi, and he also affirmed that he will not seek reinstatement. [ASB No. 07-235(A)]

- Tuscaloosa attorney Winfred Clinton Brown, Jr. was disbarred from the practice of law in Alabama effective February 19, 2008, by order of the Alabama Supreme Court. The supreme court entered its order based upon the February 19, 2008 order of the Disciplinary Board of the Alabama State Bar disbarring Brown from the practice of law. On or about July 24, 2007, Brown filed an answer to formal charges in which he admitted to violations of rules 1.15(a), 1.15(b), 8.1(a), 8.4(a), 8.4(c), and 8.4(g), Alabama Rules of Professional Conduct. In July 2006, Brown deposited a $95,000 settlement check into his trust account. Approximately $48,000 of the settlement was distributed to the client. Another $15,000 was to be held by Brown and used to pay medical debts on behalf of the client. Brown failed to use the $15,000 to pay the medical providers and spent the money on personal expenses instead. Despite repeated opportunities throughout the disciplinary process to repay the money, Brown failed to do so. [ASB No. 06-207(A)]
The Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Board, Panel IV, disbarring attorney Eugene Paul Spencer from the practice of law in Alabama, effective April 7, 2008. On February 21, 2008, Spencer signed a consent to disbarment. This consent was based upon Spencer’s admitting to having forged the signature of a circuit judge on a case action summary document. [Rule 23(a), Pet. No. 08-20; ASB No. 06-120(A)]

Suspensions

- Birmingham attorney John Edward Clark, Jr. was suspended from the practice of law in Alabama for a period of 18 months by order of the Supreme Court of Alabama, effective February 20, 2008. The supreme court based its order on Clark’s guilty plea to violations of rules 8.4(a), (b), (c), (d), and (g), Alabama Rules of Professional Conduct. Clark was retained to handle the estate of an individual and subsequently admitted that he forged letters testamentary. Clark also prepared a deed conveying property from the estate to his client. The deed was notarized by Clark, when, in fact, he was not a notary public. The deed was not recorded until after the death of the grantor. [ASB No. 08-01(A)]

- On April 7, 2008, the Supreme Court of Alabama entered an order adopting the March 3, 2008 order of the Disciplinary Board, Panel IV, accepting the conditional guilty plea for violations of rules 4.1(a), 8.4(c) and 8.4(g), Ala. R. Prof. C., entered by Dothan attorney Virginia Dewella Emfinger, and thereby suspending her law license for a period of one year, effective April 7, 2008. [ASB No. 07-236(A)]

Public Reprimands

- On April 11, 2008, Bessemer attorney Calvin David Biggers received a public reprimand with general publication for a violation of Rule 3.10(a), Ala. R. Prof. C. On or about October 13, 2006, Biggers threatened the complainant with criminal prosecution if she did not pay his client $400 by October 16, 2006. On October 16, 2006, the complainant paid Biggers’s client $477.47. On December 8, 2006, Biggers sent the complainant a second letter requesting an additional $700. The complainant did not pay this amount and a pro se complaint was filed against her by Biggers’s client. In or about March 2007, the complainant retained an attorney who filed an answer and a counter-claim for fraud and other allegations. He also filed a Rule 19 motion to join Biggers as a party defendant in the action. Biggers contacted the complainant’s attorney and admitted that he drafted the civil complaint for his client and instructed her to sign it pro se. Biggers also threatened the complainant’s attorney under the Litigation Accountability Act, if he did not withdraw the Rule 19 pleading. Biggers admitted that he discussed the complainant’s actions with the district attorney’s office but did not seek criminal prosecution. [ASB No. 07-81(A)]

- On April 11, 2008, Birmingham attorney Rodger Keith Brannum received a public reprimand without general publication for violations of rules 1.1, 1.3, 1.4(a), 1.16(d), 8.1(a), 8.4(c), and 8.4(g), Ala. R. Prof. C. Brannum was retained and paid $4,700 by an individual in or about September 2003 to represent the individual’s aunt in a post-trial appeal of a murder conviction. Due to Brannum’s failure to file the necessary Rule 32 Motion and perform the necessary work the individual had to retain other counsel. Also, because of Brannum’s lack of representation, the aunt remained incarcerated, while also suffering from a terminal illness. The aunt also learned that Brannum’s license to practice law had been suspended due to his failure to pay his bar license fee. Furthermore, Brannum failed to communicate with the aunt and the individual during his representation and failed to provide a copy of the aunt’s file to new counsel. When Brannum was requested to refund the unearned fee, he failed or refused to do so. [ASB No. 05-266(A)]

- Birmingham attorney Edward Eugene May was noticed to receive a public reprimand with general publication for
violations of rules 1.15(a) and 8.4(a), Ala R. Prof. C. On at least one occasion, May deposited personal funds in the amount of $45,000 into his client trust account. May admitted that he would occasionally deposit personal funds into the trust account as working capital. Under his own admission, he would use these monies to advance clients settlement funds if they needed money prior to settlement of their case. May also wrote checks out of the trust account for personal and business expenses. However, it does not appear that client funds were misappropriated or used to pay for any personal and/or business expenses. [ASB No. 06-174(A)]

- Mobile attorney Robert E. McDonald, Jr. was ordered to receive a public reprimand without general publication on December 26, 2007 for violations of rules 1.7(a) and 8.4(a), Alabama Rules of Professional Conduct. McDonald was originally retained to draft a will for a client while she was hospitalized. When McDonald delivered the will, he determined that she was not competent to execute the will. That same day, the client’s daughter had the client sign a settlement and release agreement and a settlement check concerning a prior motor vehicle accident. The client’s daughter deposited the check into a joint checking account she shared with the client. The client subsequently died and McDonald was hired by the daughter to open the client’s estate. Thereafter, the daughter was appointed as the personal representative in accordance with the client’s will. McDonald subsequently filed a motion to determine the interest in the bank account. After filing said motion, a dispute arose between the heirs of the estate and the client’s daughter over whether the funds in the joint checking account belonged to the estate or to the daughter individually. Despite acknowledging that McDonald represented the estate, he then argued before the probate court in support of the daughter’s individual claims. In doing so, McDonald took a position that was adverse to the interest of his client, the estate. [ASB No. 06-127(A)] ▲▼▲

ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?
Are they telling you they have it under control?

**They don’t.**
Are they telling you they can handle it?

**They can’t.**
Maybe they’re telling you it’s none of your business.

**It is.**
People entrenched in alcohol or drug dependencies can’t see what it is doing to their lives.  
**You can.**
Don’t be part of their delusion.  
**Be part of the solution.**

For every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.
Retention and Destruction of Client Files

QUESTION:

I am seeking an ethics opinion from the Alabama State Bar regarding the retention, storage and disposing of closed legal files. My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the file remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes and rules of conduct relating to this process and any other ethics opinions.

Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six-year interval, what is the appropriate method of disposing of a client's file?

DISCUSSION:

A lawyer does not have a general duty to preserve all his files permanently. However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed. ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).
While there are no specific rules in the Alabama Rules of Professional Conduct regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary Commission established the following guidelines in Formal Opinion 84-91. The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation.

For that reason, the file should be examined and the contents segregated in the following categories: (1) Documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.; (2) Documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him; (3) Documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and, (4) Documents which fall in none of the above categories.

Documents which fall into category one should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories two and three should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her. Documents which fall into category four could be appropriately destroyed. With regard to time, there is no specific period that constitutes “reasonable” time. It depends on the nature of the documents in the file and the attendant circumstances.

Since the file is the property of the client, theoretically it may be immediately returned to the client when the legal matter for which the client is being represented is concluded.

For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging from a few years to permanent retention. The length of time is more a matter of the lawyer’s or the firm’s policy rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider that the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition.

First, the client should be informed of the disposal plans and given the opportunity of being provided the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the commission’s view that six years is reasonable) and then destroyed, with the exception of those documents classified as category one above.

Second, prior to destroying any client file, the file should be screened to ensure that permanent type (category one) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer’s or law firm’s office or at some secure off-site location. Any medium that preserves the integrity of the documents in the file, whether microfilm or by electronic scanning, is appropriate. [RO 1993-10]
Alabama Supreme Court Awards
Harper Lee
Honorary Special Membership

Alabama icon Harper Lee was recently awarded an honorary special membership in the Alabama State Bar at a ceremony conducted by Alabama Supreme Court Chief Justice Sue Bell Cobb at the Heflin-Torbert Judicial Building.

The presentation was made during the induction of four new members of the Alabama Lawyers’ Hall of Fame. Lee was recognized as the author of one of the most widely read and internationally honored books of popular fiction ever written, *To Kill a Mockingbird.*

ASB President Sam Crosby said, “The character of Atticus Finch has become the personification of the exemplary lawyer in serving the legal needs of the poor and those no one else would represent. He epitomizes the type of professional, and person, lawyers strive to be every day.”

Lee studied law at the University of Alabama from 1945-1949, but was unable to complete her studies and sit for the bar examination. The idea for presenting this one-of-a-kind honor originated with Associate Justice J. Gorman Houston, Jr., who discussed it with Associate Justice Champ Lyons, Jr. Justice Lyons presented a resolution to the entire supreme court which unanimously voted to approve taking the action.

In 2006 Lee received the state bar’s Award of Merit, presented for outstanding constructive service to the legal profession in Alabama.

Noted author Harper Lee autographs a copy of *To Kill a Mockingbird* for Bar Commissioner Kelly Lee (no relation) at the special ceremony conducted during the induction of new members of the Alabama Lawyers Hall of Fame.

Photos by Thomas Ryan, Jr., bar commissioner, Huntsville, and Robert Fouts, Fouts Commercial Photography, Montgomery

My dear Roman:

I shall never forget your kindness and what you did to make it May 1st the greatest day in my life. Of course, I love you—Melinda

Members of the Board of Bar Commissioners pose with noted author Harper Lee at a special ceremony conducted during the induction of new members of the Alabama Lawyers Hall of Fame. She was honored with a one-of-a-kind honorary special membership in the Alabama State Bar which was unanimously approved by the supreme court. After receiving the award, Lee remarked, “I’m opening an office, tomorrow!” In 2006, Lee received the state bar’s Award of Merit, presented for outstanding constructive service to the legal profession in Alabama.
The late Senator Howell T. Heflin, a towering figure in the state’s political, legal, and judicial history, joined a former United States Supreme Court justice, a former governor and a distinguished community leader as the newest members of the Alabama Lawyers Hall of Fame. The most recent induction by the Alabama State Bar was May 16 in a special ceremony held at the Alabama Supreme Court. Former ASB President Samuel A. Rumore, Jr. explained, “The Hall of Fame was established five years ago to spotlight significant contributions lawyers have made to the state throughout its history. These individuals have demonstrated a lifetime of achievement that exemplifies the bar’s motto, ‘Lawyers Render Service’.”

The 2007 honorees are:

**John Archibald Campbell**  
(1811–1889)  
Accomplished Constitutional scholar and advocate, prominent lawyer, legislator (1836–1837 and 1842–1843), outstanding public man of his time, and Associate Justice of the U.S. Supreme Court (1853–1861)

**Howell T. Heflin**  
(1921–2005)  

**Thomas Goode Jones**  
(1844–1914)  
Carried flag of truce at Appomattox (1865), reporter for Alabama Supreme Court (1870–1880), member of Alabama House of Representatives (1884–1888), speaker of the house (1886–1888), governor of Alabama (1890–1894), president of the Alabama State Bar (1900–1901), Federal District Court Judge (1901–1914), and author of the *Alabama Code of Legal Ethics*, first code adopted by a state bar (1887)

**Patrick W. Richardson**  
(1925–2004)  
Fourth-generation lawyer, highly regarded mentor, president of the Huntsville-Madison County Bar Association (1965–1966), president of the Alabama State Bar (1969–1970), distinguished community leader, and principal catalyst of the creation of the University of Alabama at Huntsville

Rumore, who also chairs the bar’s Hall of Fame selection committee, noted honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national or international level. Nominees must meet the award criteria which includes having a breadth of achievement in their lifetime, demonstrating a profound respect for professional ethics, being recognized as a leader in their community, and leading, inspiring or mentoring others in the pursuit of justice. Only lawyers who have been deceased for a minimum of two years are considered.
With a total of 440 entries, judges of the Alabama State Bar’s Law Day 2008 annual competition came away with a vivid impression of what our legal system means to Alabama’s youth.

