

JULY 2010 • VOL. 71, NO. 4

THE ALABAMA LAWYER

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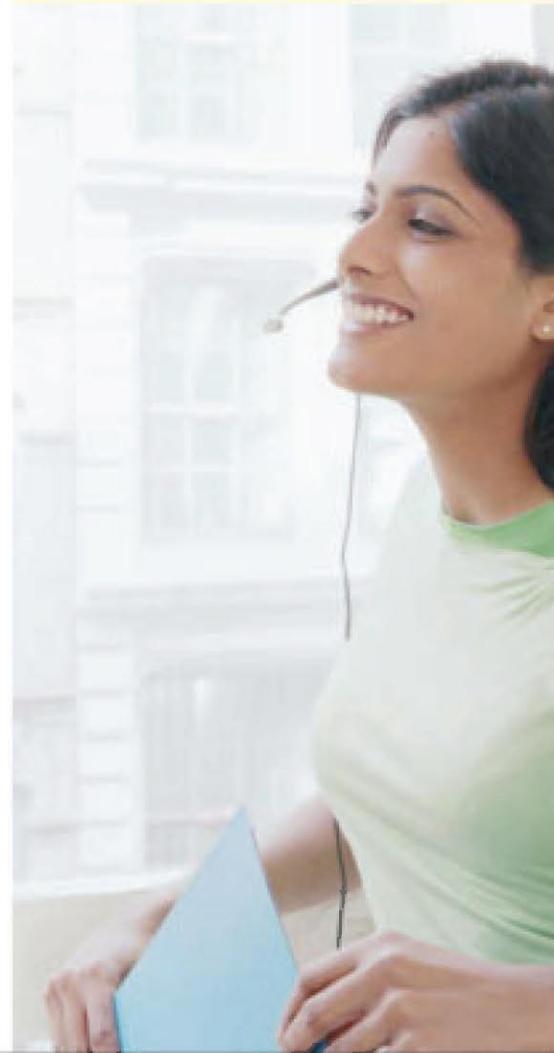
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- 12 Estate Planning *Birmingham*
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The renovated Alabama Department of Archives and History building, located in Montgomery, houses a treasure trove of Alabama history. For more about the ADAH (www.archives.alabama.gov) and the people who have made it as valuable as it is, see Keith Norman's "Executive Director's Report," beginning on page 269 of this issue.
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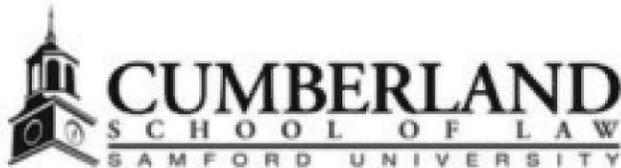
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Periodicals postage paid at Montgomery, Alabama, and additional mailing
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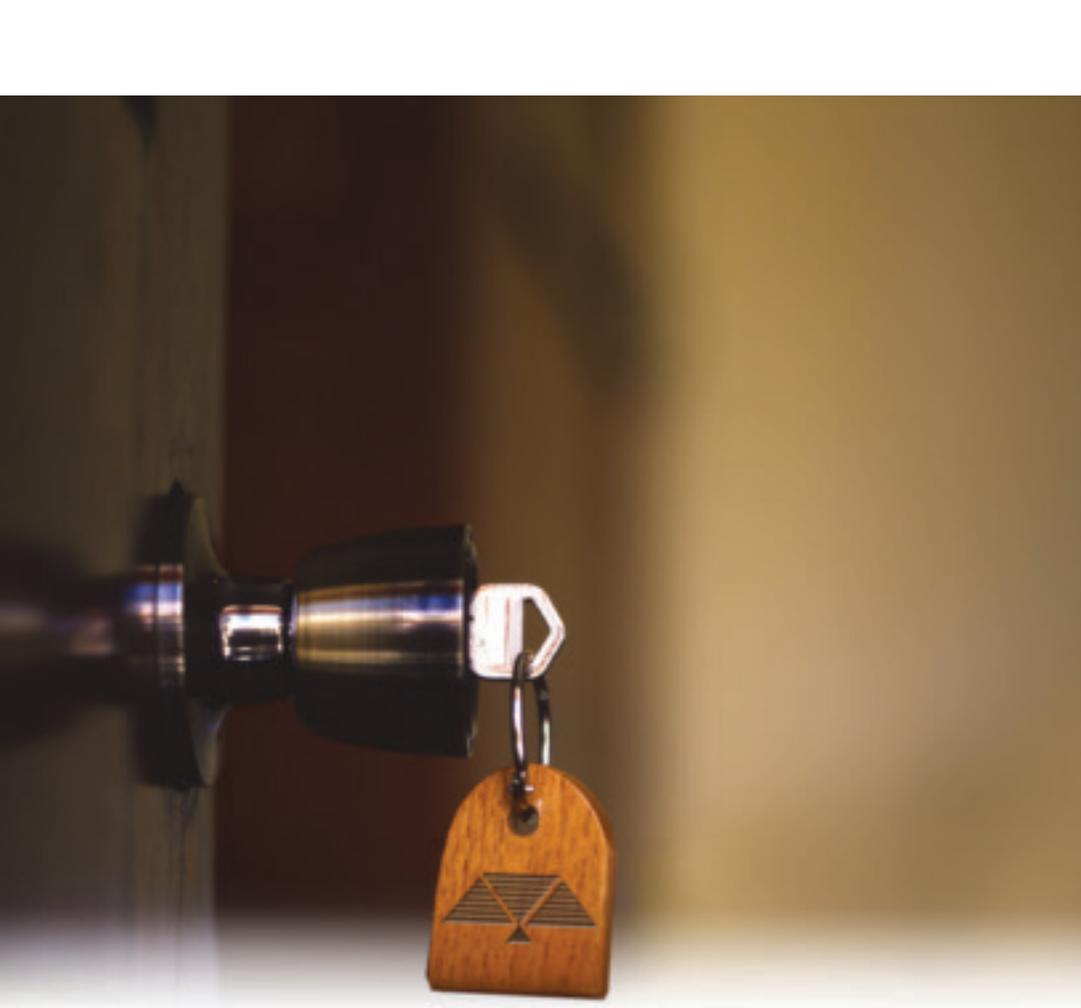
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THOMAS J. METHVIN



Access to Justice: A Report Card

Thanks to everyone who has worked so hard this year. In particular, I thank President-Elect Alyce Spruell and Vice President Phillip McCallum. Their hard work and dedication were an integral part of the success of our programs and initiatives.

Choosing a focus for our work this past year was easy. In July 2009, Alabama stood dead last in funding for "Access to Justice" in civil matters. As a result, there have been a lot of hurting people without legal representation. Ensuring legal help for the poor in these cases was, and still is, a matter of the utmost importance.

We attacked this problem by securing additional funding for "Access to Justice" from Alabama lawyers and from the legislature, and by increasing participation in our Volunteer Lawyers Program (VLP). We have made significant progress in a lot of areas. Here is a report card of our progress:

PRESIDENT'S PAGE Continued from page 263

- **Alabama lawyers gave their money. Lawyers agreed to make voluntary donations of \$850,000 to "Access to Justice."**
- **Alabama lawyers gave their time. More than 1,450 new lawyers have joined our VLP and agreed to represent the poor for free.**
- The Alabama Legislature gave us a 12 percent increase in funding for "Access to Justice," even though funding was cut for most other things.
- Our Mortgage Foreclosure Program, which provides a free lawyer to those who need one, has helped more than 3,000 people.
- Lawyers worked 23,231 volunteer hours in 2009.
- The Huntsville/Madison County VLP completely turned around with a new executive director and board, and helped 67 percent more people than last year.
- The Birmingham/Jefferson County VLP completely turned around with a new executive director and board, and helped 38 percent more people than last year.
- The Montgomery County Bar Association started a monthly Pro Bono Clinic.
- The Mobile County Bar Association continued to lead the state with its VLP, and helped 24 percent more people than last year.
- Legal Services Alabama helped 15,000 people in 2009, with an increase of 4,000 people from the previous year.
- We hired a lawyer to work with Legal Services Alabama to handle domestic violence cases that our VLP could not handle.
- We celebrated "Pro Bono Week" and drew public attention to the need for access to justice. Alabama lawyers were mentioned positively every day in publications, and on television and radio throughout the state.

- We had the biggest "Law Day" celebration in recent memory, with a theme of "And Justice for All," and again drew public attention to this area.

What a great start we've made in ensuring access to justice for all but we have not yet earned an "A" for our performance in this area. That is our goal, not just for our lawyers, but for the poor in Alabama who desperately need our help. So many lawyers have given so much to this effort that I firmly believe we can go to new heights if we keep focusing on this over the next five years. I have enjoyed being a part of this effort for "Access to Justice" and with your continued effort, we can achieve even greater heights in the future. ▲▼▲



PRESIDENTIAL INTERVIEW:

President Methvin Reflects on a Year of Accomplishments and Service

In a wide-ranging interview with *The Alabama Lawyer* editor, Robert Huffaker, ASB President Tom Methvin relives the year of his presidency. Tom's administration focused on access to justice and his efforts have yielded outstanding results. As he proudly notes, more than 1,450 new lawyers have pledged their support for the needy of this state by joining the Volunteer Lawyers Program. Moreover, lawyers have donated over 23,000 hours this year to either volunteer lawyers programs or service at the Alabama State Bar.

Robert A. Huffaker, editor: Tom, the theme of your administration has been access to justice. Why is that so important to you?

Tom Methvin: Robert, when I became the president in 2009, I wondered what the issues were facing our very first bar president in the 1870s. What were the major issues during the civil rights movement? Then I wondered, what are the major issues today? In 2009, we were in the midst of one of the worst economic times in the history of America and I had to take that into consideration. We've got a huge problem with poverty in Alabama anyway—and it's growing now because of the economy. When I surveyed how other states deal with legal needs for the poor and how we deal with it, I thought this is just a no-brainer. The number one issue for us needs to be access to justice for the poor. The Alabama legislature spends the least amount on access to justice for the poor of any state in America. Even Puerto Rico spends more than we do. I felt that was shocking, wrong, immoral and I wanted to try to do something about it.

RAH: What were the methods that you used to accomplish that?

TM: The average state spends \$4.1 million dollars a year while Alabama only spends \$300,000—and I'm talking about the civil legal needs for the poor. So, I thought we should go to the legislature and try to get them to increase funding (what a terrible year to do that with pro ration and other problems). We gave it a try at the legislature anyway. We went to lawyers and asked them to make voluntary donations to help with this and then we tried to fill the justice gap by getting lawyers to volunteer to represent the poor for free. It was a three-pronged approach. Thankfully, we were able to raise the amount the legislature gave us by



Pictured with Gov. Bob Riley as he signs legislation setting minimum experience requirements for judges are, left to right, ASB President Tom Methvin, ASB Past President Mark White, ASB Legislative Counsel Suzanne Edwards, Rep. Paul DeMarco, ASB Past President Sam Crosby, Scott Mitchell (representing Chief Justice Sue Bell Cobb), ASB Legislative Chair Jim Pratt, Raymond Crosby (Legislative Reference Service), and Sen. Roger Bedford.

12 percent, which is wonderful in a bad budget year like this. Even though a lot of lawyers are hurting financially right now, they agreed to donate \$800,000 for access to justice. And they also donated their time. We've got 1,450 new lawyers who agreed to join our Volunteer Lawyers Program and take two cases a year for free.

RAH: How does the bar spend that money—the \$800,000 that you mentioned?

TM: Some of it goes to Legal Services Alabama (LSA) to hire lawyers and some goes to volunteer lawyer programs in the state to hire staffing. Some will go to Cumberland Law School because they give law students a small check every summer so they can do public interest law (at LSA or a district attorney's office, for example) as opposed to having them work for a firm. So it's a combination of things.

RAH: Why can't LSA perform what's needed to serve the poor and disadvantaged in Alabama?

TM: Legal Services Alabama's funding comes from Washington D.C. and it gets an amount of money per poor person. However, there's nothing added to it in Alabama. In other words, Legal Services Corporation gets a big amount of money from Congress and it goes to each state's Legal Services program pro rata based on the number of people living in poverty in the state. The problem is that the average state legislature gives an additional \$4.1 million dollars to "Access to Justice," much of which goes to Legal Services. Alabama's legislature only gives \$300,000.



President Methvin visits with several law students who were recognized at a recent bar commissioners' meeting for their volunteer efforts. One of the students, Thomas Lakes (second from right), volunteered at the state bar for several months, working with the Volunteer Lawyers Program.

RAH: How have you been able to increase the number of ASB members serving in the Volunteer Lawyers Program (VLP)?

TM: Under the VLP, a lawyer can sign up for his or her area of specialty and agree to take up to two cases a year. When we've asked them, Alabama lawyers have come running to help. I have found attorneys in this state are generous souls; everything we've asked them to do, they've done. Can you believe we've gotten over 1,450 new lawyers who said, "Yes, I'll join the Volunteer Lawyers Program"? That is just great! I'm really proud of how the lawyers have stepped up. Mobile, Birmingham and Huntsville have their own programs and all the rest of the state is run out of the Alabama State Bar. Mobile has always been the best Volunteer Lawyers Program and they've even won national awards. Over 60 percent of the lawyers in Mobile are part of their program which is wonderful! Recently Huntsville and Birmingham have really turned around. In fact, Huntsville and Birmingham have gotten new boards and new executive directors and have helped a lot more people than they did last year. All the programs are on the rise and seem to be heading in the right direction.

RAH: What else has the bar done during your tenure to provide legal services to Alabama citizens?

TM: One of the best things we've done is form the Mortgage Foreclosure Program. People were losing houses in Alabama in record numbers. Many did not have a lawyer, so they didn't know where to turn and or how to protect their rights. We received a grant from the Civil Justice Foundation and the Access to Justice Commission to hire a lawyer to serve at LSA to handle mortgage foreclosure cases for free. LSA was then able to get a couple more attorneys hired through another grant so we had several lawyers working on mortgage foreclosure cases for free. We ran a TV ad informing the public of this service through the state bar. The results of that program have been great. We've been able to help over 3,000 people through the Mortgage Foreclosure Program! And, in many cases, we've saved their homes.

RAH: What committees and task forces have been particularly active this year?



Judge John Carroll, dean, Cumberland School of Law, presents President Methvin with a memento recognizing his dedication to improving access to justice in Alabama.



The ASB encouraged every circuit to participate in Law Day activities in May. Pictured are volunteers with the Mobile Bar Association's Law Helpline.

TM: One of them is the Pro Bono Week Task Force. The American Bar Association wanted to celebrate pro bono week all over the country and Alabama was the first state to get a proclamation from the governor doing just that. We also got proclamations from the cities and counties in every judicial circuit. Through that, we were able to draw public attention to the pro bono problem and to the good things that lawyers were doing. We had an outreach in almost every judicial circuit—either a pro bono clinic or a law call helpline or a CLE for lawyers. We were trying to do two things—help the poor and draw public attention to the problem.

RAH: Another much-needed program is the Alabama Lawyer Assistance Program. How is it doing?

TM: The ALAP is one of the best programs that we have at the state bar. It has won awards from the American Bar Association as being one of the best in the country. If a lawyer has a substance abuse problem, they can call a toll-free number at the state bar for help. The call does not go through the switchboard, but, instead, straight to the program director, Jeanne Marie Leslie, and it's confidential. The director is prohibited from turning these names to the General Counsel's Office for discipline. This program also has loans available for people that have substance abuse problems. The Lawyers Helping Lawyers Committee that runs the ALAP is a group of mostly recovering lawyers and they understand how important it is. I have seen them go out in the middle of the night and drive all the way across the state to help other lawyers. They're on call 24/7/365 to help other lawyers because they've seen what substance abuse can do. If you have a substance abuse problem or if you know of an attorney who does, contact the ALAP for help. It's confidential and it might save a life.

RAH: An ongoing issue has been the negative image of attorneys—what has the bar done to address that?

TM: There are a lot of bad things said about lawyers, and much of it is total fabrication. You can't combat all of it word for word, though. If you've got all this bad stuff said about us, then you need to try to have just as much good stuff said as possible, and, at some point, it kind of equals



Another example of lawyers around the state volunteering time and talents to the Access to Justice program.



Showing that service to the bar can actually be fun are President-Elect Alyce Spruell, President Tom Methvin and Immediate Past President Mark White.