There were 324 posters and 117 essays entered by Alabama students for this year’s Law Day contest. The theme for the 50th anniversary of Law Day was “U.S. Constitution: The Foundation of the Rule of Law.”

Montgomery lawyers Thomas Klinner and Gregg Everett served as co-chairs of the state bar’s Law Day committee.

Winners were recognized May 1 at a special ceremony at the Heflin-Torbert Judicial Building. Following the presentation of awards, students and their guests were treated to a luncheon at the court hosted by Chief Justice Sue Bell Cobb and Judge Tommy Bryan of the court of civil appeals.

The poster and essay contests were divided into two categories: grades K-6 for posters and grades 7-12 for essays. Winners received United States Savings Bonds.

All winners received engraved gold medals and award certificates. Schools of all winners receive certificates and teachers of the winners receive a $25 contribution per award for use in their classrooms.


ASB President Sam Crosby (right) with Judge Tommy Bryan, Alabama Court of Civil Appeals, presenting the first-place certificate and medal to student John Blanding. He attends WJ Christian School in Birmingham.
# LAW DAY LIST OF ENTRANTS

## POSTERS

### 7-9

- Ben Cagle
- Zach Alexander
- Waynette Bailey
- Annalisa Cagle
- Brody Meeks
- Jojo Madison
- Danielle Dodd
- Noah Farris
- Seneka Rudolph
- Josiah Williams
- Jared R. Little
- Aeryal Bailey
- Elizabeth Scruggs
- Mary Jeanette Mellown
- Sydney Norris
- Caroline McRight
- Will Rosenstiel
- Sarah Goldman
- Ellie Vancce
- John Lawrence
- Christopher Jones
- Amelia Thrasher
- Egypt Pettway
- Will Driscoll
- Mary Abbott Crain
- Ana McArdle
- Blake Sheppard
- Jordan Ciniglio
- John Phillip Robertson
- Tomeka Frieson
- Stuart Jones
- Dakota Coleman

### 10-12

- Toni-Anton Taite
- Taylor Robinson
- Molly Strickland
- Christian Steyer
- Peyton Burt
- Elizabeth VonKaenel
- Raven Lindsey
- Michael McCune
- Brandon Martin
- Kaitlin Knight
- Luke Welton
- Seth Gulley
- Michael Schiavi
- Tyler Lankford
- Ronald Moore
- Anthony Smith
- Hannah Johnson
- Hunter Hokek
- Michael Boshell
- Kayla Jordan
- Brooke Harris
- Joshua David Spencer
- Gabriela Isabel Caviedes
- Dixon Simmons
- Luke Hartman
- Tristan Treischel
- Adrianny Robinson
- Lydia Lindsey
- Ramey Rossum
- Madison Beall
- Mady Kirkwood
- Hannah McIglin
- Hunter Morgan
- Brona Ray
- Jody Purnell
- Meghan Marks
- Sebastian Black
- Anna Lee Nabor
- Matthew Brooks
- Janan Jarayi
- Jordan Johnson
- Juanita Mickles
- Andrea Reed
- Austin Reese
- Drew Dauphin
- Jacob Miller
- Taylor McEmore
- Jessie Barton
- Dave Steele
- Jason Burroughs
- Kayla McCoin
- Miles Daltin Smith
- Stephanie Hayes
- Nathan Blackwell
- Dalton Wood
- Champagne Cunningham
- Tyrrell Killingsworth
- Ivana Angion
- Cody Jones
- Kirstin Griffith
- Daniel Jackson
- Madison LeOhr
- Robert Spicer
- Frankie McDonald
- Anjala Chandrasoma
- Tommy Jones
- Matt Sallons
- Maxine VonKaevel
- Victoria Ashley
- Rachel Rhodes
- Mary Thornton
- Raven Lindsey
- Elizabeth VonKaevel
- Peyton Burt
- Christian Steyer
- Jordan Reeves
- Jerron Spraggins
- Molly Strickland
- Nadira Thomas
- Taylor Robinson
- Tovi-Anton Talie
- Ryan Smith
- Taylor Ghee
- Jasmine Johnson
- Alex Thras
- Katie Moseley
- Charlie Speaks
- Maya Anderson
- William V. Royal
- LeMia Mindingall
- Briya Browning
- Joseph Love
- Mason Good
- Savannah Hopkins
- Thomas O’Donnell
- Johnathan Coleman
- Tyler DEye
- Emily Ambrrose
- Litalt Berryhill
- Megan Edwards
- Jacob Collier
- John- Michael Matthews
- Gabriel Humphries
- Bridgette Davis
- Trea Mourner
- Tanner Muncey
- LaRoncha Musay
- Tiara Howton
- Jacy L. Stanford
- Kelsey Taylor Newell
- Deondra Morns
- Kimberly Loder
- Keosha Morris
- Alfonso Serna
- John Blanding
- Miranda Perrigan
- Felicia Bennett
- G & Sonsendra Perry
- Matthew Glover
- DeLauris Walker
- Megan Green
- Briania Dunston
- Sean Berry
- Ashley Lang
- Chris White
- Leonor Applewhite
- Jordan Higgins
- Ronald Moore
- Tyler Larkford
- Michael Schiavi
- Camryn Suggs
- Seth Gulley
- Jake Ewin
- Emma Eads
- Taylor Rice
- Andrew Stewart
- Luke Welton
- Jonathan Brown
- Chris Lebeau
- Kaitlein Knight
- Brandon Martin
- Wynter Sales
- Erica Blodgett
- Jalyn Langhur
- Sarah Lobes
- Grady Lynch
- Chelsea Higgins
- Peter Mekoh
- Olivia Gonzalez
- Nick Benson
- Anamarie Cresws
- Emily Craig
- Andrew Adkins
- Victoria Yvette Knight
- Shanteneres Moore
- ShaniRee Reeves
- Ashley Blaisdell
- Andracia Henson
- Ean
- Will Brooks
- Brian Robinson
- Kai Perkins
- Erin Roberts
- Joshua Gilber
- Devinn Barto
- Zachary Erow
- Joseph Evan Lawson
- Ivy Meagher
- Brandon Berendes
- Mitchell Keys
- Dakota Shamblin
- Mary Cok
- Chris Lundy
- Justin Wyner
- Amanda Munoz
- William McCoy
- Tyler Morris
- Alex Knox
- Jerry Moseley
- Tyler Eberle
- Jon Moss
- Marthe McKinley
- Hang Yu
- Meagan Springer
- Hailey Uilon
- Andrew Gisler
- Will Tubbs
- Bailey Newman
- Ymmy Newman
- Jazminne Jastine
- Kyle Anderson
- Aly Pahred
- Riley Barnes
- Kevin Lightford
- Katrina Straw
- Kayleigh Keith
- Elizabeth Petlit
- Sarah H. Munsuh
- Wendy Stevens
- Allison Stephens
- Jakaylan James
- Alivia Massey
- Destinne Ricker
- Olivia Jacobson
- Emily Snell
- Kaitlein Bosker
- Dalton Anderson
- Vareke Keel
- TC Clarke
- Justin Fletcher

## ESSAYS

- John Williams
- Jay Little
- Reave Showmanke
- Zol Donaldson
- Lauren Bailey
- Mallory Claypool
- Brock Payne
- Amanda Phillips
- Sarah Goldman
- Michael Keyser
- Kyle Mangin
- Bo Morgan
- Chris Lewis
- Gibbs Pearson
- Peter Waselkov
- James Burch
- Malachi Ray
- Will Driscoll
- Spencer Baumber
- Victoria Rosukowski
- Tyler Baggerly
- Megan Minter
- Katie Eubanks
- Andy Davidson
- Keni Pender
- Melissa Waddell
- Emily Schmoller
- Jeff Mofinos
- Katelyn Hudson
- Matthew Leonard
- Ashton McIglin
- Elizabeth Murray
- Lindsey McClure
- Tyler Claxton
- Drew Brunson
- Rachel Chastain
- Annalisa Christopher
- Hannah Owen
- Ryan Maring
- Joseph Baker
- Lauren Dark
- Jonathan Pittman
- Abbie Melvin
- Troy Steelman
- Tyler Phillips
- Emily Butler
- Gerffrey Knudton
- Laurin Lee
- Jennifer Underwood
- Aundrea Keirig
- Hannah Kilpatrick
- Wes Owens
- Hilary Lossau
- Sarah Boyd
- Nathan Spargo
- Kyle Verble
- Daniel Broderick
- Lynnette Rice
- Emily-Panther Stallworth
- Whitney Conrington
- Brenna McCullough

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### THE ALABAMA LAWYER 255
Lawyers use experts for a variety of reasons: initial case evaluation, advice on drafting discovery requests and, of course, presenting testimony at trial. This article discusses the circumstances under which a party must disclose the name, opinion and correspondence of someone who has provided an expert opinion or consultation in a case and when it is proper to withhold such information.

As a general rule, communications with an expert are not confidential. ALA.R.CIV. P. 26(b)(1) “In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...”; FED.R.CIV.P. 26(b)(1); State v. Chicago Bridge & Iron Co., 261 So.2d 882, 885 (Ala. 1972)(“There is no privileged communication between an attorney and an employed expert, not a client.”). Therefore, the practitioner should carefully consider what to include in communications with experts. Stick to the facts and keep assessments of the case private. Whatever is disclosed to a testifying expert is likely to be discoverable. See e.g. Ex parte Head, 958 So.2d 860, 869 (Ala. 2006) (attorney-client privilege waived in turning over certain documents to a retained expert.)

However, under certain circumstances, communications (along with the expert’s identity, opinions and basis for same) may be withheld from discovery under both the work-product and attorney-client privileges. Consider the following definitions:

1. Testifying Experts – one who provides expert testimony.
   a. Retained – retained expert is one who has agreed to provide expert testimony in exchange for consideration.
   b. Unretained – this type of expert has first-hand knowledge about the facts of the case but no party has agreed to pay a fee for her to provide testimony in the case. Examples include treating physicians, investigating police officers and employees of governmental groups (e.g. EPA, OSHA, and the FDA).

2. Consulting Experts – one who is retained or specially employed to give advice or guidance in anticipation of litigation or trial, but who will not testify in the case. There are two special kinds:
   a. Connected with Testifying Expert – where the consultant’s factual knowledge and opinions serve as the basis for a testifying expert’s testimony
   b. With Firsthand Knowledge of Facts – consultant in the role of a fact witness if he obtained knowledge of facts firsthand, or outside the consulting role in some manner. For instance, if a consultant actually witnessed the accident at issue in the case, or participated in the development or testing of an allegedly-defective product, he will be treated as a fact witness as to his firsthand knowledge.

By C. Anthony Graffeo and Eric J. Artrip
Protection under Various Privilege Doctrines

The ability to shield communications and expert-related materials (e.g. the expert’s notes, memorandums, reports and correspondence) from discovery normally depends on which of the above roles an expert plays in the case. The strongest of these is the work product doctrine found in ALA.R.Civ.P. 26(b)(3) which protects “disclosures of the mental impressions, conclusions, opinions or legal theories of an attorney” representing a party. Here is how assertion of the work product doctrine privilege typically corresponds with the various categories of experts:

1. Testifying Experts—Full disclosure as per ALA.R.Civ.P. 26(b)(4). But see Ex parte Morris, 530 So.2d 785, 787 (Ala. 1988) (Expert not required to provide personal tax returns in discovery process.)

   a. Retained—If this expert has developed opinions and acquired facts about the case exclusively in anticipation of litigation or trial, then parties are entitled to full discovery. If the expert received or obtained facts about the case outside the consultant role, then she is a fact witness, at least as to those facts gathered. Under these circumstances, a party is entitled to conduct discovery as to these facts just as the party would with a fact witness.

   b. Unretained—While these experts are not required to submit a report or be subject to the usual expert disclosures under Rule 26(b)(4), the parties are entitled to obtain the same scope of discovery from these experts as a fact witness. If a non-retained expert is called to support the case at trial, identify the expert and the expected topics of testimony in Rule 26 disclosures.

2. Consulting Experts—Generally speaking, discovery of these experts is off-limits. However, the court may require disclosure of the identity of the consulting-only expert and the creation of a privilege log for documents that were created...
as a result of the consultation as per Fed.R.Civ.P. and Ala.R.Civ.P. 26(b)(5).

**a. Connected with Testifying Expert**

A party is entitled to obtain copies of the notes, reports and other materials generated by the consultant that were used by the testifying expert to formulate or support his opinions. To keep a consultant relationship truly confidential, avoid any contact, whether in person or through written materials, between the consultant and testifying experts.

**b. With Firsthand Knowledge of Facts**

As a practical matter, one cannot avoid disclosing the facts known by such an individual simply by paying him a consulting fee. Be suspicious of any employee or former employee of a party who is being paid a separate consulting fee. In such situations, pursue complete disclosure, and/or a privilege log, concerning the alleged consultant.

There is, however, at least one author who finds the withholding of a consulting expert’s name and opinions antithetical to the ultimate search for the truth. See Stephen D. Easton, “Red Rover, Red Rover, Send That Expert Right Over:” Clearing the Way for Parties to Introduce the Testimony of Their Opponents’ Expert Witnesses, 55 SMU L.Rev. 1427 (Fall 2002); Stephen D. Easton, Can We Talk? Removing Counterproductive Ethical Restraints Upon ex parte Communication Between Attorneys and Adverse Expert Witnesses, 76 Ind. L.J. 647 (summer 2001).

As with any other work product protection, the protection afforded here is not absolute. If the party seeking discovery concerning the consultant can show exceptional circumstances, such as the inability to obtain the discovery in any other manner, discovery may be allowed. Ala.R.Civ.P. 26(b)(3); Fed.R.Civ.P. 26(b)(3). An example of such exceptional circumstances is where the consultant is the only person who viewed an allegedly defective product before it was lost or destroyed. Because the party seeking the discovery is now unable to conduct their own examination, they are likely entitled to limited discovery on this issue from the consultant.

It should also be noted that although Fed.R.Civ.Pro. 26(b)(4)(A), governing depositions of experts, appears to imply that some categories of experts may be exempt from the report requirement, that exemption is apparently addressed to experts who are testifying as fact witnesses, although they may also express some expert opinions (e.g. treating physicians). 4 James W. Moore, et al. Moore’s Federal Practice, § 26.04[4] at 26-107 (2d ed. 1995), and Advisory Committee Notes at 125; Patel v. Gayes, 984 F.2d 214, 218 (7th Cir. 1993) (“Rule 26 focuses not on the status of the witness but rather on the substance of the testimony”); Zarecki v. National R.R. Passenger Corp., 914 F.Supp. 1566, 1573 (N.D.Ill. 1996) (Rēτίng plaintiff’s argument that treating physician was exempt from report requirement where physician’s testimony concerned professional opinion developed for trial and not simply information acquired through observation and care of patient).

Finally, in certain circumstances, the attorney-client privilege may play a role in the need for disclosures under Ala.R.Civ.P. 23(b)(4). The privilege generally provides that, “A client has a privilege to refuse to disclose and to prevent any other person...
from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” ALA.R.EVID. 502(b). The party asserting the privilege has the burden of establishing: 1) the attorney-client relationship existed; 2) the particular communications at issue were indeed privileged; and 3) the privilege was not waived. Ex parte City of Leeds, 677 So.2d 1171, 1173 (Ala. 1996).

Typically, courts have been reluctant to extend this privilege to outside consultants such as experts. However, in some narrow circumstances, confidential communications between an outside consultant and counsel for a party may be deemed protected by the attorney-client privilege. For instance, in the case of In re: Bieter Co., 16 F.3d 929 (8th Cir. 1994), the appellate court found an outside consultant was so intertwined with the Bieter Company as to be considered a representative of the company for purposes of applying the attorney-client privilege to confidential communications the consultant had with the company’s counsel. The Bieter Company had hired Dennis S. Klohs, an outside consultant, as an independent contractor to provide advice and guidance regarding certain retail developments the company was pursuing. As part of his duties he communicated with the company’s lawyers on a regular basis. When RICO litigation erupted over some of the real estate dealings the consultant had been involved with, Bieter asserted attorney-client privilege for communications Klohs had previously had with counsel. The court ruled that Klohs was an individual without which the Bieter Company could not exist, and so he was a representative of Bieter for purposes of applying the attorney-client privilege.

As noted earlier, if either the work product or attorney-client privileges are asserted, Rule 26 of both the Alabama and Federal Rules of Civil Procedure applying the attorney-client privilege to confidential communications the consultant had with the company’s counsel. The Bieter Company had hired Dennis S. Klohs, an outside consultant, as an independent contractor to provide advice and guidance regarding certain retail developments the company was pursuing. As part of his duties he communicated with the company’s lawyers on a regular basis. When RICO litigation erupted over some of the real estate dealings the consultant had been involved with, Bieter asserted attorney-client privilege for communications Klohs had previously had with counsel. The court ruled that Klohs was an individual without which the Bieter Company could not exist, and so he was a representative of Bieter for purposes of applying the attorney-client privilege.

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require the party asserting same to state the applicable privilege and produce a log of documents and information so covered. The federal rule reads as follows:

(5) Claims of Privilege or Protection of Trial Preparation Materials

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Special Cases

As is typical, there are a number of situations which do not fit neatly into one of the above expert classifications. For example, a party’s employees sometimes are called to testify as expert witnesses by their employer. They are not automatically exempt from expert disclosure and reporting requirements. On the contrary, some courts agree that “allowing a blanket exception for all employee expert testimony would create a category of expert trial witness for whom no written disclosure is required’ and should not be permitted.” Prieto v. Malgor, 361 F.3d 1313, 1318 (11th Cir. 2004) quoting Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y. 1996).

This issue was considered to be one of first impression within the Middle District of Alabama several years ago in K.W. Plastic v. U.S. Can., Co., 199 F.R.D. 687 (M.D. Ala. 2000). The defendant in that case argued that its expert-employee was not “retained or specially employed to provide expert testimony” and his duties did not entail “regularly ... giving expert testimony,” such that the witness was not obligated to prepare and submit a signed expert report. Id. at 689. The Court rejected both premises, citing two prior cases where identical arguments were rejected by other federal courts, Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd., 177 F.R.D. 459, 461 (D.Minn.1998) and Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y.1996). In rejecting the defendant’s argument, the Court stated:

Rather than reinvent the wheel, the court quotes from the persuasive opinion in Day regarding the interpretation [of Rule 26(a)(2)(b)] advanced by the defendant in that case: The reading proposed by defendant would create a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information. The logic of defendant’s position would be to create a category of expert trial witness for whom no written disclosure is required— result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulated policy.’

More recently, the Eleventh Circuit Court of Appeals in Prieto v. Malgor, 361 F.3d 1313, 1318 (11th Cir. 2004), also relied heavily upon Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y. 1996), in requiring an expert disclosure and report from the defendant’s expert-employee. In Prieto, an excessive force case under §1983, the appellate court found that the defendant’s
employee, who had no connection to the specific events underlying the case, and who the defendant had proffered as an expert in the use of force and police procedures, was required to submit an expert report and subject to full disclosure under Rule 26. In that case, the appellate court agreed with the logic used in Day v. Consolidated Rail Corp., 1996 WL 257654 (S.D.N.Y. 1996), which flatly rejected the defendant’s argument that their employees were exempt from disclosure and report requirements, emphasizing the broad provisions for expert discovery in the Federal Rules of Civil Procedure.

Another special circumstance occurs when a party designates an expert but subsequently asserts that the expert will not testify in the case. Under this scenario, the expert has been effectively “de-designated.” A de-designated expert should be considered a consulting-only expert for purposes of discovery if, before the de-designation took place, no discovery was taken and the expert had not conducted a personal medical examination of a party under Rule 35.

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of the expert and the expert had not conducted a personal medical examination of a party under Rule 35. If the expert divulged facts known or opinions held prior to the de-designation then the opposing party may be entitled to limited discovery of the expert by deposition or subpoena.

Yet another set of criteria is considered when addressing the issue of a duel-role expert who was retained for purposes of both testifying at trial on certain issues and providing confidential (non-testifying) consulting services on other issues. This kind of expert will be treated as a retained, testifying expert for discovery purposes (full and complete disclosure) unless a clear distinction can be made between the expert’s testifying role and his consulting services. Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F.Supp. 1013, 1014 (S.D.N.Y. 1983). Any ambiguity about whether or not a document or communication took place during the testifying-versus-consulting role should be resolved in favor of providing...
full disclosure. *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997). The burden of showing that an expert did not consider certain documents in forming her opinion cannot rest on the expert’s testimony exclusively. *Id.* This burden is generally met when the documents could not have been relied upon (e.g. same were created after an expert’s testimony is taken or report is written.) *Aktiebolag v. Andrx Pharm, Inc.*, 208 F.R.D. 92, n. 12 (S.D.N.Y. 2002).

Finally, we come to one of the most commonly-used experts—the non-retained consultant. Typically this type of expert is informally consulted by one of the parties in anticipation of litigation. In determining whether a consultation is truly “informal” for the purposes of discovery, courts will typically look at: (1) how the consultation was initiated; (2) the type and extent of the information obtained from or provided to the expert; (3) the intensity of the relationship; (4) the terms, such as whether payment was provided; and (5) whether a confidentiality agreement was entered into. *Ngo v. Standard Tools & Equip., Co.*, 197 F.R.D. 263, 266 (D.Md. 2000). If a party has established that the consultant is truly non-retained, not even the identity of the expert is subject to discovery. *See Ex parte Cryer*, 814 So.2d 239, 248 (Ala. 2001) (Defendant physician established that consultation with an independent physician immediately after procedure in question was done in anticipation of litigation. Absent a showing of substantial harm by the plaintiff, court upheld trial court’s decision to not require disclosure of physician’s identity).

Lawyers continue to rely upon experts on a regular basis for consultation, testimony and other purposes. Knowing when and how to protect informal communications and withhold certain opinions from disclosure is a crucial part of this process. We hope this article will prove beneficial.
Nothing in our profession makes attorneys lose more sleep than the horror of missing a deadline.

The king of deadlines, or perhaps the grim reaper of plaintiff’s attorney nightmares, is the statute of limitations. Although not as draconian as the dismissal of an action in its entirety, the inability to pursue a claim or defense can have an equally devastating effect on the outcome of a case. Moreover, the preclusion of a particular theory is a fear shared by both sides of the bar, in that restrictions on amendments shadow both plaintiff and defendant alike.

Alabama Rule of Civil Procedure 15 governs a party’s ability to amend pleadings during the course of litigation.

Justice Champ Lyons, Jr. has described the rationale behind Rule 15:

Pleadings are a means, not an end, and the action should be resolved on its merits, not upon technicalities. . . . Without the Rule’s permissive approach to the right to amend, the allegiance to substance over form which permeates these rules would not be attainable.

The Liberal Construction of Rule 15(a)

The Alabama Supreme Court instructs that “Rule 15(a) calls for a liberality in allowing amendments, and the rules on amendments themselves are liberally construed by the courts, in order to ensure, so far as possible, that cases are decided on their merits.” McElrath, 351 So.2d at 564, quoting 1 A. Barron and Holtzoff, Federal Practice and Procedure, § 442 comments. Stated another way, “The purpose of this rule is to allow maximum opportunity for the parties to state each claim and have those claims decided on the merits of the issues.” Ex parte Reynolds, 436 So.2d 873, 874 (Ala. 1983). In short, “Rule 15 must be liberally construed by the trial judge.” In Re Stead, 310 So.2d 469, 471; 294 Ala. 3, 6 (Ala. 1975).

The 1992 Amendment

Possibly due to this mandate for a liberal construction of Rule 15, the Alabama Supreme Court has admitted that “the extent of the trial court’s discretion in permitting amendments has not been precisely delineated and has been, at times, unclear.” Ex parte Liberty National, 858 So.2d 950, 958 (Ala. 2003). In 1992, the Alabama Rules Committee made an effort at delineation, drafting an amendment to Rule 15(a). This amendment placed limitations on, and a stricter scrutiny of, amendments filed closer to trial. The prior version of Rule 15, on the other hand, had permitted amendments to pleadings without relation to the proximity of trial.