Tom and Amy Methvin, as he began his year of service as ASB president

out. Instead of trying to combat the negative, I try to put more positive out there. We started this mission this year of trying to help the poor on access to justice and we did it for the right reasons, because it's the right thing to do, because lawyers are into service. That's what lawyers ought to do. We have a monopoly on practicing law—nobody else can do it—so if we don't help them, who is going to? A side benefit to all the hard work we've done to help the poor is that our image has been helped. We have had a TV ad going running statewide all year encouraging viewers to "call the lawyers of the state bar if you need a free lawyer for your mortgage foreclosure problem" and this shows the public that lawyers are working for free. During Pro Bono Week, we were mentioned over 35 times in the press throughout the state with positive statements regarding lawyers working for free to help the poor. We did the same thing during Law Week during which our theme was "And Justice For All."

RAH: Give us a preview of this year's annual meeting at Baytowne Wharf.

TM: We think this one is going to be the best-attended one we've ever had. Baytowne Wharf is in Sandestin, where we've never held an annual meeting. It's across the street from the Gulf and very family-friendly. There are shuttles going back and forth to the beach all day. We've got some great speakers lined up, including Archie Manning. Dean Gamble, who is always a popular speaker, is coming back and we've got several federal and state court judges joining the lineup. Attendees can catch Bobby Lee Cook, the lawyer that the "Matlock" TV series was based on, and Bud Crowe, who was caught up in all the Watergate stuff and went to jail and is now going around preaching about ethics. With these great speakers and a great location, we believe it's going to be a fantastic turnout this year.

RAH: What has surprised you the most serving as ASB president?

TM: I know lawyers are busy because I'm a busy lawyer and I know how stressed they get but I think the thing that surprised me the most is how they have rallied around the cry of access to justice for the poor. I believe that lawyers in

Alabama are embarrassed about how we have treated the poor in this state, especially when we're in the Bible belt and we claim to care about the poor. We're dead last when compared to other states in providing legal services to the poor (even Puerto Rico is ahead of us), but Alabama lawyers have really rallied and come running to help. Over 1,400 lawyers have said, "Yes, I'll work for free." Lawyers have agreed to give \$800,000. These two things have surprised me the most.

RAH: What else has made you proud?

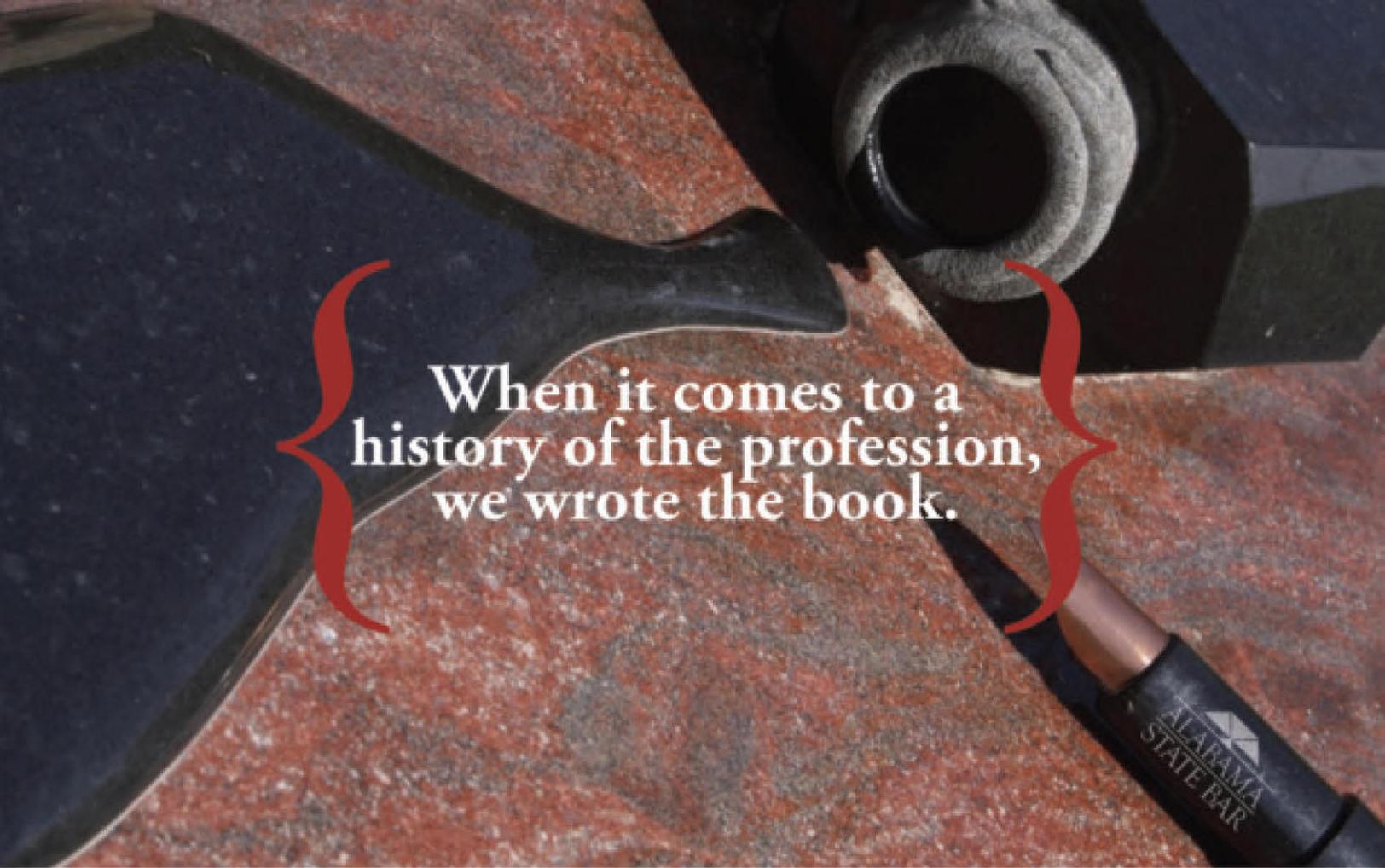
TM: Lawyers have donated over 23,000 hours this year to either volunteer lawyers programs or service at the state bar. This is a huge amount. When I became president, several people mentioned to me that Legal Services Alabama (LSA) had been not performing like it should the past few years. Judge Jimmy Fry has really turned it around. In 2009, Legal Services helped 15,000 people, which is 4,000 more than they helped the prior year. I feel great about the direction in which they're headed. It's also important that people know that we received a grant to hire a lawyer to handle family violence cases (because the VLP did not have enough attorneys to handle those cases) and he's now at Legal Services, doing just that.

RAH: It's safe to say that you've had a few speaking engagements during the year?

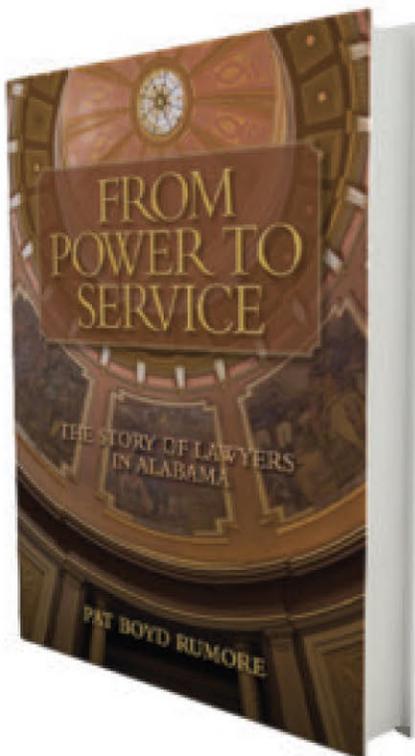
TM: So far, I've gone to 30 speaking events this year, representing the ASB, and I probably have five or ten left. Everywhere I go, I've been talking to the public and to lawyers about access to justice. I've really enjoyed going to the local bar associations and sharing this.

RAH: What's in store for Tom Methvin as of July 17th?

TM: I hope I'm going to take a week off from practicing law and being the bar president and then I'll come back and get back to the practice. I've been telling my kids and my wife that I want to learn to play the piano. I've said that for 20 years and I've never done it so I think it's time now. ▲▼▲



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KEITH B. NORMAN

Dr. Edwin C. Bridges,
ADAH director

A Real Treasure —

Alabama Department of Archives and History

Several months ago, I was introduced to a young man from Brazil. He was visiting the U.S. to conduct research for his doctoral thesis dealing with former Confederate soldiers who migrated to Mexico following the Civil War. The Brazilian scholar was conducting research at the Alabama Department of History and Archives (ADAH). After finishing his historical research there, he was to continue his research in Georgia at the University of Georgia and in North Carolina at the University of North Carolina and Duke University. His visit to Alabama and the ADAH was very telling about the importance of this state agency. Here was a foreign scholar who was conducting historical research in the document collections of three major universities in Georgia and North Carolina while in Alabama he was utilizing the resources of ADAH. For some, this might come as a surprise. But, for those who know about its extensive holdings, the ADAH is a treasure trove of historical artifacts and information.

The ADAH was created in 1901 as the nation's first publicly funded and independent state archives agency. *See* Sections 41-6-1 et seq., *Code of Alabama* (1975). Thanks largely to the efforts of its founder and first director Thomas McAdory Owen, the ADAH flourished and served as the inspiration for other states that soon followed with similar agencies of their own. Following his untimely death in 1920, Thomas Owen's wife, Marie Bankhead Owen, was appointed by the department's board of trustees to

EXECUTIVE DIRECTOR'S REPORT

Continued from page 269

succeed her late husband. She headed ADAH for the next 35 years, becoming only the second woman to head a state agency. Through her political savvy, Marie Owen, a member of the well-known and politically powerful Bankhead family¹, successfully secured funds from the Federal Emergency Relief Administration to complete the Alabama War Memorial Building which, upon its completion, housed the ADAH's growing collections and its offices and still does today.

Among the ADAH's extensive holdings are military records dating as far back as the American Revolution, online records that include a Civil War soldiers database, a World War I database, online indexes covering local government records on microfilm, newspapers on microfilm, maps, and an Alabama church and synagogue records collection, among others. In addition to its extensive records collection, the department has Native American artifacts and Civil War and other military objects and, in particular, an extensive Civil War flags collection. A visit to the ADAH's Web site, www.archives.state.al.us, reveals not only how extensive and accessible its collections are but also how well the department meets the dual goals of education and preservation enumerated in its current mission statement that reads:

To tell the story of the people of Alabama by preserving records and artifacts of historical value and promoting a better understanding of Alabama history.

In 1955, the State Records Commission was created to direct the disposition and maintenance requirements of state government records. See Sections 41-13-20 et seq., *Code of Alabama (1975)*. The ADAH receives funding from the legislature to provide staff and other resources necessary to carry out the Commission's responsibilities. We cooperate with the ADAH regarding the disposition of all state bar records under the aegis of the State Records Commission. For more than 20 years we have turned over to the ADAH the membership files of all deceased members of the

state bar. Since we began maintaining membership files electronically several years ago, we no longer transfer the files of deceased members to the department. But, we do maintain these electronic files and other pertinent bar records according to a Records Disposition Authority (RDA) approved by the State Records Commission. The RDA has allowed us to systematically categorize all bar records as permanent and non-permanent and the appropriate retention period for the non-permanent documents. As a result, we have been able to destroy tons of unnecessary records that we had kept since the early 1920s and free up a great deal of wasted storage space as well.

To develop the RDA, we worked closely with the professional staff members of the ADAH over the course of many months. The department is guided by Dr. Edwin C. Bridges, who has been its director since 1982. Dr. Bridges, who is the fifth director, has done a great deal to expand the department's collections including an emphasis on Alabama's political and social history. Under his leadership, a new wing was added to the ADAH building in 2005 to provide much needed space for its expanding collections as well as a new research room. Incidentally, we have been fortunate to work with Ed on records retention matters and he has graciously served on the Alabama Lawyers Hall of Fame Selection Committee since its inception.

Despite severe cutbacks in the ADAH's budget over the last few years that have necessitated a substantial reduction of department staff, Ed and his small but dedicated staff labor on passionately to preserve as much of Alabama's past as possible for future Alabamians to share and scholars to study. We are a much richer state today because of a wise decision 110 years ago to create the ADAH. I encourage you to visit www.archives.alabama.gov and join the Friends of the Archives to help preserve one of Alabama's real treasures. 

Endnotes

1. Marie Bankhead Owen's father was the U.S. Senator John Hollis Bankhead. Her brothers were U.S. Senator John Hollis Bankhead II and Speaker of the U.S. House of Representatives William B. Bankhead.



S.J. LAURIE

S.J. Laurie

Chatom attorney S.J. Laurie passed away December 13, 2009 at his home. Mr. Laurie was a graduate of Marion Military Institute Prep School and received his bachelor's degree and Juris Doctorate from the University of Alabama. He was admitted to the Alabama State Bar in 1971 and actively practiced in Chatom for 38 years. He dealt extensively in real estate and estate law during his years of practice. S.J. was known for being a man of high integrity and trustworthy character, among both fellow attorneys and his community.



S.J., at the time of his death, was serving as municipal judge for the Town of McIntosh, city attorney for the Town of Chatom, Washington County Public Library Board Member, Washington County Housing Authority Member, and Town of Chatom Utility Board Member. He was also a member of the Alabama State Bar and the Washington County Bar Association, and was an active American Heart Association volunteer and past chair of the United Way. S.J. served the 1st Judicial Circuit as bar president. After his death, Mr. Laurie received the "Memorial of the Year Award" from Southwest Alabama's United Way for his dedication and philanthropy in the area during his lifetime.

S.J. had a great love for the outdoors. He was an avid enthusiast of nature and wildlife, as evidence by his passion for timber, land and wildlife management in Washington County. S.J. was the great-grandson of Samuel Wilkins, one of the original settlers of Washington County.

S.J. was also a very devoted family man. He is survived by wife, Sherry M. Laurie, and two daughters, Jennifer (Keith) Laurie Lambert and Rachel (Rob) Laurie Riddle. (Both Rachel and Rob are also members of the Alabama State Bar.) He was a member of the First Baptist Church of Chatom. ▲▼▲

MEMORIALS

Continued from page 271

Austill, Jere, Jr.
Birmingham
Admitted: 1950
Died: April 10, 2010

Mattox, Virginia Leigh
Birmingham
Admitted: 1994
Died: April 27, 2010

Sikes, Gordon Griffin
Andalusia
Admitted: 1948
Died: March 5, 2010

Bashinsky, Thomas Major
Birmingham
Admitted: 1978
Died: March 15, 2010

Maxwell, Palmer S.
Birmingham
Admitted: 1951
Died: April 3, 2010

Slepian, David Philip
Mobile
Admitted: 1992
Died: October 28, 2009

Batson, Wanda Jo Wallace
Sylacauga
Admitted: 1987
Died: April 18, 2010

McGregor, Robert Polk
Hoover
Admitted: 1981
Died: March 31, 2010

Small, Ryan Scott
Mobile
Admitted: 2001
Died: April 22, 2010

Brunson, Joseph Talmadge
Mobile
Admitted: 1981
Died: March 10, 2010

McKinnon, James Shawn
Birmingham
Admitted: 2001
Died: August 17, 2007

Speir, Charles Allen
Homewood
Admitted: 1951
Died: February 28, 2010

Bryan, Howard Flournoy, III
Valley
Admitted: 1974
Died: March 28, 2010

Perkins, Robert Hoke
Pensacola
Admitted: 1959
Died: April 3, 2010

Weeks, Harold Morgan
Scottsboro
Admitted: 1966
Died: March 3, 2010

Dillon, Robert Chester
Anniston
Admitted: 1957
Died: April 13, 2010

Reid, Thomas Dwight
Mobile
Admitted: 1961
Died: April 6, 2010

White, Nancy Brooks
Greenville, SC
Admitted: 1991
Died: February 4, 2010

Jazwinski, Michael Stephen
Roanoke
Admitted: 1983
Died: April 10, 2010

Riggs, Frank Willard, III
Montgomery
Admitted: 1957
Died: April 26, 2010

Williams, Jesse McKenney, III
Montgomery
Admitted: 1964
Died: March 2, 2010



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GLENN MURDOCK, OF BIRMINGHAM
GREG SHAW, OF MONTGOMERY

MEMORANDUM

To: Fellow Members Of The Alabama Bar

From: Sue Bell Cobb, Chief Justice

Date: July 1, 2010

Subject: The Alabama Appellate Court's new online service

In June I wrote to share my excitement about the Appellate Court's new online information service that we refer to as ACIS Online. The website for the new service is <https://acis.alabama.gov>. So far, approximately 3,500 attorneys have participated in the free BETA and trial subscription programs that were offered during the months of May and June. During that period, attorneys viewed and downloaded nearly 400,000 pages of court documents. We plan to continue providing new users with a complimentary 30 day trial subscription for the foreseeable future.

In addition to timely access to recent decisions, ACIS provides attorneys with online access copies of court documents, such as trial court records and briefs, and current docket sheets in cases. The new service also allows attorneys to track or monitor cases of interest. A recently added search feature allows attorneys to locate cases by the names of the parties, the court or county of origin, the names of trial court officials, and the names of the attorneys in the case.

On behalf of the Justices, Judges, and staff of our Appellate Courts, I invite you to register with our new online service and explore its features. Whether you practice at the appellate level on a regular basis, or your practice focuses in other areas, we believe you will find the new information service of value. We welcome your comments and your feedback.



YLS members from the Mobile area recently signed up 47 new members for the Mobile VLP and eight for the state bar's VLP.



ROBERT N. BAILEY, II
rnb@lanierford.com

Young Lawyers Answer the Call!

It has been President Methvin's mission this year to increase membership in the Volunteer Lawyers programs (VLP) of Alabama, and I am proud to say that your Young Lawyers' Section has answered the call. On April 7th and April 26th, we conducted a statewide, five-location phone-a-thon to increase membership in the programs of Alabama. All total, we recruited over 160 new members to the various VLP in just two days.

In Mobile, we recruited 55 new members, 47 for the Mobile VLP and eight for the state bar's VLP. **Larkin Peters** coordinated the Mobile effort with help from **Brian Murphy, Katie Hammett, Jennifer Morgan, Brandon Hughey, Timothy Heisterhagen, Lacey Smith, Chip Tait,** and **Brad Hicks.**

In Birmingham, 40 new members joined the VLP. The Birmingham site was directed by **J. Long** with help from **Jimbo Terrell, Nick Armstrong, Andrew Nix** and **Hall Eady.**

In Huntsville, we signed up 28 new members for the Madison County VLP. Volunteers included **Mark Bledsoe, Dale Gipson,** the Madison County VLP Director **Angela Rawls** and **me.**

In Montgomery, we recruited 24 volunteers for the ASB's VLP. **Navan Ward** directed the effort with help from **Chris Waller, Bill Robertson, Parker Miller, Chris Boutwell, Nathan Dickson, John Tomlinson,** and **Kyle Wiedman.**

And, in Florence, we recruited 15 new members for the state bar's VLP. **Nathan Ryan** directed this site with help from **Douglas Hargett** and **Katy Beth Lewey.**

YOUNG LAWYERS' SECTION

Continued from page 275

Our section's commitment to service was also exemplified by our award-winning Minority Pre-law conferences, which we held March 10th in Birmingham and April 21st in Montgomery. **J.R. Gaines, Sancha Howard** and **Kitty Brown** put a great deal of time, effort and energy into coordinating and planning these events and did a fantastic job in putting on exceptional programs. Additionally, these firms and organizations sponsored the YLS Minority Pre-law conferences:

Wiggins Childs Quinn & Pantazis LLC
Burr & Forman LLP
Hand Arendall LLC
White Arnold & Dowd PC
McCallum, Methvin & Terrell PC
Bradley Arant Boult Cummings LLP
Maynard Cooper & Gayle PC
Beasley, Allen, Crow, Methvin, Portis & Miles PC

On May 14th and 15th, we hosted our annual Sandestin Seminar. **Brandon Hughey, Katie Hammett, Clay Lanham, Larkin Peters, David Cain, Brad Hicks, Chip Tait, Brian Murphy,** and **Shay Lawson** did an outstanding job putting together a great seminar. Our sponsors of Sandestin included:

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Ivize
Bain & Associates Court Reporting Service, Inc.
Baker & Baker Reporting & Video Services
Comprehensive Investigative Group
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Morgan Nichols & Pritchard, Inc.

Thanks also to our fantastic panel of speakers: **William A. Ratliff, Leon Ashford, Hon. Margaret A. Mahoney, Hon. J. Langford Floyd, C. William Daniels, Jr., Robert E. Lusk, Jr., Frederick A. Erben,** and **Shannon D. Hutchings.**

As my year as your president comes to a close, thanks go to the immediate past YLS president, **Jimbo Terrell**, who was a constant source of wisdom for me this year, as well as President-Elect **Clay Lanham**, Secretary **Navan Ward** and Treasurer **Kitty Brown**. Rest assured that with Clay, Navan and Kitty's leadership, the YLS is in great hands. I also thank all the members of the Young Lawyers' Section Executive Committee. Without your help, we could not have made the strides we did this year. Special thanks go to ASB President **Tom Methvin**, ASB President-Elect **Alyce Spruell** and the entire staff of the Alabama State Bar, who helped make my job a lot easier throughout the year, and my law firm, Lanier Ford Shaver & Payne PC, for allowing me to serve this year. Finally, thank you, Dixie, my wife, for her patience, support and understanding throughout the year.

If you have any questions, please send me an e-mail. Once again, it has been an honor to serve as your president for 2009-2010.



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

IN RE:

THE MATTER OF THE REAPPOINTMENT OF T. MICHAEL PUTNAM AS A UNITED STATES MAGISTRATE JUDGE

NOTICE

The current term of office of United States Magistrate Judge T. Michael Putnam at Birmingham, Alabama, is due to expire on February 8, 2011. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight year term.

The duties of a magistrate judge in the Northern District of Alabama include the following:

- (1) the trial and disposition of virtually all categories of civil actions with consent of the parties in accord with 28 U.S.C. § 636(c);
- (2) pursuant to the court's General Orders of Reference, presiding over all aspects of civil cases, through the entry of a recommendation for final disposition under 28 U.S.C. § 636(b);
- (3) ruling on various pretrial matters and holding evidentiary proceedings on references from the district court judges made in addition to the general orders, including discovery issues and other non-dispositive motions;
- (4) conducting settlement conference or mediation in civil actions by reference;
- (5) perform such other duties as set out in LR 72.1 through 73.2, Rules of the Northern District of Alabama and the court's General Orders of Reference;
- (6) conducting preliminary proceedings in felony criminal cases, including initial appearances, bond/detention hearings, and arraignments;
- (7) issuing warrants of arrest, search warrants and warrants in administrative actions.
- (8) ruling on all non-dispositive motions in felony criminal cases or entering findings and recommendations with respect to dispositive criminal motions such as motions to dismiss or to suppress evidence; and
- (9) conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions. Conducting such evidentiary proceedings as may be required in prisoner and habeas corpus actions.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Sharon N. Harris, Clerk of Court
United States District Court
Northern District of Alabama
1729 Fifth Avenue North
Birmingham, Alabama 35203

Comments must be received by August 31, 2010.



RULE 54(B) ORDERS: Are They Losing Their Appeal?

By William W. Watts



...the appellate courts have concluded either that the adjudicated claim was not sufficiently **“separate”** from the remaining, non-adjudicated claims to constitute an entire claim or that the adjudicated claim was so **“intertwined”** with the non-adjudicated claims that separate adjudication would pose an “unreasonable risk of inconsistent results.”

Over the past several years, appeals from Rule 54(b) orders are being dismissed with increasing frequency as not appropriate for Rule 54(b) certification. In doing so, the appellate courts have concluded either that the adjudicated claim was not sufficiently “separate” from the remaining, non-adjudicated claims to constitute an entire claim or that the adjudicated claim was so “intertwined” with the non-adjudicated claims that separate adjudication would pose an “unreasonable risk of inconsistent results.” The decisions seem to be raising the procedural bar to appellate review of certified “final” orders in a manner inconsistent with historical practice. Perhaps this trend is understandable in light of the increasing appellate case load and the consequent delays in final resolution of litigation as a result of “piecemeal” appellate adjudication. Nonetheless, as these decisions multiply, sometimes without much analysis, and sometimes without consistent application, uncertainty escalates at the trial level as to (1) whether a particular dispositive ruling is *capable* of being certified under Rule 54(b) and (2) whether the appellate courts will in fact agree that it was *properly* certifiable. Because these issues affect the courts’ appellate jurisdiction, the appeal can be dismissed *ex mero motu*, even though all parties desire immediate appellate resolution.

The three prerequisites for Rule 54(b) certification are (1) an action involving separate claims; (2) a final decision as to at least one of these claims; and (3) a determination by the trial court that there is “no just reason for delay.” *Scrushy v. Tucker*, 955 So.2d 988, 996 (Ala. 2006) (quoting *Stearnes v. Consolidated Management, Inc.*, 747 F.2d 1105, 1108 (7th Cir. 1984)). The first two issues—whether the action involves separate claims and whether there is a final decision as to at least one of the claims—are “questions of law” to which the

court applies a *de novo* standard of review. *Id.* The third prerequisite—whether there is “no just reason for delay”—is an inquiry committed to the sound discretion of the trial court and, on appeal, reviewed on the standard of whether the trial court “exceeded” that discretion. *Id.*¹ The first two prerequisites require the complete adjudication of a claim for relief that is “separate” from all other non-adjudicated claims in the case. The third prerequisite gives rise to a number of considerations, most frequently whether the adjudicated and non-adjudicated claims are so “intertwined” as to pose “an unreasonable risk of inconsistent results.”

Requirement for Complete Adjudication of Separate Claim

The requirement, under Rule 54(b), that a claim be disposed of in its entirety is a familiar one, precluding certification for interlocutory orders that do not fully resolve all the issues relating to that claim. Thus, non-certifiable orders include rulings of liability on monetary claims without awarding damages, *see State v. Brantley*, 976 So.2d 996 (Ala. 2007); *Automatic Sprinkler Corp. of America v. B. F. Goodrich Co.*, 351 So.2d 555, 557 (Ala. 1977); or determinations that some of the damages sought on a claim are non-recoverable without ruling on liability; *see Certain Underwriters at Lloyd’s London v. So. Nat. Gas Co.*, 939 So.2d 21 (Ala. 2006); *Ex parte Simmons*, 791 So.2d 371 (Ala. 2000); *Haynes v. Alfa Fin. Corp.*, 730 So.2d 178, 181 (Ala. 1999); or the entry of only injunctive relief on a claim that also sought money damages, *see Martin v. Phillips*, 2008 WL 4683634 (Ala. Civ.

App. Oct. 24, 2008); or the resolution of several, but not all, of the issues necessary to adjudicate a claim for declaratory relief as to whether or not coverage exists for a particular claim, see *Alfa Mutual Ins. Co. v. Bone*, 2009 WL 51298 (Ala. Sup. Ct. Jan. 9, 2009); or, finally, an adjudication of an alter ego relationship without determining liability. See *Banyan Corp. v. Leithead*, 2009 WL 4730808 (Ala. S. Ct. Dec. 11, 2009).

A less familiar aspect of the “complete adjudication of a separate claim” requirement arises where a particular cause of action is fully adjudicated but is deemed not to be sufficiently “separate” from one or more of the non-adjudicated causes of action and thus not an entire “claim” for relief. A case may involve multiple, separate claims (to which Rule 54(b) is applicable) or a single claim supported by multiple grounds (to which Rule 54(b) is not applicable). Even when the case does involve multiple, separate claims, difficulties can arise in determining whether an order resolves the entirety of one of those claims, as Rule 54(b) requires, or leaves parts of that claim unresolved, *i.e.*, other causes of action that simply set forth alternative theories of liability for that same “claim.” These distinctions are often “very obscure.” 10 Wright & Miller, *Federal Practice & Procedure*, § 2657.

The Supreme Court of Alabama first wrestled with the issue of what constitutes a “claim for relief” under Rule 54(b) in *Cates v. Bush*, 293 Ala. 535, 307 So.2d 6 (1975). In that case, the plaintiff sought the sale of land and the defendant’s counterclaim sought an accounting based upon a claim of an interest in the land since 1952. In determining whether a judgment on plaintiff’s claim could be certified under Rule 54(b), without adjudication of the counterclaim, the court adopted the following test used by the Second Circuit: “The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been *separately enforced*.” *Id.* at 540 (quoting *Rieser v. Baltimore & Ohio R.R. Co.*, 224 F.2d 198, 199 (2nd Cir. 1955), *cert denied*, 350 U.S. 1006, 76 S. Ct. 651 (1956)(emphasis added)). Concluding that the claim and the counterclaim could each have been separately enforced, the court found that the order determining only the plaintiff’s claim was eligible for and required a Rule 54(b) certification in order to be immediately appealable.

The court again applied this “separate enforcement,” sometimes styled the “separate recovery,” test in *Benefield v. Aqua Slide & Dive Corp.*, 406 So.2d 873 (Ala. 1981). The court concluded that the trial court’s Rule 54(b) certification of its dismissal of a claim for breach of warranty, seeking damages for injuries before death, was a separate and distinct claim from a wrongful death claim which sought punitive damages for the death itself. The breach of warranty claim “could have been separately brought and enforced without the attendant tort claim for wrongful death.” *Id.* at 875.

In *Scrushy v. Tucker*, 955 So.2d 988 (Ala. 2006), the court reviewed various state and federal authorities that had grappled with the difficulties inherent in determining whether multiple, separate claims exist or simply a single claim reiterated on alternative grounds. Some federal circuit courts employ a “common facts” test, to minimize the likelihood that a court of appeals will be required to review the same facts again in a subsequent appeal. Others adopt a “legal rights” test, focusing upon whether “separate recoveries” may arise on the various stated claims. With regard to the latter approach, the court quoted again the Second Circuit’s test adopted in *Cates v. Bush* and noted that the commentators found this test “workable”:

“A single claimant presents multiple claims for relief under the Second Circuit’s formulation when the possible recoveries are more than one in number and not mutually exclusive or, stated another way, when the facts give rise to more than one legal right or cause of action However, when a claimant presents a number of legal theories, but will be permitted to recover only on one of them, the bases for recovery are mutually exclusive, or simply presented in the alternative, and plaintiff has only a single claim for relief for purposes of Rule 54(b).

Similarly, when plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented and subdivision (b) does not apply.”

Id. at 998 (quoting 10 Wright & Miller, *FPP*, § 2657).

In *Scrushy v. Tucker*, the trial court had certified as final a partial summary judgment granted to the plaintiff shareholder on a claim for unjust enrichment that sought restitution of bonuses received by the defendant, which his employer,

HealthSouth, was not legally obligated to pay. Upholding the propriety of the Rule 54(b) certification, the court concluded that the various other claims in the complaint were

“not all variations on a single theme” and that the defendant’s breach of duty in accepting bonuses was a “sufficiently separate breach” not alleged elsewhere in the complaint. *Id.* at 998. This appears to be an employment of the “separate enforcement” test. However, the court also approved the certification by apparently applying the “common facts” test, determining that the facts underlying the unjust enrichment claim were “sufficiently discrete” such that the court would not likely have to review again those facts in the event the remainder of the case was later appealed to the court. *Id.* at 999.

The above tests for determining whether a separate claim has been entirely resolved become necessary when an order resolves *some*, but not all, of the claims of a particular plaintiff against a particular defendant. An order adjudicating *all* of the claims of one or more plaintiffs against one or more defendants would generally not run afoul of the “separate enforcement” test, no

“The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced.”

matter how many *other plaintiffs* have factually similar claims that remain unresolved against those defendants, and no matter how many *other defendants* are faced with factually similar claims by those plaintiffs: Each plaintiff can separately enforce his or her rights against each of the defendants separately. See *Cates v. Bush*, 293 Ala. 535, 307 So.2d 6, 11 (Ala. 1975)(quoting 10 Wright & Miller, *FPP*, § 2667). For similar reasons, a claim is separate from a counterclaim, for Rule 54(b) certification purposes, even though both claims arise out of the same transaction. See *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 76 S. Ct. 904 (1956); *Cates v. Bush*, *supra*. And a third-party claim for subrogation or indemnity is a separate claim from the principal claim against the indemnitee or subrogee. See *Progressive Specialty Ins. Co. v. Hammonds*, 551 So.2d 333 (Ala. 1989); *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So.2d 20 (Ala. 1990).

In *North Alabama Electric Cooperative v. New Hope Telephone Cooperative*, 2008 WL 4603736 (Ala. Sup. Ct. Oct. 17, 2008), the court applied the Second Circuit’s “separate enforcement” test to conclude that an order dismissing a claim for common law indemnity could not be certified as final where the claimant sought the same recovery for indemnification via a claim for contractual indemnity. These claims were mutually exclusive, alternative theories of indemnification for the recovery of the same damages. They could not be split for appellate review by way of Rule 54(b).