The 1992 amendment, which remains unchanged today, reads as follows:

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court’s own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires. Thereafter, a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause. A party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

The change in the rule was deemed “necessary to accommodate the constraints imposed by time standards for the disposition of litigation.” Committee
Comments to August 1, 1992 Amendment to Rule 15(a). Additionally, since the Committee was now further restraining the ability to amend pleadings based upon the date of a trial, it was cognizant of Rule 40. Specifically, “Rule 40 requires a sixty-(60-) day notice of a trial setting. Thus, [given the 42-day cut-off in the new rule,] a party has an eighteen- (18-) day period within which to file an amendment after the notice of first setting for trial without the need for obtaining leave of court.” Id. In sum, the 1992 amendment attempted to strike a balance between the need for liberal amendments and the potential prejudice which could arise from an amended pleading filed on the eve of trial.

The Committee further predicted: “Because an amendment within the forty-two-(42-) day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period.” Committee Comments to August 1, 1992 Amendment to Rule 15(a). For Alabama trial and appellate courts, consequently, the question became: “What constitutes ‘good cause?’”

Amendments Filed within 42 Days of Trial and the “Good Cause” Standard

Despite the committee’s anticipation, Alabama courts have repeatedly applied the 1992 Amendment to allow amended pleadings within 42 days of trial. Obviously, no rigid test has evolved to define or gauge “good cause.” Instead, with the phrase “good cause” ripe for interpretation, and when coupled with the traditional, liberal application of Rule 15(a), the test has naturally become fact specific. Alabama courts, however, have placed the strongest emphasis on one factor: when the information which triggered the amendment became available.

For example, in Todd v. Kelley, 783 So.2d 31 (Ala.Civ.App. 2000), a city police officer brought an action against a city, mayor, police chief and supervisor, asserting civil rights and wrongful discharge claims. Only 18 days before the first trial setting, the plaintiff moved to amend his complaint to name three additional defendants. Id. at 36. The trial court denied the plaintiff’s motion for leave to amend.

The Alabama Court of Civil Appeals reversed. The court noted that “[i]n order to comply with the 42-day requirement under Rule 15(a), the plaintiff would have had to amend his complaint to add the three new defendants . . . only eight days after taking the last relevant deposition.” Id. at 38. In light of these circumstances, the “trial court abused its discretion by determining that the plaintiff was not entitled to a continuance.” Id.

As the spouse or colleague of any lawyer knows, no case is more interesting to an attorney than his or her own. This lawyer is no exception. Nevertheless, even objective observers may agree that the bizarre factual scenario of Ziade v. Koch, a case I recently
defended with one of my partners, played out more like a law school exam question than an actual case. It is also pertinent to an analysis of “undue delay” under Rule 15.

In Ziade (pronounced Z e-ah-dee), the plaintiffs claimed that the defendants’ negligence led to the death of a fetus. The death was first confirmed on September 12, 2000, although the fetus was not delivered stillborn until September 14, 2000. The suit was filed on September 11, 2002. The plaintiffs initially identified two experts, who both opined that the fetus died at least 48 hours before the death was first detected on September 12, 2000. These witnesses were deposed on September 6 and 22, 2005, with the trial being scheduled for November 14, 2005. Pursuant to the trial court’s scheduling order, all witnesses were to be identified no less than 60 days before trial. Two days before this deadline expired, the plaintiffs identified a third expert witness. The trial court extended the expert deadline, further ordering that all expert depositions be completed by September 26, 2005. The trial remained set for November 14, 2005. On September 26, 2005, the deposition of the third plaintiffs’ expert was taken.

The third expert confirmed the testimony of the prior two, meaning that each of the plaintiffs’ experts now opined that the fetus had died at least by September 10, 2000. Since the plaintiffs had not filed suit until September 11, 2002, however, the plaintiffs’ experts had, essentially, testified the plaintiff’s case outside the statute of limitations. The defendants filed a motion for summary judgment based upon the statute of limitations in a wrongful death suit. The defendants subsequently submitted a motion for leave to file an amended answer asserting those affirmative defenses, which was filed within 42 days of trial. The trial court granted these motions, and an appeal by the plaintiff ensued.

On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face. On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face. It was only after the depositions of the plaintiffs’ experts, who pushed fetal death back to at least September 10, 2000, that the statute of limitations defense became cognizable. As the supreme court summarized, it “only became clear, after the completion of the Ziade’s experts, that the entirety of the Ziade’s proof . . . was that the death occurred . . . more than two years prior to the filing of the complaint.” Ziade v. Koch, 952 So. 2d 1072, 1075 (Ala. 2006).

Ex parte Liberty National, 858 So.2d 950 (Ala. 2003), of all the reported Alabama decisions, particularly demonstrates how alive the liberal spirit of Rule 15(a) remains. In this case, the plaintiff filed suit against Liberty National on February 13, 2001 based upon actions that took place in or before December 1978. The defendant filed an answer that did not include the rule of repose as an affirmative defense. An opinion was released by the Alabama Supreme Court in January 2002.
which clarified the law as to the rule of repose. The defendant then filed a motion for summary judgment in February 2002, asserting the rule of repose. The plaintiff filed a response, claiming waiver, since the rule of repose had not been pled as an affirmative defense. Id. at 952.

At the March 2002 hearing on the motion, the defendant was granted a continuance to address the waiver claims. After the hearing, a motion for leave to file an amended answer was submitted, but the trial court denied the motion. Id. at 952. On appeal, the Alabama Supreme Court reversed the trial court’s ruling and allowed the amendment. The court noted that at the time Liberty National filed its answer, the state of the law precluded its use of the defense. Two months after the law was clarified, Liberty National filed its motion to amend, which was acceptable to the court. Id. at 954.

The Test for Amendments after a Showing of “Good Cause”

After a party has shown “good cause” for an amended pleading filed within 42 days of trial, the analysis is not necessarily finished. A map hurdle, however, has been overcome. That is, the Alabama Supreme Court has determined that, in light of the overarching liberal policy of allowing amendments under Rule 15, the appropriate way to view the request for leave to amend, if a party demonstrates good cause, is as though the request had been brought more than 42 days before trial, when the court does not have unbridled discretion to deny the leave to amend, but can do so only upon the basis of a valid ground. Ex parte Liberty National, 858 So.2d 950, 953 (Ala. 2003).

In other words, the amendment is now treated as if it was timely filed, is subject to far less scrutiny, and “the burden is now on the trial court to state a valid ground for its denial of a requested amendment.” Id. (emphasis added).

“Actual prejudice or undue delay” are the “valid grounds” repeatedly cited by the Alabama Supreme Court as a justification for denying a timely-filed, amended pleading. Ex Parte Thomas, 628 So.2d 483, 486 ( Ala. 1993). As to the latter, the Alabama Supreme Court has interpreted “undue delay” to mean “flagrant abuse, bad faith, truly inordinate and unexplained delay.” McElrath, at 560, 564 (Ala. 1977). “A long delay is not good cause, by itself, to deny an amendment.” Ex parte Neely Truck Line, 588 So.2d 484, 485 (Ala.Civ.App. 1991). The Alabama Supreme Court does consider, however, whether “the amendment, if allowed, will cause any undue delay in the resolution of the case.” Ex parte Liberty National, 858 So.2d at 955.

Undue Delay

“Undue delay can have two different meanings” under Rule 15(a). Blackmon v. Nexity Financial Corp., 953 So. 2d 1180, 1189 (Ala. 2006). Primarily, delay deals with the party learned of the information in relation to the amendment. See Rector v. Better Houses, Inc., 388 So. 2d 75, 78 (Ala. 2001) (affirming the striking of amended complaint, when plaintiff gave no evidence to rebut trial court’s
finding that facts which were the basis of the amendment were known from the start of the suit); *Burkett v. American Gen. Fin., Inc.*, 607 So. 2d 138 ( Ala. 1992) (affirming the striking of an amended complaint where the plaintiff learned of the fact six months prior to the amendment). Alternatively, a trial court may deny an amendment when it would cause a delay of the trial. *Blackmon*, 953 So. 2d at 1190; *Horton v. Shelby Med. Ctr.*, 562 So. 2d 127 ( Ala. 1989).

A peculiar scenario of potential “undue delay” arises when the filing of a motion for summary judgment is followed by a subsequent attempt to amend an answer. That is, the motion for summary judgment precedes the filing of the very affirmative defense upon which the motion is based. The Alabama Supreme Court “has held that a defendant’s failure to plead an affirmative defense in its answer does not prevent it from raising the defense in a motion for a summary judgment, when the defendant amends its answer to include the affirmative defense before the trial court rules on the summary judgment motion.” *Avery v. Beverly Health and Rehabilitation Services, Inc.*, 902 So.2d 704, 707 ( Ala. Civ. App. 2004) (emphasis added).

In *Piersol v. ITT Phillips Drill Division, Inc.*, for example, the court affirmed a trial court’s decision to consider a motion for summary judgment based on the statute of limitations, even though the defendant did not attempt to amend its answer until four months after filing the motion. 445 So.2d 559, 560 ( Ala. 1984). This was because the amended pleading had been filed prior to the hearing on the statute of limitations. *Id.*

Likewise, in *Alexander, Corder, Plunk, Baker and Shelly, PC v. Jackson*, 811 So.2d 506 ( Ala. 2001), the court again affirmed a trial court’s decision to allow an amended answer which asserted, for the first time, the statute of frauds. The answer was filed after the motion for summary judgment. Because the defendant amended its answer before the trial court ruled on his summary judgment motion, the Alabama Supreme Court affirmed. *Id.* at 508.

**Actual Prejudice**

What constitutes “actual prejudice” has caused some confusion, with some finding the phrase to be a legal misnomer. Alabama courts have made clear that the test is not, as has been argued, whether the amended claim or defense harms or “prejudices” the opponent’s case. Instead, the non-movant must demonstrate actual prejudice to its ability to develop facts or evidence which it could have used had the amendment been timely. *Ex parte GRE Ins. Group*, 822 So.2d 388, 390 ( Ala. 2001).

The true force of this concept was demonstrated in *Ex parte GRE Ins. Group*, where a defendant amended its answer in such a fashion that would completely extinguish the plaintiff’s claims. *Id.* at 390. The trial court granted the plaintiff’s motion to strike the amended complaint, and the defendant appealed. *Id.*

In supporting the trial court’s refusal to allow the amended defense, the plaintiff asked the Alabama Supreme Court what was likely intended to be a purely rhetorical question on the true meaning of “prejudice.”
“Because actual prejudice to the opponent of the amendment is a criterion to be considered when allowing or disallowing an amendment to the pleading, . . . it bears mentioning the obvious: allowing the amendment effectively extinguishes Glenda Galvin’s claim against [the defendant] in all probability. How much more prejudice could exist?”

_Id._ at 390-91 (emphasis in original).

The court, however, chose to answer this question. In reversing the trial court’s denial of the asserted defense, based upon an abuse of discretion, the court answered:

"The plaintiff . . . misunderstands the meaning of prejudice in the context of the test for allowing amendments. It is obvious that an amendment, designed to strengthen the movant’s legal position, will in some way harm the opponent.’ In the context of a Rule 15(a) amendment, prejudice means that the nonmoving party “must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.” And by prejudice to the rights of the other party is meant, without loss to him other than such as may result from establishing the claim or defense of the party applying.’ In other words, the defense asserted in the amended answer is not prejudicial, merely because it might constitute a meritorious defense to the plaintiff’s claim.”

_Id._ at 391 (first alteration and last emphasis added).

The court has also instructed that when an amended pleading “merely changes the legal theory of a case or adds an additional theory, but the new or additional theory is based upon the same set of facts and those facts have been brought to the attention of the other party by a previous pleading, no prejudice is worked upon the other party.” _Bracy v._
Sippial Elec. Co., 379 So.2d 582, 584 (Ala. 1980). In *Ex parte Reynolds*, for example, the court reversed the striking of an amended complaint which added a count of fraud. 436 So.2d 873, 874 (Ala. 1983). In supporting its decision, the court noted that the amendment was filed more than a month before the date set for the defendant’s motion for summary judgment and added no new parties. Most critically, it “was based on a combination of facts previously alleged by [plaintiff] in support of his original complaint and facts set forth by the defendants in the affidavit in support of their motion for summary judgment.” *Id.*

In contrast, an amended complaint filed within 30 days of trial was deemed appropriately struck by the trial court, when the “new allegations of fraud and suppression [were] based upon information that was known or should have been known . . . at the time she filed the original complaint.” *Rector v. Better Homes, Inc.*., 820 So.2d 75, 77 (Ala. 2001) (alteration in original). Likewise, the court affirmed a trial court’s decision to strike a plaintiff’s second amended complaint, where it was filed six weeks before trial, two years after the original complaint, after the court’s deadline to amend pleadings, and after the defendants had filed motions for summary judgment. *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 228 (Ala. 2004); see also, *Government Street Lumber Co. v. AmSouth Bank, N.A.* 553 So.2d 68 (Ala. 1989).