The court’s explicit adoption of the “separate enforcement” test for the multiplicity of claims in *Scrushy*, and the application of that test to dismiss the appeal in *NAEC*, call into question earlier decisions which had reviewed Rule 54(b) orders adjudicating particular claims for relief, but leaving unresolved other causes of action that sought similar relief under different theories of liability. For instance, in *Collins v. Ashurst*, 821 So.2d 173 (Ala. 2001), the trial court certified as final a partial summary judgment dismissing claims for assault and battery and trespass to the person, arising from the defendant’s removal of the wrong ovary from the plaintiff, while leaving non-adjudicated a claim for negligence brought under the Alabama Medical Liability Act for the same injury. On their face, these claims appear to be alternative theories of liability which cannot be separately enforced. Nonetheless, the supreme court found the certified judgment sufficient for review. *Id.* at 175. In *Grantham v. Vanderzyl*, 802 So.2d 1077 (Ala. 2001), an operating room nurse sued a surgeon for assault and battery, negligence, wantonness and outrage, alleging that the surgeon intentionally threw the patient’s blood on her during surgery. The trial court certified an order dismissing the claim for tort of outrage under Rule 54(b), and on appeal the supreme court affirmed, implicitly concluding that the claim was sufficiently separate from the other claims seeking recovery of the same injuries under different theories of liability. In *Bagby v. Mazda Motor Corp.*, 864 So.2d 301 (Ala. 2003), the buyer of an automobile sued a manufacturer and dealer for personal injuries arising when the wheel separated from his vehicle, seeking damages for breach of warranty and negligence and later for fraud. The trial court granted partial summary judgment on the fraud claim and certified the order as final under Rule 54(b). The plaintiff failed to appeal within 42 days of this ruling and on appeal the supreme court dismissed the appeal as untimely, implicitly ruling that the partial summary judgment was properly certified. The court has

also, in the past, reviewed without reservation a certified order for partial summary judgment on claims of wantonness, where claims of negligence were otherwise unresolved. See *Barry v. Fife*, 590 So.2d 884 (Ala. 1991). And a Rule 54(b) order for partial summary judgment on claims of bad faith and fraud against an insurer has been reviewed on appeal, even though a breach of contract claim against the insurer remained pending. See *State Farm Fire & Casualty Co. v. Shady Grove Baptist Church*, 838 So.2d 1039 (Ala. 2002)(referencing court of civil appeals’ earlier affirmance of trial court’s judgment without opinion). Under the “separate enforcement” analysis employed in *Scrushy* and *NAEC*, these decisions are not easily justified.

Requirement that Claims Be Not So “Intertwined” as to Risk Inconsistent Results

If a Rule 54(b) order complies with the first two prerequisites—i.e., the action involves multiple separate claims and the court’s order is a final decision as to at least one of those separate claims—that order must still not exceed the trial court’s discretion in determining that there is “no just reason for delay,” as required by Rule 54(b). “When the issues raised in the complaint containing multiple claims are directly related to, and intertwined with, each other to such a degree that a separate adjudication of one of those claims would pose an unreasonable risk of inconsistent results on the adjudication of the remaining claims, then, of

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course, the entry of a final judgment as to that claim would be an abuse of discretion by the trial court.” *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So.2d at 26. The issue as to whether an adjudicated claim is too “intertwined” with the remaining non-adjudicated claims is oftentimes closely related to the inquiry as to whether the adjudicated claim is sufficiently “separate” from the remaining non-adjudicated claims to constitute an entire claim. Sometimes, the court has intermingled these analyses.² More often, it has dismissed the appeal, employing the “intertwining” doctrine without independently assessing the “separateness” of the adjudicated claim. Nonetheless, these are analytically separate issues, particularly given the fact that determination of the trial court that “no just reason for delay” exists is a discretionary ruling, theoretically reviewable only for abuse of discretion, as discussed above.

The supreme court first employed the “intertwining” doctrine in the context of a claim on a promissory note, as to which partial summary judgment in favor of the bank had been granted and certified as final, where the borrower had asserted a counterclaim alleging fraud in the inducement of the note. The court held that the issues in the two claims were “so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results,” and therefore set aside the Rule 54(b) certification of finality. *See Branch v. SouthTrust Bank of Dothan, NA*, 514 So.2d 1373 (Ala. 1987).

The appellate courts have continued to follow this precedent whenever a counterclaim challenges the validity of the transaction upon which the complaint is based, or which would otherwise defeat the claims in the complaint: The claims and counterclaims are too “intertwined” to support a Rule 54(b) certification on one without the other. *See Summerlin v. Summerlin*, 962 So.2d 170 (Ala. 2007); *Clark-Mobile County Gas District v. Pryor Energy Corp.*, 834 So.2d 88 (Ala. 2002); *Palmer v. Resolution Trust Corp.*, 613 So.2d 373 (Ala. 1993); *Gray v. Central Bank of Tuscaloosa, NA*, 519 So.2d 477 (Ala. 1987); *Gregory v. Ferguson*, 2008 WL 5103398 (Ala. Civ. App. Dec. 5, 2008); *Owen v. Hopper*, 999 So.2d 953 (Ala. Civ. App. 2008); *Poesy v. Mulahan*, 991 So.2d 253 (Ala. Civ. App. 2008); *Hurst v. Cooke*, 981 So.2d 1143 (Ala. Civ. App. 2007); *BB&S General Contractors, Inc. v. Thornton & Associates, Inc.*, 979 So.2d 121 (Ala. Civ. App. 2007).

More recently, however, without even a reference to the intertwining doctrine, the appellate courts have reviewed certified Rule 54(b) orders on claims relating to a particular contract, notwithstanding the pendency of claims of the opposing party, which claims related to that same contract and would have defeated the adjudicated claims. *See Board of Water & Sewer Commissioners of City of Mobile v. Bill Harbert Constructions Co.*, 2009 WL 2343710 (Ala. Sup. Ct. July 31, 2009) (review of certified partial summary judgment in favor of contractor and surety on counterclaims of city for breach of contract and fraud relating to same contracts upon which contractor had pending, non-adjudicated claims against city); *Progressive Speciality Ins. Co. v. Kyle*, 2009 WL 3517596 (Ala. Civ. App. Oct. 30, 2009) (review of certified partial summary judgment on insurer’s

declaratory judgment claim, determining amount of UIM benefits owed, while counterclaim for bad faith failure to pay UIM benefits remained pending). Other decisions reviewing Rule 54(b) orders are also hard to square with a rigorous application of the intertwining doctrine. *See, e.g., Ford v. Stringfellow Memorial Hospital*, 2009 WL 3415304 (Ala. Civ. App. Oct. 23, 2009), (reviewing certified partial summary judgment in favor of certain medical malpractice defendants, who were accused of joint negligence with one other defendant, a manufacturer’s representative who was present during the plaintiff’s wrist surgery, against whom a claim remained pending).

On several occasions, the court of civil appeals has concluded that judgments in favor of the claimant on its claims were not appropriate for Rule 54(b) certification where a counterclaim remained pending that could offset the amount of damages collectible on the adjudicated claim. *See HPH Properties, Inc. v. Cahaba Lumber & Millwork, Inc.*, 811 So.2d 554 (Ala. Civ. App. 2001); *Ann Corp. v. Aerostar World, Inc.*, 781 So.2d 231 (Ala. Civ. App. 2000); *Harper Sales Co. v. Brown, Stagner, Richardson, Inc.*, 742 So.2d 190 (Ala. Civ. App. 1999). These decisions cannot be justified *solely* on the premise that the counterclaim potentially offset the damages collectible on

the principal claim. This would deprive Rule 54(b) of much of its usefulness, given that counterclaims nearly always seek damages offsetting the principal claim. *See Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S. Ct. 1460 (1980) (“The mere presence of [non-frivolous counterclaims], however, does not render a Rule 54(b) certification inappropriate.”). Furthermore, the Alabama Supreme Court, relying on *Curtis-Wright*, has more recently rejected the argument that the existence of potential setoffs to an adjudicated unjust enrichment claim rendered the claim non-certifiable.

Schrushy v. Tucker, 955 So.2d at 999. It may be, however, that these decisions can be justified on the basis that the claims and the counterclaims both involved interpretations of the same contract and thus separate adjudication posed a risk of inconsistent results. *See HPH Properties, Inc. v. Cahaba Lumber & Millwork, Inc.*, 811 So.2d at 556 (Murdock, J., concurring in result).

On occasion, the court has concluded that claims or counterclaims are too “intertwined” without a sufficient analysis of the risk of inconsistent results, or even in the face of facts that do not appear to pose such a risk. In *Howard v. Allstate Insurance Co.*, 2008 WL 4967411 (Ala. S. Ct. Nov. 21, 2008), the plaintiffs were injured when a vehicle being driven by Thomas Gonzalez struck their vehicle in the rear. Suit was brought against Gonzalez as well as the owner of the vehicle, the owner’s brother and the employer of Gonzalez, all on the basis that Gonzalez was acting as an agent or employee of those defendants. Later, plaintiffs added Gonzalez’s housemate, arguing that he was an agent of the other defendants and that he had negligently or wantonly entrusted Gonzalez with the truck. Partial summary judgment was granted to Gonzalez, the vehicle owner and the vehicle owner’s brother on the plaintiff’s claims, due to the lack of any evidence that Gonzalez was acting as

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their agent or employee at the time of the accident and that none of these defendants had given him permission to use the truck. Dismissing the appeal from the certified partial summary judgment, the court concluded that the non-adjudicated claims against Gonzalez and his housemate were too intertwined with the adjudicated claims alleged against the other defendants. Specifically, the claims against Gonzalez alleged that he was “acting in the line and scope of his employment” of the owner and employer, and the claims against his housemate alleged that at all times his housemate was “acting as an agent, servant or employee” for the vehicle owner, his brother or Gonzalez’s employer. The opinion contains no analysis as to why the court believed that “common issues are intertwined.” The tort claims against Gonzalez did not depend upon or require an adjudication of his acting in the line and scope of any agency or employment relationship with the other defendants. Nor would the liability of his housemate in entrusting the vehicle to Gonzalez depend on or require adjudication of whether he was the agent, servant or employee of the other defendants. A risk of inconsistent results is not readily apparent if there were separate adjudications of the remaining claims against Gonzalez and his housemate.³

Other cases in which the court has accepted review of Rule 54(b) orders, concluding that there was no risk of inconsistent results, include a partial summary judgment in favor of the driver of a vehicle and his employer on claims of negligence against them, where a claim of wantonness remained against the driver of the other vehicle in which the injured plaintiffs were riding as

passengers, *see Vanvoorst v. Federal Express Corp.*, 2008 WL 4447590 (Ala. S. Ct. Oct. 3, 2008); the dismissal of claims of slander against two defendants on the basis of a legislative privilege, where claims for slander as to certain newspaper defendants, which published the legislators’ allegedly defamatory comments, remained pending, *see Hillman v. Yarbrough*, 936 So.2d 1056 (Ala. 2006); summary adjudication of a claim of liability on a loan guaranty where claims brought by the loan guarantor against a third party for indemnification remained pending, *see Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So.2d 20 (Ala. 1990); and dismissal of a claim of breach of fiduciary duty against one defendant where a similar claim of breach of duty, but requiring different proof, remained pending against another defendant. *Peterson v. Anderson*, 719 So.2d 216 (Ala. Civ. App. 1997). In these cases, the court observed that there was no overlap in the issues involved.

In a few recent cases, the court has justified the intertwining doctrine on grounds of judicial economy. Where “repeated appellate review of the same underlying facts would be a probability” in a later appeal of the pending claims, the court has concluded that the Rule 54(b) certification was an abuse of discretion. *See Smith v. Slack Alost Development Services of Ala., LLC*, 2009 WL 1819334 (Ala. Sup. Ct. June 26, 2009); *Centennial Associates, Ltd. v. Guthrie*, 2009 WL 1027082 (Ala. Sup. Ct. April 17, 2009). This “judicial economy” policy potentially implicates a much larger number of Rule 54(b) certifications than a standard requiring an “unreasonable risk of inconsistent results.”



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Other Considerations Affecting Reviewability of Rule 54(b) Orders

On occasion, the courts have also concluded that a Rule 54(b) certification was not appropriate where adjudication of the remaining claims might render moot the adjudicated claim from which an appeal was taken. *See A. L. Parish v. Blazer Financial Services, Inc.*, 682 So.2d 1383 (Ala. Civ. App. 1996); *Fullilove v. Home Finance Co., Inc.*, 678 So.2d 151 (Ala. Civ. App. 1996). *See generally* 10 Wright & Miller, *Fed. Practice and Proc. Civ. 3d*, § 2659.

Another factor that may be taken into account, in assessing the propriety of a Rule 54(b) order, is the impact of an immediate appeal on the remaining trial proceedings. If immediate appeal may resolve an issue that will significantly improve or significantly simplify the trial of the non-adjudicated claims or may avoid the need for further proceedings in their entirety, this weighs in favor of immediate review. *See* 10 Wright & Miller, *Fed. Practice and Proc. Civ. 3d*, § 2659.

When an order entitles a party to relief on one claim, and remaining claims may give him further relief, a Rule 54(b) certification may be appropriate in order to give that party the immediate benefit of the recovery awarded, provided that doing so does not prejudice the opposing party. 10 Wright & Miller, *F.P.P.* § 2659; *see Curtis-Wright Corp. v. General Electric Co.*, *supra*.

Prejudice to the judgment loser if an appeal is delayed can also be a factor for consideration. 10 Wright & Miller, *F.P.P.* § 2659.

Finally, dismissals or defaults entered against a party as a sanction may create special problems for appellate review if any issues on any claims remain to be adjudicated. In *Dzwonkowski v. Sonitrol of Mobile, Inc.*, 892 So.2d 354 (Ala. 2004), the trial court, as a sanction for a plaintiff's misconduct at trial, dismissed with prejudice the plaintiff's four-count complaint and entered a default judgment against him on 35 separate counterclaims by the defendants. It certified the judgment under Rule 54(b) as to all aspects of its order, even though 29 of the 35 counterclaims requested damages that had not yet been determined. The supreme court held that the appeal had to be dismissed with respect to the counterclaims for damages because those claims were not fully and finally resolved. The court also dismissed the appeal as to the order of dismissal of the plaintiff's claims and the default judgment on the remaining counterclaims seeking non-monetary relief (which claims were fully adjudicated) because the judgment of dismissal and default "purports to bring up as a unit all the claims and counterclaims." *Id.* at 362 (emphasis in original). The judgment, as it pertained to those claims, "is not subject to resolution *independently* of the 29 counterclaims for damages." *Id.* at 362. The court noted that the force of plaintiff's argument on appeal—that the trial court abused its discretion in imposing these sanctions—depended in part upon the *breadth* of the claims dismissed and counterclaims defaulted. The court could not resolve the issues on appeal as to the claims and the counterclaims for which damages were not sought without necessarily considering the propriety of the default judgment entered on the counterclaims over which the court had no appellate jurisdiction. *Id.* at 363.



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Increasing the “Appeal” of a 54(b) Order

In light of the above considerations, how can you improve your chances of having a Rule 54(b) order accepted for review?

- First of all, if you are the movant and want finality, consider whether you can obtain a judgment in your favor on all causes of action that may constitute a single ‘claim’ for purposes of Rule 54(b). If you are the non-movant and want the right of immediate appeal from an adverse judgment, consider stipulating to the inclusion of other causes of action that might form part of the same ‘claim’ in the adverse judgment or, alternatively, dismissing those other claims or causes of action. This will obviously depend upon an analysis of the relative strengths and weaknesses of the various theories or grounds of liability that form the basis for the ‘claim.’
- Secondly, although a Rule 54(b) order does not have to identify the factors considered in finding there was no just reason for delay, *see Schneider National Carriers, Inc. v. Tinney*, 776 So.2d 753, 756, n. 3 (Ala. 2000), a well-crafted Rule 54(b) order, setting forth such reasons, may well increase the chances that the appellate court will review the ruling. Such an order, if cogently drafted, should make it more difficult for an appellate court to conclude that the trial court exceeded its discretion.

Conclusion

By use of its “separate enforcement” principle for analyzing whether a “separate” claim has been fully adjudicated and its use of the “intertwining” doctrine, the court has put some teeth into its policy against “piecemeal” appellate review and the restriction of Rule 54(b) orders to “exceptional cases.” *See Centennial Assoc., Ltd. v. Guthrie*, 20 So.3d 1277, 1279-80 (Ala. 2009) (quoting *Schlarb v. Lee*, 955 So.2d 418, 419 (Ala. 2006)). Indeed, if strictly applied, these two doctrines would permit review of Rule 54(b) orders only if the order resolved *all* the claims against

a party which sought similar recovery on alternative theories of liability and only if the issues on appeal have no overlap with the issues remaining to be resolved on the non-adjudicated claims. For better or for worse, however, the court has not been entirely consistent in its application of these doctrines. Whether your Rule 54(b) order escapes dismissal may ultimately have less to do with the application of these doctrines and more to do with whether the court finds your appeal otherwise appealing or would rather not review it in its current posture. ▲▼▲

Endnotes

1. Although the court in *Scrushy* did apply these separate standards of review, in analyzing the Rule 54(b) certification in that case, subsequent decisions seem to have ignored these differing standards of review, showing no particular deference to the trial court’s discretion on the third prerequisite.
2. In the *North Alabama Electric Cooperative v. New Hope Telephone Cooperative*, 2008 WL 4603736 (Ala. S. Ct. Oct. 17, 2008), the court discussed its decision in *Scrushy* as an exposition on “how courts determine whether claims are so intertwined that a Rule 54(b) certification is untenable.” Actually, the *Scrushy* opinion never used the word “intertwine,” but rather concluded that the adjudicated claim was “separate” from the remaining claims.
3. The holding in *Howard* might more easily be justified on the basis that the claims against the defendants based on vicarious liability for Gonzalez’s actions could not be enforced separately from the claims for the same injury against those defendants based on their vicarious liability for his housemate’s acts; thus, there was not an adjudication of an entire “claim.” *See Schexnaydre v. Travellers Ins. Co.*, 527 F.2d 855 (5th Cir. 1976) (claim against defendant for vicarious liability for contractor’s actions not separate from claim for defendant’s own negligent actions).



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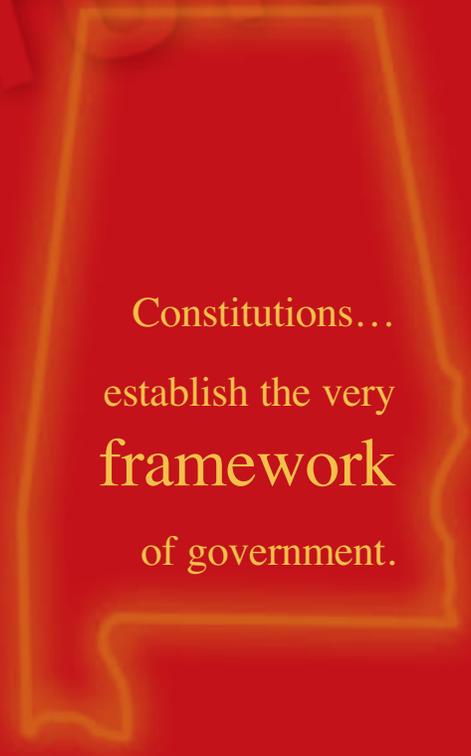
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Interpreting the Alabama Constitution

By Marc James Ayers

The interpretation of statutory text is guided by fairly well-known policies (like separation of powers) and rules (the “canons” of construction). What about constitutional text? Constitutional text is somewhat different in nature than that found in statutes. Does this difference affect how courts do or should interpret the text of Alabama’s Constitution? And what are the guiding principles that govern Alabama appellate courts’ interpretation of the Alabama Constitution?

Of course, a complete survey on this subject could be the task of much larger work. This article is intended to summarize the Alabama appellate courts’ basic philosophy governing the interpretation of the Alabama Constitution, and then to provide examples of some of the recognized rules of interpretation stemming from that underlying philosophy.

Constitutions Versus Statutes

Statutes are purely majority-rule matters that can concern virtually any topic and change back-and-forth with the political winds. Constitutions, on the other hand, recognize and identify fundamental rights

and powers, and establish the very framework of government.¹ While initially established by a majority, a constitution exists to be somewhat anti-majority and undemocratic with regard to those rights and powers that the people consider to be fundamental, thus helping protect important, long-recognized legal rights or principles against sudden, unwise changes sought by, for example, a temporary but passing political majority. Constitutions recognize that “change” (particularly drastic change from well-established practices or traditions) is not always a good thing—it all depends on the direction. Accordingly, while constitutions can be amended, it is intentionally a difficult thing to accomplish.

Although a legislature is presumed to be the “voice of the citizens,” in many ways a constitution is more directly and forcefully so. A legislature can pass wholly unpopular legislation—and can do so unilaterally with an override of a gubernatorial veto—and the people have no direct power to intervene to stop it. (In fact, debate over this very issue was seen in recent days with regard to the controversial health care legislation passed by Congress despite, by most accounts, a consistently strong majority of the citizenry in opposition.) However, unlike with statutes, it is virtually impossible to pass an unpopular constitutional amendment, because the people themselves have the ultimate say and are, in a real sense, a constitution’s authors.

This distinction between the nature of statutory and constitutional text is relevant to how such text is interpreted by the courts. In interpreting statutes, Alabama courts are ultimately guided by Section 43 of the Alabama Constitution, which requires a strict separation between the three branches of government:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall *never* exercise the executive and judicial powers, or either of them; the executive shall *never* exercise the legislative and judicial powers, or either of them; the judicial shall *never* exercise the legislative and executive powers, or either of them; *to the end that it may be a government of laws and not of men.*²

Because it is the province of the legislature to make and change statutes, courts have to be cautious to avoid usurping the legislative role under the guise of “interpretation.”

However, an improper judicial “revision” of *constitutional* text is not technically a separation of powers violation because the judiciary is not usurping the role of the legislative or executive branches. *No* branch has the “role” or

ability to amend the constitution; it is solely the province of the Alabama citizenry to revise what is correctly called “*their* Constitution.”³ The legislature certainly plays a part in the people’s revision of their fundamental charter, but, unlike with statutes, the legislature cannot rewrite the constitution itself.

The Limited Role of *Stare Decisis* in Constitutional Interpretation

Perhaps where this distinction is most often illustrated is in the Alabama appellate courts’ application of the doctrine of *stare decisis*. “*Stare decisis* is “[t]he doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”⁴ The Alabama Supreme Court has repeatedly held that *stare decisis* carries much less weight in analyzing previous interpretations of constitutional provisions than it does in analyzing prior interpretations of statutes because, as stated above, erroneous constitutional interpretations are much more difficult to correct than are erroneous interpretations of statutes.⁵

The Alabama Judiciary’s Guiding Philosophy for Interpreting the Alabama Constitution: Judicial Restraint and *Ex Parte Melof*

Every method of constitutional interpretation is ultimately guided by some fundamental judicial philosophy, and that philosophy will be determined to a great extent on how the judiciary views its own role in the constitutional system. In the words of Judge Learned Hand, does the judiciary exist to “do justice” as the judiciary defines “justice” from case to case, or does the judiciary exist to “apply the law [as set forth by the people] and hope that justice is done?”⁶ The former philosophy tends toward the view that a constitution is a “living document” that can and must change on its own as society changes. The latter philosophy, that of “judicial restraint,” tends more toward the view that a constitution is a *legal* document that by definition resists change,⁷ as it is for the authors—i.e., the people—who should judge when a social “change” is a good change that should receive constitutional recognition. By all accounts, Alabama courts are in the latter camp.

There is no specific constitutional provision addressing how Alabama courts are to interpret constitutional text. The Section 43 separation of powers provision gives some general guidance, but that provision is more directly applicable to statutory interpretation, as discussed above. Perhaps the most illuminating provisions in the Alabama Constitution are the amendment provisions,⁸ which make clear (1) that it is ultimately for the people—not the courts or anyone else—to change the constitution, and (2) that this process is intentionally difficult and time-consuming (much more difficult to pass

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than statutes). These principles help illustrate that the Alabama judiciary's guiding principle of *constitutional* interpretation is and must be guided not precisely from the notion of separation of powers (as with statutes), but from the inherent nature of a constitutional system where the judiciary holds the enormous (and potentially dangerous) power of "judicial review"—the final say on what the Alabama Constitution means.⁹ Perhaps the best discussion of this issue occurred in the debate over Alabama's "phantom equal protection clause" found in the Alabama Supreme Court's decision in *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999).

In *Melof*, the court corrected an erroneous line of decisions that had actually created and relied upon a constitutional provision—an "equal protection provision"—where none existed in the Alabama Constitution of 1901. It was undisputed that such a provision existed in earlier Alabama constitutions but that it had been intentionally removed in the 1901 Constitutional Convention¹⁰ in an overall effort to hinder black Alabamians. However, in 1977 the court ruled (based on a scrivener's error, as it turns out¹¹) that various other constitutional provisions somehow combined to form the essence of an "equal protection provision" similar to, but not necessarily identical to, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.¹² This "provision" had no specific text (and therefore no history to be examined), but was merely the "spirit" behind several different provisions.

Like the federal Constitution's Equal Protection Clause, an equal protection provision in the Alabama Constitution would carry with it certain substantive limitations on the state, and could be interpreted as providing much greater limitations than those provided under the Equal Protection Clause. And as this "provision" was allegedly part of the Alabama Constitution, any ruling by the Alabama Supreme Court under that provision would not be reviewable by the

United States Supreme Court. The "phantom equal protection provision" was used in striking down as unconstitutional tort reform legislation¹³ and in attempting to judicially restructure the funding of Alabama's educational system.¹⁴

The phantom equal protection provision finally met its end in *Melof*. In that decision, the court stressed that it could not simply create constitutional provisions under the guise of "interpretation," and that, even though several decisions had relied on the phantom provision, the principle of *stare decisis* could not—for the reasons discussed above—apply to uphold a wholly unfounded constitutional interpretation. Although several of the justices made it clear that they personally desired that the Alabama Constitution contain an equal protection provision¹⁵—Justice Houston even included in his special writing a letter to members of all three branches of Alabama's government expressing this desire¹⁶—they also made it clear that a strong desire to see the constitution written differently does not provide grounds for the judiciary to simply declare it to be so.

Three justices dissented, led by Justice Cook.¹⁷ Although admitting that the Alabama Constitution of 1901 did not have an express "equal protection provision," the dissenting justices argued that the essence of such a provision is found in and among other constitutional provisions. Justice Cook accurately described how the actions of the Constitutional Convention of 1901 were explicitly undergirded with racist motivations, including the Convention's elimination of the equal protection provision. Justice Cook's eloquent opinion provided much support for the general concept of equal protection under the law and for the inclusion of an equal protection clause in Alabama's Constitution. He also argued that some other states do not have an explicit "equal protection provision" but have nonetheless construed their state constitutions to include one.¹⁸

Although he wrote the majority opinion, Justice Houston also filed a special

conurrence in which he responded to Justice Cook's impassioned defense of an implicit equal protection provision. Justice Houston felt the force of Justice Cook's arguments (especially Justice Cook's accurate description of the racist motivations behind the framing of the Alabama Constitution of 1901), but explained how the framers' abuse of power only served as more reason to show judicial restraint, even when it hurts in the short term:

Among Supreme Court Justices, the notion of truth should be paramount. As demonstrated by Justice Cook's well-documented account of the racially biased forces that were present at the Constitutional Convention of 1901, we have all seen how much damage can be done by the State when truth is overlooked in favor of expedience and power. If I have done anything by consistently pointing out what is unfortunately but unmistakably true—that Alabama's Constitution currently has no equal-protection clause—I have attempted to keep the Court from corrupting not only the Constitution, but itself as well. We pour corruption on both sacred entities by failing to resist the urge to drink from the chalice of illegitimate, but available, power. With that understood, I want to underscore one unavoidable truth: that the power to amend the Constitution rests with the people of the State of Alabama, not with the members of this Court.

...

We must recognize that we cannot change our history, no matter how egregious or embarrassing our history might be. It is precisely because individuals who govern can do some egregious things with the power that has been given them that we have the concept of the constitution—a legal document

In the words of Judge Learned Hand, does the judiciary exist to "do justice" as the judiciary defines "justice" from case to case, or does the judiciary exist to "apply the law [as set forth by the people] and hope that justice is done?"

meant to achieve two primary goals. First, a constitution establishes a particular form of government. Second, a constitution, as the solidifying agent of the rights recognized by the government, protects the individual against the whim of those in power.

As a legal document, a constitution does not change on its own. The very purpose of protecting individuals would be undermined if those in charge of interpreting the constitution were to add or delete provisions to reflect “changes in society.” Why? Because both the question of who selects the interpreter and the question of what counts as a “change in society” will be decided by those in power at any particular time. No, as a legal document, a constitution can change only if the parties who gave effect to the document—the people—call for change. This recognition of the exclusive right of the people to change their own constitution is inherent in the amendment procedure.

....

Such is the danger of sitting on the highest court of any sovereign when that court is interpreting the sovereign’s own constitution. With no threat of being overruled, we can wield our words in any way that we like, knowing that they will be given the full effect of law. In this way, the nature of being Supreme Court Justices creates a dangerous dynamic. As we are sworn in, we are handed—by the people—a powerful sword: our ability to state what the law is. At the same time, we are placed inside a paper boundary—a written constitution—and told by the people “this far you may go, and no further.” The problem is that the sword can easily sever the boundary and we

can escape its limits, perhaps with the notion of “doing justice.” Once the boundary is severed, however, it is not easily repaired; and the next judge, now not bound, is free to do either justice or evil. As judges, then, we are entrusted by the people to use that sword wisely and with restraint; to stay within the boundary no matter how strongly we think it too small to meet the people’s needs. The people made the boundary; it is for the people to enlarge it.

It is true, as Justice Cook points out, that racist motives were behind the action of the 1901 Constitutional Convention eliminating the equal-protection clause from our Constitution. The fact that we still do not have an equal-protection clause in our Constitution is certainly troubling. It is just this kind of situation that sparks in all of us such an emotional indignation that we want to correct this wrong as fast as possible, in any way possible.... To be sure, a judicial declaration [creating an “equal protection provision”] would be much faster and easier than a constitutional amendment. Also, I am sure that the general population would overwhelmingly support such a declaration. There would be very little resistance or grumbling among the citizens of Alabama, so why not?

The problem, of course, as I have illustrated above, is that while such a popular declaration may be all right today, we must ask: What about tomorrow’s judge and tomorrow’s issue? If we are not restrained to the text of the Constitution; if we current Justices can amend it today by judicial declaration to include a provision that the people have not put there, will the next “declaration” be so favorable? As Justice Cook has made

clear in his dissent, those with power can do some horrible things for some horrible reasons. It is naive to think that something like that could not happen again. As the saying goes, those who do not pay attention to history are doomed to repeat it.

Might does not make right. We should not, simply because we can, shift the power to amend the Constitution from the hands of the people into the hands of nine Supreme Court Justices. I wholeheartedly believe that the Alabama Constitution should have an equal-protection clause, but I do not believe in obtaining it by a method that would turn this Court into an autonomous super-legislature. ...¹⁹

The Alabama Supreme Court has continued to hold fast to this interpretive philosophy of judicial restraint.²⁰ And, as it must be, this philosophy is at the heart of the various rules and methods of constitutional interpretation that have been adopted by the Alabama appellate courts.

Particular Canons of Constitutional Interpretation Used by the Alabama Appellate Courts

Except when impacted by the difference between constitutional and statutory text discussed above, the canons of statutory construction appear to be generally applicable to the interpretation of constitutional provisions.²¹ Indeed, many of the recognized principles that guide the interpretation of statutes have been

Except when impacted by the difference between constitutional and statutory text..., the canons of statutory construction appear to be generally applicable to the interpretation of constitutional provisions.

applied without difficulty to the interpretation of constitutional texts, for example, the canons of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another)²² and *eiusdem generis* (general words at the end of a list will be construed as encompassing things of the same nature as the specifically enumerated items in the list),²³ the rule that provisions are to be read *in pari materia*,²⁴ the rule that general provisions give way to specific provisions on the same topic,²⁵ and the rule that all provisions of the constitution should be interpreted so as not to nullify any other provision, if possible.²⁶ Other rules, however, are specific to the interpretation of constitutional texts. Some of these (at times competing) rules of interpreting the Alabama Constitution are discussed more fully below.