**Rule 15’s “Liberal Application” Has Its Limits**

Despite the overall theme of this article, and the majority of Rule 15 case law, parties should certainly not confuse the intentionally liberal application of Rule 15 with a “carte blanche authority to amend . . . at any time.” *Burkett v. American Gen. Fin. Inc.* 607 So. 2d 388, 390 (Ala. 2001), quoting *Stallings v. Angelica Uniform Co.*, 388 So. 2d 942, 947 (Ala. 1980). Rule 15 specifically vests a trial court with the discretion to deny *any* amended pleading, even if filed outside 42 days. In short, a trial court has the discretion to deny *any* amendment for good cause.

No case better emphasizes this discretion than *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180 (Ala. 2006). In fact, *Blackmon* demonstrates how a trial court can exercise its discretionary muscle in multiple ways. The internal flexibility of Rule 15 can be used by trial judges to void the very time limits of the rule itself. For example, the trial court in *Blackmon* entered a scheduling order that changed the deadline for amended pleadings. The Alabama Supreme Court held that this scheduling order overrode the “default” time provision of Rule 15(a). *Id.* at 1189.

The plaintiff incorrectly assumed, however, that as long as his amended complaint was filed prior to the trial court’s scheduled...
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deadline, he was entitled to this amendment. The trial court disagreed, striking three new counts filed prior to its own deadline. It did so, because: (1) the plaintiff’s amendment was based upon his own deposition testimony, so that there was undue delay in waiting until the eve of trial to amend the complaint; and (2) the amendment would cause more discovery and, consequently, a delay in the trial.

On appeal, the plaintiff argued there was no prejudice, because the defendants had been aware of the information upon which the amendment was based for at least eight months—the time period between the plaintiff’s deposition and the amendment. The Alabama Supreme Court, however, noted that the trial court had relied on undue delay, rather than prejudice. Thus, the plaintiff’s “no prejudice” argument effectively proved his own delay, since the plaintiff would have likewise been aware of his own testimony long before it was amended into legal claims by the amendment.

**Conclusion**

As shown generally above, the Rules Committee’s hope to mark a fine, if not absolute, line for amending pleadings has not been completely achieved. Through the “good cause” crack in the dam of Rule 15(a), a steady trickle of decisions defining that phrase continues to this day. Indeed, the unanticipated factual scenarios which the real world creates, and these cases exhibit, are the very reason the committee could not, and should not, create an absolute rule of preclusion like the statute of limitations. Thus, because the application of Rule 15(a) remains so fact-specific, the ability to add claims, or foreclose them, will remain fodder for new case law, and the likely stuff of attorney nightmares, for years to come.

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How much electronically stored information (ESI) must I produce? When should the cost of search and restoration be shifted to the requesting party? Will I have to produce data if my client is not presently actively using the material? How will the court decide these difficult questions?

The specter of the unknown and the unknowable, high stakes, expensive technical expertise, chance disclosures, highly trained investigators, and human failings, keeps some of us interested in the unfolding lines of case law on electronic discovery issues. Though we learn something with each new case, the underlying electronic facts remain a mystery to most of us. Where is electronic information stored, after all? Every day seems to disclose yet another place that it has been hidden, intentionally or inadvertently. What must we do to properly disclose and respond to discovery requests for electronic information? Are there any parameters that will provide a safe haven for the attorney acting in good faith?

One concept noted in the Federal Rules of Civil Procedure and discussed in certain federal court decisions that have been relied on by the Alabama Supreme Court is that a party may identify data as inaccessible and exclude it preliminarily from required disclosures on that basis. Inaccessibility is discussed herein, with the hope that this discussion will assist in determining your discovery obligations.

The Alabama Supreme Court’s recent review of the limits of discovery of electronic information in Ex Parte Cooper Tire & Rubber Company, ___ So.2d ___, 2007 WL 3121813 (Ala.2007) considering a petition for writ of mandamus to force limitation of discovery orders pursuant to the defendant’s requested protective order, recognized that the Alabama Rules of Civil Procedure have not, yet, been amended to include direction for production of electronic discovery. The Cooper Tire court adopted the test set out in Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568 (N.D. Ill. 2004) to determine whether to shift the costs of searching and producing inaccessible data to the requesting party in order to protect the producing party from unduly burdensome e-discovery requests. Id., at 572.

The plaintiff in the Cooper Tire wrongful death action alleged a tire defect caused the deaths of three family members and caused serious injury to a surviving member.
The requested protective order would have provided relief from an order compelling production of extensive tire-defective design information regarding all models of the defendants’ tires over a period of almost nine years in some instances, backup tapes of electronically stored information, and previously produced confidential litigation discovery.

The Cooper Tire court carefully reviewed and largely approved of the Marion County Circuit Court’s analysis of recent federal case law regarding whether a party should be required to produce large quantities of electronic data. The Cooper Tire trial court applied McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C.2001); Rowe Entertainment, Inc., v. The William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002); Byers v. Illinois State Police, not reported in F.Supp.2d, 2002 WL 1264004 (N.D.Ill2002) [not reviewed herein, as it added little to the discussion]; Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003); and the Federal Rules of Civil Procedure, Rule 26(b)(2)(iii). The Cooper Tire trial court discussed the “marginal utility” test, the “proportionality test” and the presumption that a party responding to a discovery request normally pays for its own discovery production.

On review of the Cooper Tire trial court’s order, the Alabama Supreme Court determined that a more recent federal court case, Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 573 (N.D. Ill. 2004), stated the proper test to be applied in determining whether the defendant should be required to comply with plaintiff’s extensive discovery requests. The Alabama Supreme Court adopted the Wiginton test for use in Alabama to test the breadth of appropriate discovery and whether the costs associated with production of the requested information should be shared by the requesting party. On April 25, 2008, the Alabama Supreme Court affirmed its reliance on Wiginton and on the Federal Rules of Civil Procedure in Ex Parte Vulcan Materials Company, 2008 WL 1838309 (Ala.). The Wiginton test follows:

1) the likelihood of discovering critical information;
2) the availability of such information from other sources;
3) the amount in controversy as compared to the total cost of production;
4) the parties’ resources as compared to the total cost of production;
5) the relative ability of each party to control costs and its incentive to do so;
6) the importance of the issues at stake in the litigation;
7) the importance of the requested discovery in resolving the issues at stake in the litigation; and
8) the relative benefits to the parties of obtaining the information.

Upon completion of its analysis, the Alabama Supreme Court Cooper Tire court first applied a broad discovery based relevance analysis to eliminate any request for documents not relevant, nor likely to reveal relevant evidence. The court then instructed the trial court to apply the “recent federal guidelines” to determine whether ordering production of the requested e-mails would constitute undue burden.

Though the wording is somewhat different, the tests established in Cooper Tire and Wiginton do not vary greatly from the Federal Rules of Civil Procedure, Rule 26, as amended effective December 1, 2006, and Comments following. (The rules underwent subsequent amending, however, this portion of the rule does not appear to have changed.)

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
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(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.


Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include:

1) the specificity of the discovery request;
2) the quantity of information available from other and more easily accessed sources;
3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

5) predictions as to the importance and usefulness of the further information;
6) the importance of the issues at stake in the litigation; and
7) the parties' resources.

Federal Rules of Civil Procedure, Rule 26, Comments,
December 1, 2006 Amendment (paragraph structure adjusted to highlight list)

We are watching the unfolding of a new application of the litigation process. Like electronic information itself, cases enforcing disclosure requirements and discovery requests appear to be searching for the consensus position. The amended Federal Rules of Civil Procedure do not significantly change existing fairness criteria developed over the years.

A computer performs its functions outside the understanding of most of us. Even if we manage to take off the tough casing, we cannot see the computer work its magic. Perhaps the search for a common legal language and an understanding of the nature of electronic information storage capabilities will begin to demystify electronic information discovery.

The courts and amended rules provide us with guidelines and precedents for compliance with current legal standards. Let's look at some cases referenced by the courts cited in Alabama in Cooper Tire to ground our search for direction. We will review the issues of both quantity and assignment of cost of production of electronic information. Ill address them in the sequential order they were issued.

There are two McPeek decisions from our nation's capital, demonstrating the court's use of what is now often called sampling. The McPeek court addressed a request for review and acknowledged the high expense of restoration of e-mails from numerous back-up tapes. McPeek I described the concepts that later courts used to limit discovery production based on undue burden, accessibility of electronic information and cost-shifting of electronic information production. The McPeek plaintiff wanted the Department of Justice to search backup systems for evidence of deleted information. The McPeek court analyzed difficulties associated with the plaintiff's request:

"... the backup tapes have to be "restored" or rendered readable by returning the files to a source ... from which they can be read by the application which originally created them. Then, someone would have to review the restored file ... and determine whether it falls within one of plaintiff's document requests ... merely restoring the e-mail from a single backup tape would take eight hours ..."

"... Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter. ...

"Unlike a labeled file cabinet or paper files organized under an index, the collection of data by the backup tapes ... was random. It must be remembered that the ... use of a backup ... system was not for the purpose of creating a
perfect mirror image of each user’s hard drive. Instead, the system was designed to prevent disaster, i.e., the destruction of all the data being produced on a given day if the network system crashed.

“Once the day ended and the system had not crashed, the system administrator could breathe a sigh of relief. She may then have maintained that day’s backup tapes for some period of time, but then eventually taped over them...”

...“It is...impossible to know in advance what is on these backup tapes. There is a theoretical possibility that there may be something on the tapes that is relevant to a claim or defense, for example, a subsequently deleted e-mail that might be evidence...”

...“...I have decided to take small steps and perform, as it were, a test run”


I believe the McPeek cases stand for the principle that a sampling may reveal the relative benefits of further ESI or document review and the nature of information which may be found and allow a proper cost-benefit analysis by the court. (Compare and contrast quick-peek agreements, concerning privilege, See, Zubulake v. UBS Warburg LLC, 216 F.R.D. 280,290 (S.D.N.Y.2003)).

We know that later both Wiginton and the F.R.C.P., Rule 26 cited above, encourage such an analysis. F.R.C.P., Rule 34(a) specifically acknowledges that sampling is a reasonable procedure in connection with a production of documents, or ESI, as follows:

“(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:

(a) any designated documents or electronically stored information—luding writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—tored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or...”

Federal Rules of Civil Procedure, Rule 34(a) (selected portion only, bolding added).

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Cost-shifting is fully analyzed in the Rowe case series. Rowe Entertainment, Inc. v. The William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002) provided an analysis of cost shifting provided for in F.R.C.P., Rule 26(c). Plaintiff demanded production of electronic and other information, some of which resided on backup tapes. The Rowe court enumerated eight factors to be considered when determining whether discovery costs should be shifted. Those eight factors became the basis of the Zubulake and, then, the Wiginton analyses. The Rowe court noted general relevancy of the request and ordered cost-shifting for only costs of production, but reserved the expense of review regarding privileged or confidential materials to the producer. The decision was reviewed and approved by the assigned trial court judge, Rowe Entertainment, Inc. v. The William Morris Agency, Inc., not reported in F.Supp.2d, 2002 WL 975713 (S.D.N.Y. 2002), with more extensive analysis.

There are at least seven reported decisions in Zubulake. The Zubulake opinion cited in Cooper Tire is generally regarded as Zubulake I and reviews the reported Rowe decision regarding standards to use in determining the parameters of court-ordered discovery of electronic information and an analysis of the appropriate use of cost-shifting, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, (S.D.N.Y. May 13, 2003). Significantly, Zubulake I describes the difference between accessible and inaccessible data; though Rowe did not use this terminology, the concepts are the same.

“Information deemed ‘accessible’ is stored in a readily usable format. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. ‘Inaccessible’ data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.”

Zubulake I, supra at 320 (bolding added).

What I will call Zubulake III painstakingly applied the concepts in Zubulake I for a completely transparent cost-shifting analysis. The decision reiterated the court’s statements that the costs of production do not shift, only the costs of restoration and search. Zubulake III emphasized the rule that costs of production are normally assigned to the producing party. Zubulake v. UBS Warburg LLC, 216 F.R.D. 290, (S.D.N.Y. July 24, 2003).