A. The “plain meaning rule”

The “plain meaning rule” is the primary canon of Alabama *statutory* construction,²⁷ and also has been applied in interpreting Alabama constitutional provisions.²⁸ Indeed, the Alabama Supreme Court has made clear that Alabama courts are “not at liberty to disregard or restrict the plain meaning of the provisions of the [Alabama] Constitution.”²⁹

However, Alabama courts also appear to recognize that the inherent differences between statutory and constitutional texts might, at times, require a different approach. Recognizing that “[c]onstitutions usually deal with larger topics and are couched in broader phrase than legislative acts,” the Alabama Supreme Court has stated that “their just interpretation is not always reached by the application of similar methods” and that constitutional provisions are not always “to receive a technical construction, like a common-law instrument, or statute.”³⁰

B. The hunt for the “original” meaning

To the extent that a straight application of the “plain meaning rule” is used, an additional question is what is the proper frame of reference (i.e., the “plain meaning” then or now)? For example, if looking for the “dictionary definition,” does one look at a 2010 dictionary or a 1901 dictionary? Words can adopt new meanings

over time, and original references can be lost on a modern reader. Given that a constitution is intended to be the most secure means by which the people can firmly fix certain fundamental governing principles against such “meaning drift,” the Alabama Supreme Court has indicated that the search for the “plain meaning” is in fact a search for the “original meaning”:

The [Alabama] Constitution is a document of the people. Words or terms used in that document must be given their ordinary meaning *common to understanding at the time of its adoption by the people*.... We are, therefore, not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution.³¹

Accordingly, “[i]n construing the Constitution, the leading purpose would be to ascertain and effectuate the intent and object *originally intended to be accomplished*.”³²

In order to determine the original meaning of a constitutional provision, “it is permissible in ascertaining their purpose and intent to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption.”³³ Because “[t]he Constitution was written to be understood by the voters, its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may, of course, include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”³⁴ Accordingly, when interpreting the Alabama Constitution, Alabama courts frequently look to the proceedings of the Constitutional Convention of 1901,³⁵ the common law,³⁶ and the related laws existing at the time,³⁷ contemporary dictionaries,³⁸ and anything else that might reveal the original purpose or object of the constitutional provision at issue.³⁹

C. Interpreting text in light of similar provisions in earlier versions of the Alabama Constitution

If the constitutional text at issue has

predecessor provisions—similar or related provisions in earlier versions of the Alabama Constitution—such predecessor provisions can help illuminate the text being interpreted. The Alabama Supreme Court has long recognized “that constitutions are to be construed in the light of previously existing constitutions.”⁴⁰

D. Some provisions are interpreted like similar federal provisions

If the constitutional provision being considered has a similar federal counterpart, Alabama courts may interpret the provision in light of established federal law. For example, Alabama’s constitutional guarantee of due process of law has long been construed “to be coextensive with the due process guaranteed under the United States Constitution.”⁴¹ Of course, state courts are not limited in their interpretations of state constitutional provisions by federal interpretations of similar federal provisions, and can interpret state provisions as providing greater protections than provided by the federal constitution.⁴²

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E. Exceptions to constitutional prohibitions are narrowly construed

When a constitutional amendment is, in reality, an exception to an established constitutional provision generally prohibiting some activity, such an amendment is narrowly construed.⁴³

F. Use of similar phrases in other constitutional provisions

If the language being interpreted is similar to language used in other provisions of the Alabama Constitution, those other provisions may guide a court's interpretation.⁴⁴ Indeed, the Alabama Supreme Court has held that "[a] phrase that is used repeatedly in [constitutional] provisions relating to the same object or subject matter shall 'be interpreted to have the same meaning' throughout."⁴⁵ "Moreover, 'where, in a constitution or statute, a word or phrase is repeated, and in one instance its meaning is definite and clear, and in the other it is susceptible of two meanings, it

will be presumed to have been employed in the former sense."⁴⁶

G. Deference to interpretations of other branches and to those branches' longstanding practices

To the extent that the legislature or the executive has interpreted a constitutional provision—either by statute, by established practice or otherwise—that interpretation may receive deference by the judiciary.⁴⁷ Of course, "a legislative act cannot change the meaning of a constitutional provision."⁴⁸ However, "the uniform legislative interpretation of doubtful constitutional provisions, running through many years, is of weighty consideration with the courts."⁴⁹

H. "Political Question Doctrine"—Some constitutional provisions are only for other branches to interpret

A step beyond mere deference, if the constitutional text at issue shows that the people entrusted the ultimate interpretation of the provision to either the legislative or executive branches, the interpretation of that text may be completely the duty of that branch, and not of the judiciary. (Of course, it will be for the judiciary to make the determination whether that textual commitment to a particular branch is actually present.) The Alabama Supreme Court applied this "political question doctrine" in *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*, 912 So. 2d 204 (Ala. 2005) ("BJCC").

In *BJCC*, the court refused to get into the middle of what it saw as a purely legislative matter regarding when sufficient votes were cast to pass a bill in the legislative houses. At issue was the interpretation of Section 63 of the Alabama Constitution, which provides that "no bill shall become a law, unless on its final passage it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor...."⁵⁰ The question presented was whether the

phrase "a majority of each house" meant (1) a majority of a quorum of that house, or (2) a majority of the votes actually cast in the presence of a quorum.

Only the propriety of the voting in the Alabama House of Representatives was challenged. There are 105 members of the House of Representatives, making a quorum—the amount necessary to be present in order to do business—53 members. The trial court had held that two bills passed by the legislature were unconstitutional because, although there was a quorum present at the vote on each bill, they had only received 21 and 18 yeas, with most of the members (55 and 53, respectively) abstaining. The trial court read Section 63's voting requirements to require a majority of the quorum present. However, under the legislature's long-standing interpretation of Section 63's voting requirements, all that was necessary to pass a bill was that (1) a quorum be present, and (2) the bill receive a favorable majority of the votes actually cast (not counting abstentions).

The Alabama Supreme Court unanimously held that the case presented a nonjusticiable political question, one that was solely within the province of the legislature to determine. The court began its analysis by noting that its jurisdiction to hear the matter was governed by a concern for the separation of powers and judicial restraint:

Great care must be exercised by the courts not to usurp the functions of other departments of government. § 43, Constitution 1901. No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary. Thus, just as this Court will declare legislative usurpation of the judicial power violative of the separation-of-powers provision of our Constitution, so it must decline to exercise the judicial power when to do so would infringe upon the exercise of the legislative power.⁵²

The court vacated the trial court's judgment and dismissed the appeal, unanimously holding that it was without jurisdiction because the interpretation of Section 63's voting requirements was for the legislature, not the courts, to determine.

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The court listed three reasons for this holding. First, the court examined the text of the constitution and determined that “there is a textually demonstrable constitutional commitment to the legislature of the question of how to determine what constitutes a ‘majority of each house ... voting in [the bill’s] favor.’” Second, the court noted that there were no specific, discoverable standards in the text of the constitution by which a court might attempt to resolve the question. This fact “strengthen[s] the conclusion that there had been a textually demonstrable commitment of the question” to the Legislature. Third, the court stated that becoming involved in this question would demonstrate a lack of respect for the legislature as a co-equal branch of government that, like the judiciary, has a duty to uphold the constitution.⁵²

Conclusion

The above list of rules of Alabama constitutional interpretation is not intended to be, and certainly is not, an exclusive list of available rules. However, regardless of the rule of construction being applied, when presenting an argument which requires an interpretation of some provision of the Alabama Constitution, practitioners should try to frame their argument and the applicable rules of construction with an eye toward the Alabama judiciary’s underlying philosophy of constitutional interpretation. If a court has to choose between competing rules of construction, it should select the rule most in harmony with that core philosophy of judicial restraint. ▲▲▲

Endnotes

1. See, e.g., *State ex rel. Meyer v. Greene*, 154 Ala. 249, 254, 46 So. 268, 270 (1908) (stating that “the Constitution is a limitation, not a grant, of power [and] its mandates are the supreme law to the legislative, executive, and judicial departments of this government”).
2. Art. III, § 43, ALA. CONST. 1901 (emphasis added). See also Art. III, § 42, Ala. Const. 1901 (“The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”).
3. E.g., *Ex parte Cranman*, 792 So. 2d 392, 398 (Ala. 2000) (discussing governmental immunity as being “almost invincible, made so by the people through their Constitution”) (internal quotations omitted); accord *Black v. Pike County Comm’n*, 360 So. 2d 303, 305 (Ala. 1978) (“[S]overeignty itself remains with the people, by whom and for whom all government exists and acts.”).
4. *Goldome Credit Corp. v. Burke*, 923 So. 2d 282, 292 (Ala. 2005) (quoting *Black’s Law Dictionary* 1443 (8th ed. 2004) (emphasis added)).
5. See *Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002) (“[L]ike the United States Supreme Court’s duty with regard to the federal constitution, our status as final arbiter imputes to us a particularly important duty with regard to the Alabama Constitution, because while our interpretations of statutes can be, in a sense, ‘overruled’ by subsequent legislative enactment, our interpretations of the Alabama Constitution are beyond legislative alteration.”); see also *Hexcel Decatur, Inc. v. Vickers*, 908 So. 2d 237, 241-42 (Ala. 2005); *Marsh v. Green*, 782 So. 2d 223, 232-33 (Ala. 2000).
6. See *Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (citing *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 306-07 (Dilliard ed. 1960)).
7. See *Alabama State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432, 439 (Ala. 2001) (noting that “the Constitution does not change from year to year”).
8. See Art. XVIII, §§ 284-287, ALA. CONST. 1901 (providing the exclusive methods for amending the Alabama Constitution).
9. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). The power of judicial review of the Alabama Constitution is truly an extraordinary power. In theory, it is a power over the other branches, in that, upon the institution of a court action, the Alabama judiciary could actually declare any act taken by either the executive or the legislative branch to be “unconstitutional.” See *Rice v. English*, 835 So. 2d 157, 162-63 (Ala. 2002) (discussing judicial review and noting that that power had been described as “no doubt a dangerous liberty, not lightly to be resorted to....”) (internal quotations omitted). This is perhaps one of the reasons that the people of Alabama have held so staunchly to their right to elect their judges, and explains why the courts have adopted such a high standard for determining when a legislative act violates the Alabama Constitution—only where the violation is shown “beyond a reasonable doubt.” See, e.g., *Cole v. Riley*, 989 So. 2d 1001, 1015 (Ala. 2007) (“[T]his Court may not interfere with the action of a coordinate branch of government unless it is shown beyond a reasonable doubt that the action is unconstitutional.”).
10. See *Opinion of the Justices No. 102*, 252 Ala. 527, 530, 41 So. 2d 775, 777 (1949) (“We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Constitution of 1875 was dropped from the Constitution of 1901.”).
11. In creating the Alabama “equal protection provision,” the court had adopted as law a clearly erroneous description of an earlier Alabama decision that appeared in a legal publication. See *Ex parte Melof*, 735 So. 2d at 1185-86 (discussing *City of Hueytown v. Jiffy Chek Co.*, 342 So. 2d 761 (Ala. 1977), and *Peddy v. Montgomery*, 345 So. 2d 631 (Ala. 1977)). The publisher later corrected this obvious error, but, until *Melof*, the court did not correct its reliance upon it. *Id.*
12. See U.S. CONST. amend. XIV (“no state shall ... deny to any person within its jurisdiction the equal protection of the laws.”).
13. See *Smith v. Schulte*, 671 So. 2d 1334, 1337 (Ala. 1995) (holding that a statutory cap on amounts recoverable in a wrongful-death action against medical providers violated the equal-protection guarantee of the Alabama Constitution) (plurality opinion); *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 165-71 (Ala. 1991) (holding that a limit on noneconomic damages in medical malpractice cases violated Alabama’s equal protection guarantee) (plurality opinion).
14. See *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901-10 (Ala. 1995) (Houston, J., concurring in the result).
15. *Ex parte Melof*, 735 So. 2d at 1186-88 (Hooper, C.J., concurring specially); *Id.* at 1188 (Maddox, J., concurring specially); *Id.* at 1192-96 (See, J., concurring specially).
16. *Id.* at 1191 (Houston, J., concurring specially). In fact, Justice Houston had held that desire since the “phantom” status of Alabama’s “equal protection provision” was discovered. See *Moore, supra*, 592 So. 2d at 175 (Houston, J., concurring in the result) (“If I were drafting a constitution, I would make certain that there was an equal protection clause in that constitution; however, there is not one in the Alabama Constitution.”).
17. Justices Cook and Kennedy actually concurred in the result but dissented from the court’s reasoning concerning the phantom equal protection clause. See *Ex*



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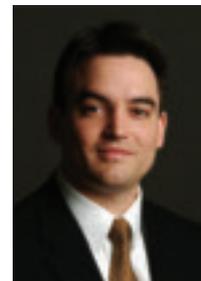
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- parte Melof*, 735 So. 2d at 1195-1205 (Cook, J., concurring in the result; dissenting from the rationale). Justice Johnstone dissented, but appears to have dissented only from the court's rationale. *See id.* at 1205-08 (Johnstone, J., dissenting).
18. *Id.* at 1195-1205 (Cook, J., concurring in the result; dissenting from the rationale).
 19. *Id.* at 1188-90 (Houston, J., concurring specially).
 20. *See, e.g., King v. Campbell*, 988 So. 2d 969, 981 (Ala. 2007) ("We do not have the prerogative, by judicial fiat, of reviving a practice once permitted by our Constitution but subsequently repealed.").
 21. *See Hunt v. Hubbert*, 588 So. 2d 848, 862 (Ala. 1991) (Houston, J., concurring in the result) ("The Constitution is subject to the same general rules of construction as are other laws ... due regard being had to the broader objects and scope of the constitution as a charter of popular government.").
 22. *See Wood v. Booth*, 990 So. 2d 314, 332 (Ala. 2008) (Smith, J., concurring specially) (noting that "This Court has applied the *expressio unius* maxim in interpreting provisions of the Alabama Constitution") (citing *Griggs v. Bennett*, 710 So. 2d 411, 413-14 (Ala. 1998); *Alabama State Bar ex rel. Steiner v. Moore*, 282 Ala. 562, 565, 213 So. 2d 404, 406 (1968)). However, Justice Smith opined that the *expressio unius* maxim should have a limited applicability in state constitutional interpretation, because, unlike with the federal constitution, a state constitution is limitation, not a grant, of power. *See Wood*, 990 So. 2d at 332 & n.24.
 23. *Alabama State Docks Dep't v. Alabama Pub. Serv. Comm'n*, 288 Ala. 716, 724, 265 So.2d 135, 143 (1972).
 24. *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992).
 25. *See, e.g., Chambers County Comm'n v. Chambers County Bd. of Educ.*, 852 So. 2d 102, 107 (Ala. 2002) (holding that "the last sentence of Amendment No. 202 is a general provision, which, as a matter of construction, cannot countermand the express, specific provisions of the first sentence limiting the five-mill taxing power to the county governing body").
 26. *See Bouchelle v. State Highway Comm'n*, 211 Ala. 474, 477, 100 So. 884, 886 (1924); *see also City of Bessemer v. McClain*, 957 So.2d 1061, 1092 (Ala. 2006) ("[W]e cannot adopt an interpretation of § 149 of the Judicial Article that requires the Court to ignore words in the constitutional scheme.").
 27. *See, e.g., DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 275-76 (Ala. 1998) (setting forth the "plain meaning rule"); *see also* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 Ala. Law. 31 (Jan. 2006) (discussing *DeKalb County* and its progeny).
 28. *See, e.g., Padgett v. Conecuh County Comm'n*, 901 So. 2d 678, 688 (Ala. 2004) (applying *DeKalb County* in interpreting constitutional amendment); *State ex rel. Robertson v. McGough*, 118 Ala. 159, 166-67, 24 So. 395, 397 (1898) ("Whenever a constitutional provision is plain and unambiguous, when no two meanings can be placed on the words employed, it is mandatory, and the courts are bound to obey it. . . . In such a case, as has been said, there is no room for construction, and certainly none for disobedience by the courts. If so, there would remain no certainty or stability in the written Constitutions of the states, or federal government.").
 29. *Brown v. Board of Educ.*, 863 So. 2d 73, 90 (Ala. 2003) (internal quotations omitted).
 30. *See, e.g., Realty Inv. Co. v. City of Mobile*, 181 Ala. 184, 187, 61 So. 248, 249 (1913) (internal quotations omitted).
 31. *Holsbrooks v. Stacy*, 830 So. 2d 708, 710 (Ala. 2002) (quoting *McGee v. Borom*, 341 So. 2d 141, 143 (Ala. 1976) (emphasis added)).
 32. *Alexander v. State ex rel. Carver*, 274 Ala. 441, 446, 150 So. 2d 204, 208 (1963) (emphasis added).
 33. *Barber v. Cornerstone Cmty. Outreach, Inc.*, ___ So. 3d ___, 2009 WL 3805712, at *10 (Ala. 2009) (quoting *Houston County v. Martin*, 232 Ala. 511, 514, 169 So. 13, 16 (1936)).
 34. *Barber*, 2009 WL 3805712, at *10 (quoting *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008)).
 35. *See Hunt, supra*, 588 So. 2d at 854 ("The proceedings of constitutional conventions are valuable in determining the meaning and purpose of constitutional provisions. Accordingly, we look first to the proceedings of the 1901 Constitutional Convention for aid in interpreting § 125."); *accord, e.g., Chism v. Jefferson County*, 954 So. 2d 1058, 1083 (Ala. 2006); *Zeigler v. Baker*, 344 So. 2d 761, 764-67 (Ala. 1977).
 36. *See, e.g., Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 200 (Ala. 1991) ("A state constitution is always interpreted in the light of the common law, and if it be not the first constitution, in the light of its predecessors.") (internal quotations omitted); *Vining v. Board of Dental Exam'rs of Ala.*, 492 So. 2d 607 (Ala. Civ. App. 1985) ("Even in interpreting the constitution, recurrence may be had to the principles of common law."); *accord Fox v. McDonald*, 101 Ala. 51, 66-67, 13 So. 416, 419-20 (1893) (constitutional provisions should be interpreted in light of the history before their ratification).
 37. *Bouchelle, supra*, 211 Ala. at 477, 100 So. at 886.
 38. *Cf. Ex parte Alabama Alcoholic Beverage Control Bd.*, 683 So. 2d 952 (Ala. 1996) (Houston, J., concurring in the result) ("Corporate" is defined as "[b]elonging to a corporation; as a corporate name. Incorporated; as a corporate body." *Black's Law Dictionary* 339. This is the same definition that appeared in the 1891 *Black's Law Dictionary* 278 (the oldest Black's that I have been able to consult). I cannot find a particular or different meaning for the phrase 'corporate enterprise' in use at the time the 1875 Constitution or the 1901 Constitution was drafted.").
 39. *See Ex parte Boyd*, 796 So. 2d 1092, 1093 (Ala. 2001) (examining early Alabama decisions concerning "[t]he object" of Section 45 of the Alabama Constitution) (internal quotations omitted).
 40. *Moog v. Randolph*, 77 Ala. 597, 606 (1884); *see also Rice v. English*, 835 So. 2d 157, 163 (Ala. 2002) (examining older versions of separation-of-powers provision); *Lockridge v. Adrian*, 638 So. 2d 766, 768 (Ala. 1994) ("An amended or revised State constitution should be interpreted in the light of its predecessors; and when new provisions are introduced, they should be given a fair and legitimate meaning, and so construed, having regard, to their nature and purposes, as to accomplish the objects intended.").
 41. *Ex parte DBI, Inc.*, 23 So. 3d 635, 643 (Ala. 2009); *see also, e.g., Vista Land & Equip., L.L.C. v. Computer Programs & Sys., Inc.*, 953 So. 2d 1170, 1174 (Ala. 2006). *Accord Cole v. Riley*, 989 So. 2d 1001, 1009 (Ala. 2007) (See, J., concurring specially) (looking to federal constitutional decisions as guidance "in construing the word 'necessary' when it is used in a constitutional context.").
 42. *See, e.g., Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 170 (1991); *Gilbreath v. Wallace*, 292 Ala. 267, 271, 292 So. 2d 651, 654-55 (1974).
 43. *See Barber, supra*, 2009 WL 3805712, at *10; *see also Griggs v. Bennett*, 710 So. 2d 411, 413-14 (Ala. 1998) (stating that "general canons of construction" required strict construction of constitutional proviso of questionable application that would restrict the operation of a general constitutional rule).
 44. *See Yellow Dog Dev., LLC v. Bibb County*, 871 So. 2d 39, 42-43 (Ala. 2003).
 45. *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992).
 46. *Id.* (quoting *Greene, supra*, 154 Ala. at 257, 46 So. at 271).
 47. *See, e.g., Opinion of the Justices No. 323*, 512 So. 2d 72, 75-78 (Ala. 1987) (defining "appropriations for public education" by reference to what the Legislature had historically included in the education appropriation bill for the purpose of interpreting constitutional single-subject requirement).
 48. *Jansen v. State ex rel. Downing*, 273 Ala. 166, 169, 137 So. 2d 47, 49 (1962); *see also State v. Tenaska Ala. Partners, L.P.*, 847 So.2d 962 (Ala. Civ. App. 2002) (quoting *Jansen*).
 49. *Parke v. Bradley*, 204 Ala. 455, 459, 86 So. 28, 32 (1920).
 50. Art. IV, § 63, ALA. CONST. 1901 (emphasis added).
 51. *BJCC*, 912 So. 2d at 212 (citations, internal quotations, and footnote omitted).
 52. *Id.* at 218-21 (citations omitted); *see also id.* 225-26 (Parker, J., concurring specially) (stating that the Legislature has a role in interpreting the Constitution, and those interpretations should be given deference, particularly when the constitutional provision at issue relates to the Legislature's inner workings).