The Federal Rules of Civil Procedure, as amended effective December 1, 2006, address electronically stored information, but are less descriptive of the meaning of accessibility.

“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost . . .”

portions of F.R.C.P., Rule 26(b)(2)(B) (bolding added).

However, 2006 Amendment, Advisory Committee Notes provide help in determining whether data should be considered accessible:

“... some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

“It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources...”

Advisory Committee Notes to F.R.C.P., Rule 26, 2006 Amendment, Subdivision(b)(2) (bolding added).

On October 10, 2007, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the proposed Uniform Rules Relating to the Discovery of Electronically-Stored Information, Judge John L. Carroll, dean and professor of law at Cumberland School of Law, served as the reporter for this commission’s draft of uniform rules for discovery of ESI. The commission drafts and promotes enactment of uniform state laws where they deem it appropriate to strengthen the federal system, interstate commerce and international commerce, while considering varying state concerns.

The proposed uniform rules of electronic discovery (found at www.law.upenn.edu/bll/archives/ucl/udoera/2007_final.htm) were discussed by George M. Dent, III in his article published in the March 2008 Alabama Lawyer, at page 107. Mr. Dent, who is the chair of the Alabama Supreme Court Standing Committee on the Alabama Rules of Civil Procedure, requested comments on the proposed rules or other issues of importance. My review of the proposed uniform rules relating to the discovery of ESI convinced me that they are fully compatible with the federal rules excepting only in a difference in the required time limits for required actions. The proposed uniform rules also gather all ESI discovery issues in one more manageable place than the dispersed requirements in the F.R.C.P.

Generally, I am persuaded that improved document management systems will be used in the future to make our discovery searches and productions more manageable. Until then, identify, preserve, confer, reach agreement, disclose, object, or produce!

Rebecca Jennathan Luck has been an assistant attorney general for the Alabama Department of Mental Health and Mental Retardation since 1996. Luck also practiced in Tennessee and California.
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Notes on Stays Pending Appeals in Alabama’s Appellate Courts
Obtaining a stay pending either an appeal or consideration of a petition for an extraordinary writ can be essential to successfully pursuing relief from Alabama’s appellate courts. Of course, without a stay, the prevailing party can act to enforce a judgment, which can be problematic for the losing party. In certain circumstances, the failure to obtain a stay pending appeal can even render an appeal moot.

While the general procedures for obtaining a stay pending appeal are fairly clear, the applicable standards for when a stay is proper are not necessarily so. The intent of this article is to briefly outline the procedures and applicable standards that are and should be followed in seeking a stay pending an appeal, and to address a unique case that has caused some disagreement in the federal courts: when a stay is proper pending an appeal from a denial of a motion to compel arbitration.

By Marc James Ayers

Procedures for obtaining a stay pending appeal

Except where provided by statute the procedures governing stays pending appeal are found in Rule 62 of the Alabama Rules of Civil Procedure and Rule 8 of the Alabama Rules of Appellate Procedure. As indicated in those rules, many stays pending appeal are not discretionary; they depend only on whether a party has properly submitted a supersedeas bond “approved by the clerk of the trial court, payable to the appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render.” The purpose of the supersedeas bond is to maintain the status quo between the parties pending an appeal. It ensures that the party who has obtained a judgment will not be prejudiced by a stay of execution of the judgment pending the appeal.
final determination of an appeal."8 Posting a supersedeas bond does not waive an argument on appeal that the trial court lacked jurisdiction.7

As set forth in Rule 8, Ala. R. App. P., a party is entitled to a stay pending appeal of a money judgment if the party executes a proper supersedeas bond in an amount “equal to 150 percent of the amount of the judgment if the judgment does not exceed $10,000, or 125 percent if the judgment exceeds $10,000."8 If the judgment appealed from is “for the payment of money and also for the performance of some other act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay pending appeal when he executes and submits a bond in the amount of what would be required for the money judgment itself, plus an additional amount “as the trial court may in writing prescribe.”9 If the judgment appealed from is “only for the performance of some act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay upon the execution and submission of a bond in an amount “as the trial court may in writing prescribe.”10

Although the trial court has discretion in determining the proper bond amount with respect to non-money judgments, under Rule 8 the trial court generally has no discretion as to setting bonds on money judgments.11 However, the Alabama Supreme Court has recognized one narrow exception to this principle, now known as the “Ware exception.” As explained by the court, the Ware exception allows a trial court to avoid the strictures of Rule 8 if an appellant makes a satisfactory showing that he does not have the funds to satisfy the Rule 8 bond requirements:

In Ware v. Timmons, case no. 1030488, in response to a motion to suspend the requirement of Rule 8(a)(1), this Court issued an order in which it recognized a narrow exception to Rule 8. In that case, this Court directed the trial court to accept “the maximum bond obtainable, based on the appellants’ entire net worth and available insurance coverage. . . .” The Ware exception is now recorded in the Committee Comments to Rule 8(a) and (b), Adopted January 12, 2005. The Comments note that the modification to the supersedeas bond requirement in Ware was derived from this court’s authority under Rule 2(b), Ala. R. App. P., to suspend a rule of procedure for “good cause shown.”12

An appellant seeking a stay should first apply to the trial court if “practicable,”13 and then to the appellate court if necessary. When a stay is sought from an appellate court, the party should explain that a stay could not be obtained from the trial court, explain why a stay is appropriate and include the pertinent parts of the record:

The motion for a stay shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are substantial, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such photocopied parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court.14

The appellate court may condition a stay upon the giving of a bond or other security.15

Applicable standards for obtaining a discretionary stay on appeal—and why there are no Alabama appellate decisions regarding such stays

Many often wonder why there are no Alabama appellate decisions setting forth a standard for acquiring a stay pending appeal in those cases not specifically delineated in Rule 8, such as stays sought along with a petition for a writ of mandamus.16 These stays do not depend solely on the posting of a bond, but are discretionary in the nature of an injunction. The reason for the lack of published precedent is because the Alabama appellate courts resolve stay motions and certain other matters on a separate docket before the appeal is resolved (in the Alabama Supreme Court, this is referred to as the “miscellaneous docket”).17 Therefore, these stays are granted or denied by order of the appellate court and not by published opinion.

The common practice in crafting an argument as to why a stay is appropriate in these circumstances is to follow those standards set forth in federal decisions.18 In the federal courts, whether a stay pending appeal is appropriate usually depends upon a balancing of some or all of the following factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”19 The test is not intended “to be reduced to a set of rigid rules,”20 and, accordingly, “the nature of the showing required to justify a stay pending appeal may vary with the circumstances presented.”21 For example, the Eleventh Circuit has held that a stay pending appellate review can be warranted where there exists only “a substantial case on the merits when a serious legal question is involved” and “the balance of equities weighs heavily in favor of granting the stay.”22

Stay pending the appeal of a denial of a motion to compel arbitration

A unique situation arises when an appeal is taken from a trial court’s denial of a motion to compel arbitration. Orders granting or denying motions to compel arbitration are appealable as a matter of right.23 However, no Alabama appellate decision addresses whether a trial court must stay further proceedings during the appeal of a denial of such a motion.

In Alabama, “the general rule is that a trial court is divested of its jurisdiction during a pending appeal.”24 Accordingly, “while an appeal is pending, the trial court can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.”25 During an appeal of a judgment or order, “a trial court may proceed in matters that are entirely collateral to the appeal.”26 A denial of a motion to compel arbitration is a ruling that it is...
for the court, rather than an arbitrator, to hear and rule on the claims at issue. Therefore, it would seem that proceeding to trial would not be collateral to the denial, but would be purely dependent on its correctness. Moreover, allowing a trial court to proceed to trial during the appeal of its denial of a motion to send the claims to arbitration would undermine the point of arbitration in the first place, which is to provide a fast and efficient method of resolving disputes.27 It would appear, then, that under Alabama law a stay of further proceedings would be required upon the appeal of a trial court’s denial of a motion to compel arbitration.

This is precisely the conclusion reached by the majority of federal circuit courts of appeal that have addressed the issue— including the Eleventh Circuit. In addition to the Eleventh Circuit, the Third, Seventh, Tenth, and D.C. (and perhaps the Federal) circuits hold that stays pending appeal are mandatory following the denial of a motion to compel arbitration unless it can be shown that the appeal is frivolous.28 Underlying this holding is the jurisprudential principle noted above that “the only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court. The issue of continued litigation in the district court is not collateral to the question presented by an appeal . . . .”29 As the Seventh Circuit put it, “We believe the case should be litigated in the district court is not an issue collateral to the question presented by an appeal . . . . it is the mirror image of the question presented on appeal.”30

Furthermore, these courts have recognized that if litigation is allowed to continue even though a party has appealed an order denying arbitration, then the purposes of arbitration will be completely frustrated:

By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration . . . . Thus, the underlying reasons for allowing immediate appeal of a denial of a motion to compel arbitration are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.31

Two federal circuit courts of appeal—the Second and the Ninth—have endorsed the contrary view that stays pending appeal of a denial of a motion to compel arbitration are not required.32 However, the majority rule, which one noted commentary has approved as “the sounder approach,”33 appears to accord more fully with Alabama law concerning the transfer of jurisdiction between the trial and appellate courts and the purposes of arbitration.

Endnotes

1. Rule 62(a), Ala. R. Civ. P. provides for a 30-day automatic stay on execution on and enforcement of a judgment except “an interlocutory or final judgment in an action for an injunction or in a receivership action.” Rule 62(a), Ala. R. Civ. P. and Rule 62(b), Ala. R. Civ. P. allows the trial court to further stay execution of a judgment during consideration of a post-judgment motion “[in its discretion and on such conditions for the security of the adverse party as are proper.” But if the losing party wishes to prevent execution on or enforcement of a judgment pending appeal, that party must seek a stay pending appeal as discussed in this article.

2. See Masonry Arts, Inc. v. Mobile County Comm’n, 629 So. 2d 334 (Ala. 1993) (dismissing appeal of trial court’s denial of injunction to prevent the award of a public contract because bidder failed to request a stay pending appeal and contract was awarded and executed pending appeal); Skelton v. J & G, LLC, 973 So. 2d 1066 (Ala. Civ. App. 2008) (holding that the plaintiffs’ appeal was rendered moot by their failure to acquire a stay of judgment concerning their right to redeem an apartment building; the time period for redemption set by the court elapsed without having been stayed); see also Reeb v. Murphy, 481 So. 2d 372 (Ala. 1985) (appeal dismissed because appellant failed to stay issuance of redemption deed and therefore ratified action of trial court).

3. For example, see, e.g., Ala. Code § 9-16-10(b) (1975) (appeals from decisions concerning violations of statutes governing mining operations).

4. This article concerns stays in civil proceedings. Stays pending appeal in criminal matters are governed by Ala. R. Crim. P. 7.2(c) and Ala. R. App. P. 9(d). See generally Ex parte Watson, 757 So. 2d 1107 (Ala. 2000).

5. Ala. R. App. P. 8(a); see also Ala. R. Civ. P. 62(d) (“When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained

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in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.”; see also St. Regis Paper Co. v. Kerlin, 476 So. 2d 64, 66 (Ala. 1985) (“The common law rule, that an appeal automatically superseded the judgment, in and of itself, has been changed to the extent that an appeal does not ordinarily supersede the judgment in the absence of a supersedeas bond. Under Rule 62, A.R.Civ.P., and [Rule 8], A.R.A.P., a supersedeas bond must be posted in order to stay the execution of a judgment.”) (citation omitted).


11. See Ex parte Spriggs Enters., Inc., 376 So. 2d 1088, 1089 (Ala. 1979) (“The plain meaning of Rule 8(a)(1) is that one who appeals a judgment against him for money damages only must execute a supersedeas bond in an amount equal to 125 percent of the amount of the judgment when the judgment exceeds $10,000. The language utilized in the rule is mandatory; the trial judge is given no discretion in setting the amount of the supersedeas bond.”); Scrushy v. Tucker, 955 So. 2d 988, 1000-01 (Ala. 2006) (citing Ex parte Spriggs Enters.).

12. Scrushy, 955 So. 2d at 1000-01 (footnote omitted); see also id. (holding that there was no sufficient evidence that Appellant Scrushy could not post a bond as required under Rule 8).


14. id.

15. id.


17. In addition to stay motions, the Alabama appellate courts also address other preliminary matters (such as initial rulings on petitions for extraordinary writs) on a separate docket. See Marc James Ayers, The Use and Review of the Extraordinary Writs of Mandamus and Prohibition in Alabama’s Appellate Courts, 68 Ala. Law. 396, 398 (2007).


22. Ruiz v. Estelle, 580 F.2d 555, 556 (5th Cir. Unit A 1981); see United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992) (following Ruiz); Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986) (same). See also Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983) (discussing the “continuum” on which stays are evaluated, and stating: “At one end of the continuum, the moving party must show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor.”) (citations and internal quotations omitted); 16A Wright, Miller & Cooper, Federal Practice and Procedure, at § 3954 (“If the balance of hardships tips decidedly in favor of the party seeking a stay, it may be sufficient showing on the merits to show the existence of serious legal questions.”) (citing cases).


25. Reynolds, 874 So. 2d at 503 (internal quotations omitted).

26. id.

27. See, e.g., Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 13 (Ala. 2006) (noting that “a key purpose” of arbitration is “to permit speedy resolution of disputes”); Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 12-14 (1st Cir. 2005)).

28. See Blinco v. Green Tree Servicing LLC, 366 F.3d 1249, 1251 (11th Cir. 2004) (“Upon motion, proceedings in the district court should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration.”); Bradford-Scott Data Corp. v. Physician Computer Network, Inc., 128 F.3d 504, 507 (7th Cir. 1997) (holding that a district court must stay litigation during the pendency of appeal upon the filing of a non-frivolous notice of appeal of a denial of a motion to compel arbitration); McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162-63 (10th Cir. 2005) (same); Ehleiter v. Graapetree Shores Inc., 482 F.3d 207, 215 n.6 (3d Cir. 2007) (agreeing with majority rule); Bombadier Corp. v. National R.R. Passenger Corp., 2002 WL 31818924 (D.C. Cir. 2002) (unpublished); see also Ecolab, Inc. v. Gardner Mfg. Co., 56 Fed. Appx. 484, 485 (Fed. Cir. 2003) (citing Bradford-Scott for the principle that an appeal from a denial of a motion to compel arbitration “divests the district court of jurisdiction to conduct the trial”) (unpublished). Cf. In re White Mountain Mining Co., 403 F.3d 164, 170-71 (4th Cir. 2005) (stating that “[ou]r court has not decided whether a stay of the entire action is required pending appeal of an order denying a motion to compel arbitration or whether the filing of an interlocutory appeal divests the trial court of jurisdiction”; and holding that the issue was moot).

29. Blinco, 366 F.3d at 1251; see also Bradford-Scott, 128 F.3d at 505 (“It is fundamental to a hierarchical judiciary that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—i[t] confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”) (internal quotations omitted).

30. Bradford-Scott, 128 F.3d at 505.


32. See Motorola Credit Corp. v. Uzan, 388 F.3d 39, 53-54 (2d Cir. 2004); Britton v. Co-op Banking Group, 916 F.2d 1405, 1411-12 (9th Cir. 1990).

33. 19 Moore’s Federal Practice § 203.123[a] (3d ed. 2007) (discussing the circuit split, and concluding that “[t]he sounder approach appears to be that adopted by the Eleventh Circuit, which holds that the district court should grant a motion to stay the litigation pending an appeal from the denial of a motion to compel arbitration, so long as the appeal is not frivolous”).
Another Great Year for the YLS

This year has been another great year for the YLS, and I’ve thoroughly enjoyed serving as president. Because there is no way to do this job alone I take this opportunity to thank all (to the extent possible) the persons and firms who have made this year such a success.

The YLS held its Sandestin Seminar in May. Thanks to these businesses and law firms for sponsoring it:

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I also send thanks to our other exhibitor sponsors and speakers not mentioned above who helped make the seminar a success.

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- Robert F. Prince
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Additionally, the following firms sponsored the YLS Minority Pre-Law Conference held in Birmingham April 2 and in Montgomery April 17:

- Carr Allison Pugh Howard Oliver & Sisson PC
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Also, thank “you’s” go to the following for their sponsorship of the 2008 Bar Admission Ceremony held in May and to be held in October:

- Boggs Reporting & Video
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- U.S. District Courts Northern, Middle and Southern Districts of Alabama

In addition to those above, thanks go to members of the Young Lawyers’ Section Executive Committee. Without your help, there is no way that I could have led the group this year. Special thanks also go to Jimbo Terrell (president-elect), who will do an outstanding job next year; Clay Lanham (treasurer); Leslie Ellis (YLS board member), who could not have been any more helpful to me and the Executive Committee; Navan Ward (YLS board member) for heading up the Minority Pre-law Conference; and the entire Sandestin committee for all of their help putting on a great CLE. I also thank Alabama State Bar President Sam Crosby, Alabama State Bar President-Elect Mark White and the Alabama State Bar staff who helped make my job easier and who were so supportive of the YLS events. Finally, “thank you’s” go to my law firm, Bradley Arant Rose & White, for all of its support of me and the YLS during this year and, last but certainly not least, to my wife, Jessi, for her patience and understanding during the past year.

As always, I encourage you to become more involved in the YLS if it is of interest to you. If you have any questions, please give me a call or send me an e-mail. Once again, thank you for allowing me to serve as your YLS president this year.
Elections

The Alabama primary election was June 3, 2008, with a run-off election scheduled for July 15, 2008. The party nominees then will face off in the general election on November 4, 2008.

In addition to the election of the President of the United States, all members of Congress must be elected and one of Alabama’s senators (Senator Jeff Sessions) is running as well.

The following statewide offices are on the ballots: president of the Public Service Commission; one seat on the Alabama Supreme Court being vacated by Justice Harold See; and members of the Court of Criminal Appeals and Court of Civil Appeals.

Also, members of the State Board of Education are running for office (they run in geographical districts).

In the courthouse, the following elected offices are on the ballot: county commissioners, revenue commissioners, tax collectors, tax assessors, county treasurers, county constables, county school boards, and county school superintendents.

In addition to state and county elections, there will also be many municipal elections.

The last day to qualify to run for municipal office is July 15, 2008. August 26, 2008 is the regular municipal election day, with October 7, 2008 as the run-off election day for municipal elections. Approximately a dozen of the larger cities hold elections in other years but the vast majority of municipal elections will be held this year.

Election Law Changes

As a result of work done by an Institute committee chaired by former legislator and Speaker Pro Tem Jim Campbell and 24 other members who were legislators, lawyers, judges, sheriffs, clerks, and the Secretary of State, the entire Election Code-Title 17 was reviewed. The committee cleared up inconsistencies,
LEGISLATIVE WRAP-UP

Continued from page 291

duplications and obsolete laws. The election laws then were reorganized to make them more accessible and usable without making substantive changes to the current practice.

Alabama’s election law evolved from paper ballots, to machine voting, to electronic voting. All three processes had separate voting procedures that remained in the law, thereby making a cumbersome and outdated law which was made more complicated by the passage of the federal “Help America Vote Act,” the Secretary of State’s Administrative Rules and voting officials obtaining Attorney General’s Opinions to interpret the various statutes.

The new revision of the law simplified the existing law by conforming all the laws, rules and opinions to electronic voting machines to make sure the statutory law coincides with the voting procedure practice.

The legislature passed the new revision, and it was signed into law by the governor on April 25, 2006 with an effective date of January 1, 2007. Before the law could be effective, it had to be pre-cleared by the Justice Department. It wasn’t until over a year later, in July 2007, that the Attorney General of Alabama submitted the act to the Justice Department which approved the revision in November 2007.

The 2008 election is the first opportunity for the new election code to be in effect. It did make certain changes in duties and responsibilities of elected officials. For clarification of these changes one may wish to consult Title 17 or the Alabama Election Handbook, 13th Edition.

Some of the more meaningful changes were the realignment of certain responsibilities of the probate judge as chief election official of the county and the sheriff. Further, the appointing of election officials by the appointing board (probate judge, sheriff and circuit clerk) has been clarified. The revision delineates the responsibilities of the canvassing board to receive the ballots. For general elections, the canvassing board is the probate judge, sheriff and circuit clerk, while in primary elections, the canvassing board is the party election officials.

Some of the most confusing areas in the law were purging the voter list, identifying the responsibilities of poll workers and the voter identification law as it is applied to absentee ballots and provisional ballots. Again, these were clarified and made more understandable.

Mention the Help America Vote Act provided for provisional ballots; the election code had to be revised to replace our existing challenged ballots.

Municipal law changes were also made to coincide with the most recent changes in the general law. These changes can be found in the Elections chapter of the Municipal Code, which is Chapter 46 of Title 11. Also available is a Municipal Election Code Handbook that can be obtained from the League of Municipalities’ Web site at www.alalm.org.

Voting Rights Act

Because Alabama falls within Section 5 of the Voting Rights Act of 1965, 79STAT.439, 42USC§1973(C), any changes or qualifications in voting with respect to voting procedures different from those in effect November 1, 1964 must be submitted to the United States District Court or District of Columbia or a declaratory judgment must be obtained as to the validity of the change or the change submitted to the U.S. Attorney for approval. John Tanner, formerly chief of the Voting Rights Section, Civil Rights Division, U.S. Justice Department, Washington, D.C., is currently serving a sabbatical with the Alabama Law Institute as a visiting Fellow. His article in this Alabama Lawyer, entitled “Emergency Voting Changes,” is a reference to the pre-clearance procedure for lawyers to follow in the event of changes that occur close to election day.

The next Alabama Lawyer will review all of the legislation passed by the 2008 Regular Session of the legislature. At the time this article went to press, the legislature was continuing to filibuster and no meaningful statewide legislation had been able to pass.

Annual Meeting

The Institute’s Annual Meeting will be held during the annual meeting of the Alabama State Bar. This year’s meeting, in Sandestin, will be Friday, July 11, 2008 at 10:15 a.m. Institute President Demetrius Newton will preside over a program that will include:

2008 Legislation of Interest to Lawyers Panel:
Senator Roger Bedford
Senator Zeb Little
Representative Marcel Black
Representative Cam Ward
Business & Non-Profit Entities Code
Professor Howard Walthal
Pre-clearance Election Issues under The Voting Rights Act
John Tanner, Institute Fellow (see above)
Things go wrong with elections, as recent experience across the United States has abundantly proved. The most careful planning cannot address every contingency, and situations arise where full compliance with the law is virtually or actually impossible. The best-laid plans of state and local officials can be disrupted by everything from a hurricane to a truculent owner of a building used as a polling place.

In addition to finding a new polling place and advertising its location, or solving whatever the actual problem may be in a manner consistent with state law, the practitioner struggling with an emergency has to face a federal law, Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Section 5 protects the voting rights of minority citizens, and requires federal review of your proposed remedial plan. That review must take place before your new procedure can be implemented, and the statute gives the U.S. Department of Justice months in which to complete its review. A misstep can mean redoing the whole election.

Success depends on awareness of the nature of and need of federal review, prompt action to comply and, most importantly, close consultation with the affected minority community on developing and implementing the new voting procedure.

Background: Section 5 of the Voting Rights Act

Under Section 5, any new voting practice or procedure—every change in an election date, voter registration or candidate qualifying deadline, polling place location, district boundary, or alteration of an election system—must undergo federal review to assure that it is not racially discriminatory as to either its purpose or effect. The review can be by either the United States District Court for the District of Columbia in a declaratory judgment action or administratively by the United States Attorney General, at the local government’s choice. In an emergency, of course, the District Court process is out of the question. It is used relatively rarely even in more leisurely circumstances, and the vast majority of changes are reviewed administratively by the Department of Justice through the Voting Section of the Department’s Civil Rights Division.

That review can take time. The statute allows the Department 60 days from its receipt of a submission of a new polling place or other voting change in which to interpose an objection to that change. The Department can, at any time within those 60 days, request additional information, and the 60-day period begins anew after receipt by the Department of the complete information. Until that 60-day period has expired with no objection interposed, the change is legally unenforceable: the polling place cannot be moved.