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Practice Section. Ayers is a 1998 graduate of the Cumberland School of Law and formerly served as clerk and staff attorney to Alabama Supreme Court Justice J. Gorman Houston, Jr.

Alabama Law Foundation Honors Fellows



Alabama Senator Jeff Sessions with his former law partner, Billy Bedsole, and Bedsole's wife, Mamie, at the annual Fellows Dinner sponsored by the Alabama Law Foundation

Every year, the Alabama Law Foundation hosts a special evening, the Fellows Dinner, to honor a group of exceptional lawyers for their service and commitment. The event recognizes lawyers who have been selected to join the foundation's Fellows Program and those elevated to "Life Fellows" status. The selection committee chooses new members from an exceptional group of lawyers: no more than one percent of bar members who have demonstrated outstanding dedication to their profession and their community are invited into fellowship. Life Fellows are members previously inducted who have met their pledge and continue to provide support and leadership for the Alabama Law Foundation.

The 2010 Fellows dinner was held February 20 at the Montgomery Museum of Fine Arts. The black-tie affair attracted friends and colleagues from across Alabama to recognize the new Fellows and the Life Fellows for their professional service and excellence.

The Fellows program was established in 1995 to honor Alabama bar members for outstanding service and commitment. Those chosen to become Fellows are given the opportunity to increase their leadership roles through the Alabama Law Foundation. As leaders in the legal community, Fellows provide financial and personal support for the Alabama Law Foundation, the charitable arm of the Alabama State Bar.



Fellows accepted into membership for 2009:

J. Greg Allen, Montgomery, Beasley, Allen, Crow, Methvin, Portis & Miles

W. Percy Badham, III, Birmingham, Badham & Buck

Edward G. I. Bowron, Mobile, Burr & Forman

J. R. Brooks, Huntsville, Lanier, Ford, Shaver & Payne

Charles F. Carr, Fairhope, Carr, Allison, Pugh, Howard, Oliver & Sisson

Lee H. Copeland, Montgomery, Copeland, Franco, Screws & Gill

Wendy Brooks Crew, Birmingham, Crew & Howell

Laura L. Crum, Montgomery, Hill, Hill, Carter, Franco, Cole & Black

W. Anthony Davis, III, Birmingham, Starnes & Atchison

Robert G. Esdale, Sr., Montgomery, clerk, Supreme Court of Alabama

H. Lewis Gillis, Montgomery, Thomas, Means, Gillis & Seay

Charles A. Graddick, Mobile, presiding circuit judge, 13th Judicial Circuit

Dawn W. Hare, Monroeville, circuit judge, 35th Judicial Circuit

Gregory H. Hawley, Birmingham, White, Arnold & Dowd

Phillip W. McCallum, Birmingham, McCallum, Methvin & Terrell

Joseph C. McCorquodale, III, Jackson, McCorquodale & McCorquodale

Teresa G. Minor, Birmingham, Balch & Bingham

George M. Neal, Jr., Birmingham, Sirote & Permutt

Thomas L. Oliver, II, Birmingham, Carr, Allison, Pugh, Howard, Oliver & Sisson

W. Boyd Reeves, Mobile, Armbrrecht Jackson

Jefferson B. Sessions, III, Mobile, United States Senator

Alyce M. Spruell, Tuscaloosa, Spruell & Powell

Malcolm B. Street, Jr., Anniston, circuit judge, 7th Judicial Circuit

2009 Life Fellows

W. Harold Albritton

J. Greg Allen

Richard A. Ball, Jr.

John B. Barnett, III

Charles F. Carr

John L. Carroll

Ralph D. Cook

Laura L. Crum

W. Anthony Davis, III

Robert G. Esdale

Randy Haynes

James F. Hughey, Jr.

M. Dale Marsh

Phillip W. McCallum

Mac McCorquodale

Teresa G. Minor

Cleophus Thomas, Jr.

W. Lee Thuston

Admiralty Law for the Land-Side Alabama Lawyer

By Norman M. Stockman





Alabama has an active seaport and an extensive network of inland waterways, many of which support maritime commerce.

Introduction

Admiralty law can be a fascinating and challenging practice area, with rules and customs dating back to the Middle Ages and an abundance of case law that at times can be difficult for even the most weathered practitioner to sort out. With its mysterious procedures like “arresting” a ship and references to obscure Latin phrases such as *uberrimae fidei*, most Alabama lawyers north of the salt line probably give little, if any, thought to the possible application of admiralty law in their practice. Indeed, I learned early on that answering “admiralty law” in response to the question, “What type of law do you practice?” invariably resulted in perplexed looks and glazed eyes among the uninitiated.

So what is admiralty law, and why does admiralty law matter to the land-side Alabama lawyer, at least one not mulling a change in career path? *Black’s Law Dictionary* defines “maritime law” and, by reference, “admiralty law,” as “[t]he body of law governing marine commerce and navigation, the carriage at sea of persons and property, and marine affairs in general; the rules governing contract, tort, and workers’-compensation claims or relating to commerce on or over water.” *Black’s Law Dictionary* 988 (8th ed. 2004). In practice, many admiralty lawyers are specialized general

practitioners, drafting contracts, preparing cases for trial and handling employee injury claims, all with a general relation to water-based commerce (or “salty flavor,” see *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961)). And, while Alabama has a short coastline compared to many other coastal states, it has an active seaport and an extensive network of inland waterways, many of which support maritime commerce. This means that even for Alabama lawyers far from the waters of the Gulf of Mexico, the possibility exists for admiralty law to apply to a particular situation, even to situations where the salty flavor may not be apparent. And, admiralty law may apply in ways unfamiliar to the land-side lawyer, meaning that a lawyer who ignores admiralty law when it applies may well miss the boat.

This article describes some of the highlights of admiralty law and points out common practice areas where admiralty law may apply. Obviously, space and time do not permit a review of all of the aspects of admiralty law or a discussion of every area touched by admiralty law, and this article is not intended to provide a comprehensive study of the subject matter. Nonetheless, it may prompt the land-side Alabama lawyer unfamiliar with admiralty law to consider admiralty law’s potential application to situations where otherwise it might have been ignored to the detriment of both lawyer and client.

Admiralty Jurisdiction

So, where does the land-side lawyer begin? The general rule is that “[w]ith admiralty jurisdiction comes the application of substantive admiralty law.” *E. River S.S. Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). Therefore, the logical starting point is to consider the scope of admiralty jurisdiction. At the risk of oversimplification, admiralty jurisdiction covers three main areas: maritime torts, maritime contracts and injuries to employees in maritime fields. Admiralty law also has a criminal law component that is not addressed in this discussion.

Admiralty Tort Jurisdiction

Admiralty tort jurisdiction requires a maritime tort. See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253, (1972). To be a maritime tort, a tort must meet a two-pronged test. First, the tort must occur on navigable waters (the “locus test”). See *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 923-24 (11th Cir. 2001). Second, the wrong must have a significant connection to a traditional maritime activity (the “nexus test”). See *id.* For the locus test, a “body of water is considered navigable ‘if it is one that, by itself, or uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce.’” *In re Bridges Enters., Inc.*, 2003 A.M.C. 2811, 2814-15 (S.D. Fla. 2003) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1871)). The nexus test requires a two-part analysis. First, the court must “‘assess the general features of the type of accident involved,’ to determine whether the incident has ‘a potentially disruptive impact on maritime commerce.’” *Alderman v. Pac. N. Victor, Inc.*, 95 F.3d 1061, 1064 (11th Cir. 1996) (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539-40 (1995)). Second, the court “‘must determine whether the ‘general character’ of the ‘activity giving rise to the incident’ shows a ‘substantial relationship to traditional maritime activity.’” *Id.*

In Alabama, this jurisdictional analysis can lead to unexpected results. For example, a pleasure boat collision on Lake Guntersville, a body of water over which interstate commerce is possible, almost certainly would meet the locus test for admiralty tort jurisdiction; an otherwise similar collision on Lake Martin, which is located entirely within Alabama and which is not navigable in interstate commerce because of its position between two lockless dams, would not. See *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992) (inland reservoir upstream from a lockless dam was not a navigable waterway for purposes of admiralty tort jurisdiction because it was not navigable in interstate commerce). Because a collision between pleasure boats on navigable waters generally meets the nexus test, see *Foremost Ins. Co. v. Richardson*, 457

U.S. 668, 675 (1982), it is almost certain that the collision on Lake Guntersville would be governed by admiralty law, while the collision on Lake Martin would not. This result could have significant implications for any tort claims arising out of the collisions, as discussed later in this article.

In addition to those torts meeting the locus and nexus tests, the Admiralty Extension Act extends admiralty tort jurisdiction, and therefore the application of admiralty tort law, to all injury or damage “caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.” 46 U.S.C. § 30101(a). The Death on the High Seas Act (“DOHSA”), 46 U.S.C. §§ 30301-30308, extends admiralty jurisdiction to claims arising out of deaths caused by acts occurring on the high seas more than three nautical miles offshore, or 12 nautical miles in the case of commercial aviation accidents, and regardless of whether the maritime nexus test is met. See *Motts v. M/V GREEN WAVE*, 210 F.3d 565, 571 (5th Cir. 2000). On the other hand, the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1331-1356a, provides that in most situations state law, as a “surrogate” for federal law, applies to torts occurring on offshore platforms that are “permanently or temporarily attached to the seabed” of the Outer Continental Shelf. See *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 476 (5th Cir. 1993).

Admiralty Contract Jurisdiction

Admiralty contract jurisdiction requires a maritime contract. “To determine whether a contract falls within maritime jurisdiction we look to ‘the subject-matter, the nature and character of the contract . . . the true criterion being the nature of the contract, as to whether it have [sic] reference to maritime service or maritime transactions.’” *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*, — F.3d —, No. 09-10083, 2010 WL 184012, at *3 (11th Cir. Jan. 21, 2010) (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)). Stated another way, to be maritime a contract must “relate[] to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment.” *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992).

There is no bright-line test for admiralty jurisdiction under this definition of a maritime contract, and courts have struggled with reconciling the case law in this area. See *New Hampshire Ins. Co. v. Home Sav. & Loan Co.*, 581 F.3d 420, 426-27 (6th Cir. 2009) (“Despite our best efforts, however, we have not been able to divine an overarching principle or scheme that brings together all of the disparate maritime cases under a single, unified banner.”). Despite the blurriness at the margins, admiralty courts over the years have addressed the maritime nature of all manner of contracts, and a little research usually yields an answer to the question

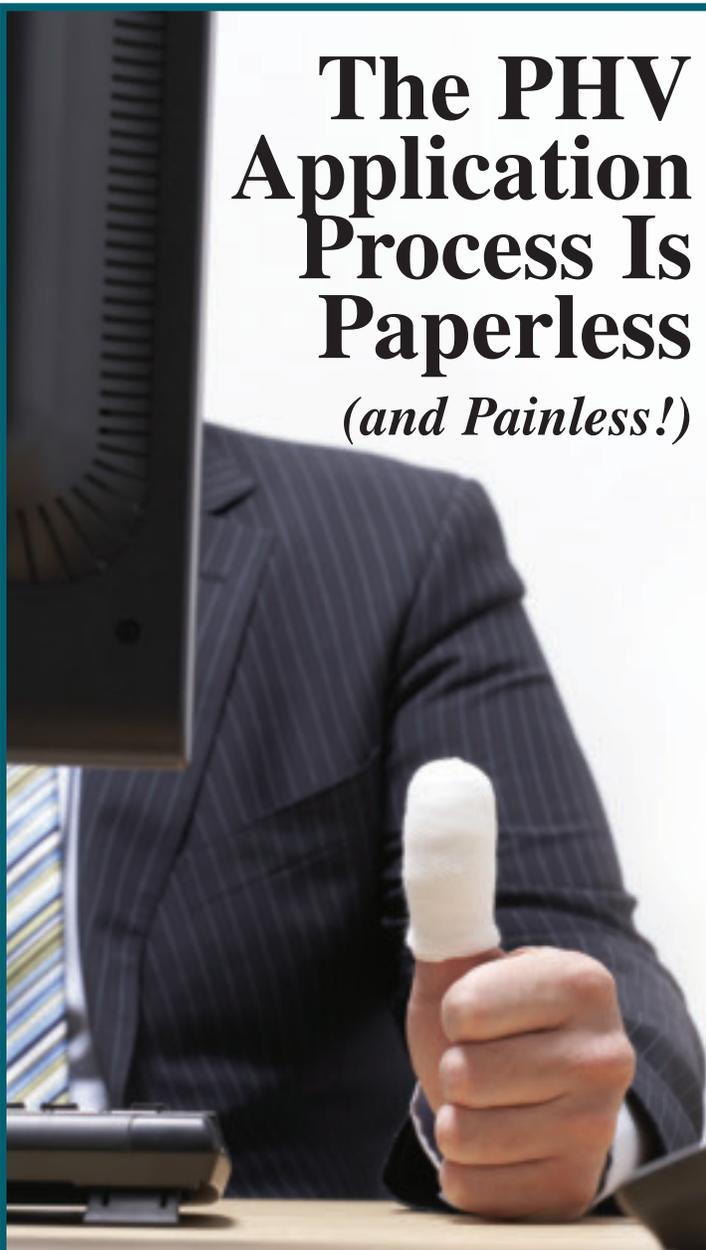
For the locus test, a “body of water is considered navigable ‘if it is one that, by itself, or uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce.’”



of whether a contract is, or is not, maritime. The answer may not always be the one expected, however. For example, a contract to repair a vessel is a maritime contract. *Diesel "Repower", Inc. v. Islander Invs. Ltd.*, 271 F.3d 1318, 1322-23 (11th Cir. 2001). A contract to build a vessel is not. *Kossick*, 365 U.S. at 735. A vessel charter (lease) is a maritime contract. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1214 (5th Cir. 1986). A contract to sell a vessel is not. *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988); *contra Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd.*, 591 F. Supp. 2d 505, 509 (S.D.N.Y. 2008). Other maritime contracts include: contracts to provide services or supplies to a vessel, wharfage (dockage) agreements, vessel storage contracts, towage contracts, and contracts for carriage of goods by vessel. See 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-10 (4th ed. 2004)(listing various maritime contracts).