Governments ignore Section 5 at their peril. In the absence of Section 5 “pre-clearance” of a change, not only the Justice Department but any affected voter can seek an injunction from a three-judge panel to enjoin the change or obtain other relief. Allen v. State Board of Elections, 393 U.S. 545, 554-557 (1969). Many readers will recall that a federal court allowed the 1982 Alabama state legislative elections to go forward under a redistricting plan that had not been pre-cleared as to all areas of the state, but limited the legislators to one-year terms. Legislators had to face the voters again in a 1983 special election held under a new, pre-cleared plan. Burton v. Hobbie, 561 F. Supp. 1029 (M.D. Ala. 1983). Even now, 25 years later, a former legislator grumbled to me about the 1983 do-over election.

Step V: Working with the Minority Community

The most important step in avoiding problems under the statute is to satisfy its purpose, and avoid any action that may discriminate against minority voters. The best way to avoid enacting changes that
are racially discriminatory is immediate, 
frank consultation with the potential vic-
tims of any discrimination, the affected 
minority community.

Looking back to its origins in 1965, one 
of the most important facets of Section 5 is 
that it has given local minority communi-
ties a seat at the table at which decisions 
are made. That facet should be remem-
bered and honored. It is important to 
engage leaders of this community, or these 
communities, in a genuinely collaborative 
process. If you need to select a new 
polling place, run through the options with 
them. Ask if they know of additional 
options. Listen to their ideas and concerns. 
Their views will be helpful in identifying a 
solution to the emergency problem.

A wise attorney will not succumb to the 
temptation to avoid consulting those 
community members who are most likely to 
raise complaints. If someone has a com-
plaint, it is best by far to know about it 
early. As a part of its review, the Voting 
Section contacts local minority elected 
officials and other community leaders who 
will not be hesitant to articulate any con-
cerns they have. Identifying those concerns 
at the outset allows the attorney to address 
them, consider alternatives and 
either achieve consensus or, at least, pro-
cceed knowing what the complaints will be. 
The attorney can, at minimum, arm herself 
to rebut any claims and be in a position to 
establish the absence of discrimination.

There may be more than one minority 
community. Alabama, like other states, has 
growing Hispanic and Asian populations 
in some areas, as well as African American 
and Native American populations. The 
interests and access to voting of each of 
these groups should be considered fully 
where they are present and eligible to vote.

It is one thing to identify a new proce-
dure to meet an emergency situation. It is 
another thing to let the voters know what 
you have done. The Justice Department 
will look to whether the new polling place 
or new procedure has been publicized in a 
way that voters, including minority voters, 
actually will learn of it. The minority 
community itself will be the best guide to 
effective publicity among its members, 
and the most effective communication 
may vary from group to group. Court 
decisions, including the recent string of 
decisions in Common Cause v. Billups, 
504 F. Supp. 2d 1333 (N.D. Ga. 2007), 
have weighed notice to voters heavily, and 
it can be a factor in Section 5 review.

The publicity issue may be especially 
important for Hispanic or Asian commu-
nities, where some citizens have limited 
English-speaking and reading proficien-
cy, and may rely on separate communica-
tion channels. Members of those communi-
cations will know what those communica-
tion channels are, as will retailers who 
sell products to those communities, reli-
gious leaders who serve their spiritual 
needs and other service providers.

The Price of Failure to Comply

The price of a failure to comply with 
Section 5 can be very high. Where a vot-
ing change is determined to be discrimi-
natory, the jurisdiction faces the prospect 
of having a new election, just as the 
Alabama legislature did in Burton v. 
Hobbie. In a recent example, the North 
Harris Montgomery Community College 
District adopted a change reducing the 
number of polling places for its May 13, 
2006 election from 84 sites co-located 
with sites of its constituent school dis-
tricts, which were having elections on the 
same day, to 12 entirely separate loca-
tions. As set forth in a May 5, 2006 letter 
terposing an objection to the change,

“Under the proposed change, District 
elections will be held separately 
from school district elections, so 
that voters will have to travel to two 
separate polling places in order to 
cast their ballots. Moreover, instead 
of 84 polling places, there will be 12 
polling places. These 12 polling 
places will serve a geographic area 
of well over 1,000 square miles with 
over 540,000 registered voters. The 
assignment of voters to these 12 sites 
is remarkably uneven: the site with 
the smallest proportion of minority 
voters will serve 6,500 voters, while 
the most heavily minority site (79.2 
percent black and Hispanic) will 
serve over 67,000 voters.”

Letter of May 5, 2006 from 
Assistant Attorney General Wan J. 
Kim to Renee Smith Byas.

Under these circumstances, the District 
failed to meet its burden of establishing 
the absence of discrimination. The 
District determined to hold no May elec-
tion at all. The Department of Justice sub-
sequently filed suit under Section 5 and 
obtained relief requiring the District to 
hold its election in conjunction with the 
November 2006 general election, using 
all polling places within its boundaries of 
the two constituent counties for that elec-
tion. United States v. North Harris 
Montgomery Community College District 
Civil Action No. H 06-2499 (S.D. Tex. 

Step IV Working with the 
Justice Department

Contact the Voting Section promptly, 
even before you have finalized your 
plans for new procedures. The thought of 
navigating a federal bureaucracy can be 
dunting, but you can expect to engage in 
a productive conversation with knowl-
edgeable people. They will not give legal 
advice as such, and will avoid answering 
some questions prior to their investiga-
tion and consultation, but they will iden-
tify issues, including sources of potential 
discrimination that may not have 
ocurred to local officials. They can be 
helpful, and can help you to a much dif-
ferent outcome than that of the North 
Harris Montgomery Community College 
District.

The most notable recent case of an 
election emergency flowed from the dev-
astation to New Orleans by Hurricane 
Katrina on August 26, 2005 and its after-
math, when the scope of the devastation 
gradually became known. On September 
7, 2005, the Department wrote the 
Louisiana Secretary of State,

“I can only imagine the host of bur-
dens facing you and other Louisiana 
officials. I write to express my symp-
athy and also to ease your burden in 
at least one respect. Specifically, I am 
aware that the State of Louisiana has 
an open primary election scheduled 
for October 15, 2005. No doubt the 
devastation and disruption caused by 
Hurricane Katrina will necessitate 
the postponement and rescheduling 
of that election. Please be assured 
that the Civil Rights Division stands 
ready to expedite the review of any 
and all submissions of voting 
changes (especially scheduling and 
polling place changes) resulting from 
Hurricane Katrina which the state 
and/or its subdivisions submit to our 
Voting Section for review under 
Section 5 of the Voting Rights Act.”
Similar letters were sent to other states affected by Katrina and Rita. The Louisiana letter offered broader assistance “in any way we can,” and the state took advantage of the offer. The October and November 2005 elections were postponed, as was the regular New Orleans mayoral election scheduled for the following February. Even with that delay, extraordinary changes in voting procedures were necessary and had to be adopted in a short period under daunting circumstances. The Department of Justice worked closely with state election officials, legislative leaders and others to facilitate a process for early inclusion of informed minority leaders in the formulation of each of the complex steps, from satellite poll locations across Louisiana to special absentee voting procedures to new and consolidated polling places, necessary to conduct an election. Accordingly, when these procedures were finalized and received by the Department, review was completed in short order. March 16, 2006 letter from Voting Section Chief John K. Tanner to Assistant Attorney General William P. Bryant III, and Section 5 files 2006-0399, -0436, -0733, -1207, -1208, and -1209. (Submission of four state acts, the Secretary of State’s Emergency Election Plan and an Executive Order completed March 10, 2006; pre-cleared on March 16, 2006.)

Without comparing them to hurricanes, decisions of the courts also can disrupt the routines of election administration and create Section 5 exigencies. The Texas Supreme Court entered orders in several candidate qualification cases on January 27, 2006 which delayed the ballot certification of both the Republican and Democratic parties for their March 7, 2006 primary elections. The delay was such that at least two vendors of voting equipment and ballots could not deliver printed ballots to Texas counties on time; they would be over a week late. That delay wrecked the schedule for compliance with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973, (UOCAVA) which requires 30 days for transmittal of ballots to and from military personnel and persons overseas. Thus, the state found itself in a bind between the command of the state supreme court and federal law. The state used existing discretionary authority to make up for the week’s delay in sending out ballots by extending the deadline for receiving ballots by nearly two weeks, from March 7 to March 20. The state submitted that change for Section 5 review by letter of February 23, 2006. February 23, 2006 letter from to Texas Director of Elections Ann McGeehan to Voting Section Chief John K. Tanner. The change was pre-cleared the same day. February 23, 2006 letter from Voting Section Chief John K. Tanner, to Texas Director of Elections Ann McGeehan

**Actual impossibility**

The Department of Justice thus is at pains to accommodate the needs of local authorities, and can act with remarkable speed. Circumstances can overcome even the best of efforts, however. In the fall of 2004, local elections were scheduled for many Gulf Coast communities just as Hurricane Ivan was bearing down on the area. On September 13, 2004, the City of Spanish Fort sensibly voted to postpone
their September 14 municipal election. They submitted that postponement for Section 5 review on the same day and, no doubt, headed inland with Section 5 the last thing on their minds.

The federal courts and the Justice Department long have taken a sensible approach to such situations, and have allowed nunc pro tunc compliance with Section 5 review requirements—“post-clearance,” as it were. In 1968, Georgia enacted a change in the method of electing the County Commissioners of Peach County. The change was never submitted for Section 5 review and private citizens filed suit on the eve of the 1976 commissioner election. In *Berry v. Doles*, 438 U.S. 190 (1978), the Supreme Court adopted the suggestion of the Department of Justice that the county be required to make a submission within 30 days, and noted that the courts could revisit the issue of relief if an objection were to be interposed. 438 U.S. 192-193. “If approval is obtained, the matter will be at an end.” *Id*. The Department took that same approach in the Spanish Fort change in election date, which subsequently was “post-cleared.”

**Conclusion**

The attorney whose client has an election emergency faces a difficult but manageable legal task. The statutory time period for federal review may make the federal legal requirements seem impossible to meet. They are not. *Berry v. Doles* identifies the two elements to obtaining “post-clearance”: prompt efforts to comply and, most importantly, avoiding changes that are, in fact, racially discriminatory. The attorney who fails to follow these steps takes his client on a stroll through a minefield. The attorney who moves quickly and who meets the goals of the federal law through prompt inclusion of minority community in planning and publicity can find the Department of Justice to be a source of assistance and cooperation, rather than an obstacle.

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John Tanner, formerly chief of the Voting Rights Section, Civil Rights Division, U.S. Justice Department, is serving a sabbatical with the Alabama Law Institute as a visiting Fellow.
About Members

Dan Cushing announces the opening of his office at 2653-B Old Shell Rd., Mobile 36607. Phone (251) 471-9885.


James Mac Patton announces the opening of the Jim Patton Law Firm, LLC at 2956 Rhodes Circle, Birmingham 35205. Phone (205) 933-8383.

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Balch & Bingham LLP announces that Carey Bennett McRae has joined the firm’s Birmingham office as partner.

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Chip Cleveland announces that Robert E. Riddle is now associated with the firm.

Conrad & Barlar announces that Krissy McCulloch has become associated with the firm.

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Estes, Sanders & Williams LLC announces that Devon L. Johnson, W. Walker Moss and Jonathan G. Wells have become associates.

Haskell Slaughter Young & Rediker LLP announces that Robert L. Williams and Thomas J. Buchanan have joined the firm as counsel.

Jackson, Foster & Graham announces that Mathew Bernard
Richardson has become a member of the firm and the firm name is now Jackson, Foster & Richardson.

Kaufman Gilpin McKenzie Thomas Weiss PC announces that John Allen Howard, Jr. and Davis H. Smith have become shareholders.

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J. Lenn Ryals, John S. Plummer, M. Andrew Donaldson, Algert S. Angricola, Jr., and Jeffrey W. Smith announce the formation of Ryals, Plummer, Donaldson, Agricola & Smith PC with offices at 60 Commerce St., Ste. 1400, Montgomery 36104.

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Wilmer & Lee PA announces that Lisa Davis Young, Angela Slate Rawls, Katie L. Granlund, Ellen C. Wingenter, and Jeffrey D. Maynor have joined the firm as associates.

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<table>
<thead>
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<th>Male, Super Preferred, Non-Tobacco Monthly Premium</th>
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**$500,000 Level Term Coverage**

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<th>Male, Super Preferred, Non-Tobacco Monthly Premium</th>
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