While a contract need not concern a vessel to be maritime, whether a particular contract concerns a vessel often assists in the

determination of whether a contract is maritime. The definition of vessel is also important in other areas of maritime law, such as the determination of seaman status under the Jones Act and the application of the Admiralty Extension Act. In general, under admiralty law a "vessel" is "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water." See *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488-90 (2005) (quoting 1 U.S.C. § 3). Under this definition, to be a vessel a watercraft must be practically, rather than merely theoretically, capable of use as a means of water-borne transportation. *Id.* at 493-94. There are many cases addressing the issue of whether particular objects are vessels, not all of which are reconcilable. Compare *Bd. of Comm'rs of Orleans Levee Dist. v. MV BELLE OF ORLEANS*, 535 F.3d 1299, 1312 (11th Cir. 2008) (moored riverboat casino was a vessel) with *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir. 2006) (moored riverboat casino was not a vessel).



The PHV Application Process Is Paperless (and Painless!)

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

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

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

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

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

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

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

Admiralty Jurisdiction over Employee Injury Claims

Admiralty jurisdiction also extends to certain employment-related injuries suffered by seamen and other maritime workers. For workers meeting the definition of “seaman,” admiralty jurisdiction extends to the seaman’s claims for maintenance and cure, unseaworthiness and negligence under the Jones Act (46 U.S.C. § 30104). See *O’Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943). Even a seaman injured on land falls within admiralty jurisdiction with respect to these employment-related claims, as long as the injury was suffered in the course of the seaman’s employment. See *id.* Under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950, non-seaman maritime workers meeting the statutory definition of an “employee” under the act are entitled to benefits for injuries occurring on navigable waters “including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.” 33 U.S.C. § 903(a).

Choice of Forum

The fact that admiralty law may apply to a given case does not necessarily mean that the forum will be a federal court sitting in admiralty. Federal district courts do have original jurisdiction over admiralty and maritime cases. 28 U.S.C. § 1333(1). But, this statutory grant includes an exception, the “saving to suitors” clause, which reserves to parties “in all cases all other remedies to which they are otherwise entitled.” *Id.* The “saving to suitors” clause has been interpreted to mean that with respect to *in personam*, as opposed to *in rem*, admiralty claims, a plaintiff may bring suit in state court or on the law side of federal district court if there is another basis for federal jurisdiction such as diversity. See *Diesel “Repower,” Inc.*, 271 F.3d at 1322. Nonetheless, the state court or federal district court sitting at law generally must apply admiralty law. See *id.* Absent another basis for federal court jurisdiction, as a general rule admiralty actions brought in state court under the “saving to suitors” clause are not removable. See 14 Charles Alan Wright et al., *Federal Practice & Procedure* § 3722 (4th ed. 2009).

Certain admiralty law actions may only be brought in federal district court sitting in admiralty, most notably *in rem* actions, actions for maritime attachment and garnishment, and actions under the Limitation of Liability of Shipowners Act. See *Diesel “Repower,” Inc.*, 271 F.3d at 1322 (*in rem* actions); Fed. R. Civ. P. Supp. R. B (maritime attachment and garnishment actions); 46 U.S.C. §§ 30511 (limitation of liability actions).

Admiralty Tort Law

Once it is clear that admiralty law may apply, the question then becomes whether the application of admiralty law makes any substantive difference. In many respects, admiralty law and Alabama law are similar, and indeed admiralty law often borrows principles from state law. See *Wells v. Liddy*, 186 F.3d 505, 525 (4th Cir. 1999). In the tort arena, the primary maritime claim is the general maritime law negligence cause of action. Its elements are the familiar duty, breach, proximate cause and damages. See *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 376 (5th Cir. 2000). Unlike Alabama law, however, admiralty law applies comparative

fault. See *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983). Nonetheless, as in Alabama the doctrine of joint and several liability applies in admiralty, but with contribution available among joint tortfeasors. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272 & n. 30 (1979).

In addition to the general maritime law negligence cause of action, admiralty law recognizes a tort cause of action for strict liability in products liability cases. See *E. River S.S. Corp. v. TransAmerica DeLaval, Inc.*, 476 U.S. 858, 865-66 (1986). Admiralty law enforces the economic loss rule, meaning that where a defective product damages only itself, a plaintiff must resort to contract remedies, if any, and tort recovery is not allowed. See *id.*

Maritime wrongful death claims are governed by a confusing array of principles that dictate applicable law based on the circumstances and location of the death and the status of the decedent. See Schoenbaum, § 8-1 (noting that a “crazy-quilt pattern of wrongful death actions is recognized in admiralty for occurrences on navigable waters and within admiralty jurisdiction”).

Of particular significance, the time for filing suit may vary between Alabama law and admiralty law. Maritime claims for personal injury or death are governed by a three-year statute of limitations under 46 U.S.C. § 30106, as compared to Alabama’s two-year statute of limitations for most personal injury and death claims under *Ala. Code* § 6-2-38. Most other admiralty law claims are not subject to a strict statute of limitations, but are subject to the affirmative defense of laches (inexcusable delay combined with prejudice). See *Venus Lines Agency, Inc. v. CVG Int’l Am., Inc.*, 234 F.3d 1225, 1230 (11th Cir. 2000). In applying laches, courts will look to the analogous state statute of limitations as a benchmark to measure the reasonableness of any delay in filing suit, but this benchmark is not determinative. *Id.* Instead, the passage of the analogous state statute of limitations shifts the burden to the plaintiff to show excusable neglect or that no prejudice resulted. *Mecom v. Livingston Shipbuilding Co.*, 622 F.2d 1209, 1215 (5th Cir. 1980). Certain statutory claims in admiralty have their own time limitations for filing suit. See, e.g., 46 U.S.C. § 30905 (two-year time limit for claims against the United States under the Suits in Admiralty Act). Also, 46 U.S.C. § 30508 allows passenger contracts of carriage to include time limits of as little as six months for giving notice of a claim and one year for filing suit arising out of personal injury or death.

Admiralty Contract Law

Admiralty contract law operates in many areas, including vessel charters (leases), contracts for repairs, services, and supplies to vessels, marine insurance, contracts for salvage, contracts for carriage of goods and passengers, and contracts for towage. As a general rule, maritime contracts are interpreted under federal law; however, state law may be applied to a maritime contract if the interpretation of the contract implicates state interests and those interests can be accommodated without defeating a federal interest (that federal interest usually being uniformity or the application of established maritime law). See *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27-29 (2004). The rules of interpretation and construction of maritime contracts are the general rules of contract interpretation and construction familiar to any Alabama lawyer. See *FWF, Inc. v. Detroit Diesel Corp.*, 494 F. Supp. 2d 1342, 1356 (S.D. Fla. 2007) (citations omitted).

Nonetheless, maritime contracts may be subject to rules or interpretations that are unfamiliar to the land-side lawyer. For example, admiralty law enforces oral contracts, even those covering extended time periods, so long as all of the usual elements of a contract exist. *Venus Lines Agency, Inc. v. CVG Intern. Am., Inc.*, 234 F.3d 1225, 1229 (11th Cir. 2000). And contracts calling in part for transportation of goods by rail or truck may be deemed “maritime contracts” governed by laws applicable to carriage by sea, meaning that contract claims arising out of damage to cargo occurring well inland may be governed by admiralty law. See, e.g., *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. at 24 (“This is a maritime case about a train wreck.”).

Marine insurance contracts present particularly thorny issues. Traditionally, marine insurance has been subject to certain implied covenants between the insurer and the insured, such as the parties’ duty of *uberrimae fidei* (“utmost good faith”), which requires the insured to disclose to the insurer all facts material to the risk, and the insured’s implied warranty that the vessel is seaworthy at the inception of the policy. See *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 981-84 (5th Cir. 1969). These covenants are not always consistent with state insurance laws, which the United States Supreme Court has held apply to marine insurance in the absence of contrary established admiralty law. See *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 320 (1955). Courts have reached different conclusions as to whether state insurance law should supplant particular admiralty law concepts, and these differences of opinion can have significant consequences for the parties. Compare *Albany Ins. Co. v. Kieu*, 927 F.2d 882, 889-90 (5th Cir. 1991) (holding insured’s duty of *uberrimae fidei* was supplanted by state insurance law that relieved insured of consequences of misrepresentations in application) with *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362-63 (11th Cir. 2000) (holding duty of *uberrimae fidei* was entrenched federal maritime law and that insured’s misrepresentation in application voided marine insurance policy *ab initio*).

Employee Injury Claims under Admiralty Law

Employee injury claims are an area where the land-side lawyer may be most likely to encounter admiralty law. Injured employees in maritime fields generally fall into one of three classes: (1) seaman, (2) maritime workers covered by the Longshore and Harbor Workers’ Compensation Act and (3) workers covered by state workers’ compensation acts. The available remedies for employment-related injuries vary dramatically between these three classes, meaning that a lawyer advising

Employee injury claims are an area where the land-side lawyer may be most likely to encounter admiralty law.



employers or injured employees whose activities have any maritime flavor should consider whether admiralty law may apply.

Seaman’s Remedies: Maintenance and Cure, Unseaworthiness and the Jones Act

The seaman’s remedies for on-the-job injuries and illnesses are unique among American workers. To be considered a “seaman,” “an employee’s duties must contribut[e] to the function of [a] vessel or to the accomplishment of her mission,” and the employee “must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Seamen have three available remedies for employment-related injuries and illnesses.

First, a seaman who is injured or becomes ill while in the service of a vessel, even if ashore, is entitled to receive “maintenance and cure,” which includes payment of a living allowance for shore-side room and board (“maintenance”), medical treatment until the point of “maximum cure” (“cure”) and unearned wages until the end of the voyage or contract term. *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1122 (11th Cir. 1995). Maintenance and cure dates back to the Middle Ages, and references to maintenance and cure-like obligations can be found in the Laws of Oleron, the Laws of Wisbuy, the Dantzic Ship-Laws, the Laws of the Hanse Towns, and the Marine Ordinances of Louis XIV. See 2 Robert Force and Martin J. Norris, *The Law of Seaman* § 26:6 (5th ed. 2003). Maintenance and cure is paid regardless of fault, although a seaman who is injured as a result of willful misconduct is not entitled to maintenance and cure. See *id.* at 1123. The entitlement to maintenance, cure and unearned wages ends when the seaman reaches “maximum cure.” *Kusprik v. United States*, 87 F.3d 462, 464 (11th Cir. 1996).

Second, a seaman may bring an action for damages against the vessel owner for “unseaworthiness” if he or she suffers injury caused by an unseaworthy vessel. *Michell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). An unseaworthy vessel is a vessel not reasonably fit for its intended purpose. *Id.* at 550. A vessel operator is strictly liable for unseaworthiness. See *id.*

Third, a seaman may bring a negligence cause of action for damages against his employer under the Jones Act, 46 U.S.C. § 30104. The Jones Act adopts for seaman the remedies for railroad employees under the Federal Employers Liability Act (FELA). 46 U.S.C. § 30104; *Atl. Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2576-77 (2009).

Seamen are considered “wards of the admiralty,” and for this reason courts will scrutinize releases given by seaman to their employers. See *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 246, 248 (1942). “[T]he burden is upon one who sets up a seaman’s release to show that it was executed freely, without deception or coercion, and that it was made by the seaman

with full understanding of his rights.” *Id.* at 248. Therefore, care must be taken in settling claims by seamen, particularly those not represented by counsel, to ensure that this burden can be met if the release is later challenged.

The Longshore and Harbor Workers’ Compensation Act

The Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950, is a federal workers’ compensation scheme for certain non-seaman maritime workers, including longshoremen, others engaged in longshoring operations, harbor-workers, ship repairmen, shipbuilders, and shipmakers. *See* 33 U.S.C. § 902. In addition to the compensation available from the employer, the LHWCA specifically provides for a negligence cause of action in favor of the covered employee against vessel owners. *See* 33 U.S.C. § 905(b). These “Section 905(b) claims,” as well as claims against non-vessel owner third parties (which may or may not be admiralty law claims), can be an important component of the injured maritime worker’s claims, as the nature of the maritime worker’s employment often means that there is a vessel owner or other third party involved in the injury-causing events.

State Workers’ Compensation Acts

Non-seamen employees who are not covered by the LHWCA may resort to state workers’ compensation acts for employment-related injuries, if such acts otherwise would apply.

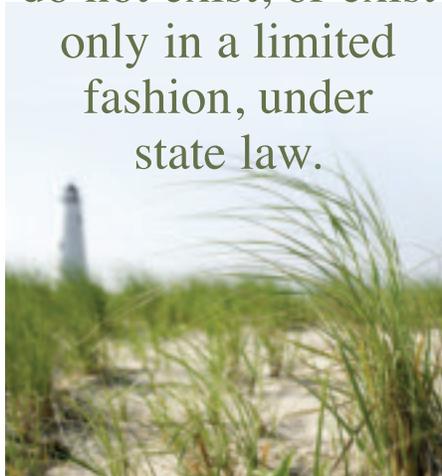
Peculiar Admiralty Procedures

For the land-side lawyer, perhaps the most peculiar features of admiralty law are the various federal admiralty court procedures that do not exist, or exist only in a limited fashion, under state law. These procedures include prejudgment attachment and seizure, limitation of liability actions by vessel owners and the right of a defendant to bring culpable third parties into a lawsuit to defend a plaintiff’s claims.

Maritime Attachment and Garnishment, Actions *In Rem* and Possessory, Petitory and Partition Actions

Admiralty law permits wide-ranging prejudgment attachment, garnishment, and asset seizure. The prejudgment procedures for such actions are set forth in the Federal Rules of Civil Procedure’s Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, in particular, Rule B governing maritime attachment and garnishment, Rule C governing

For the land-side lawyer, perhaps the most peculiar features of admiralty law are the various federal admiralty court procedures that do not exist, or exist only in a limited fashion, under state law.



actions *in rem* and Rule D governing possessory actions against maritime property.

Rule B governs maritime attachment and garnishment. Rule B permits a plaintiff with an *in personam* maritime claim to attach the defendant’s tangible or intangible personal property in the hands of third parties, up to the amount of the claim. *See* Fed. R. Civ. P. Supp. R. B. The purpose of Rule B is to obtain jurisdiction and security; because of its jurisdictional purpose, Rule B can only be used if the defendant cannot be found in the district. *See id.*; *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping PTE Ltd.*, 560 F.3d 127, 130 (2d Cir. 2009). For purposes of Rule B, “found in the district” means that a defendant is amenable to jurisdiction and service of process in the district. *See id.* at 130-31. While Rule B is essentially a jurisdictional tool, it also serves as an effective device to obtain prejudgment security.

Rule C governs maritime *in rem* actions. Rule C permits a plaintiff with a maritime lien claim against property to file suit against that property and to cause the United States Marshal to arrest the property and hold it as security for the plaintiff’s claim. *See* Fed. R. Civ. P. Supp. R. C.

Maritime liens arise in a wide variety of circumstances, such as maritime torts, ship mortgages, maritime contracts for repairs, supplies and other “necessaries” provided to vessels, cargo damage claims, and others. *See* Schoenbaum, *supra*, § 9-1. Thus, Rule C has broad application to maritime claims.

Rule C arrest is often used where a vessel owner or operator has failed to pay for supplies or services rendered to the vessel, or where a foreign vessel has been involved in a maritime tort and the vessel is at risk of departure. In contract matters, a Rule C arrest of a vessel often gets the attention of even the most recalcitrant vessel owner, and in practice a Rule C arrest often results in swift resolution of nonpayment or slow payment issues. In tort matters, a Rule C arrest of an offending vessel usually results in a substitution of the vessel with suitable security under Rule E, permitting the vessel to continue on its voyage and ensuring that the plaintiff has a fund from which to collect any judgment later obtained.

Rule D permits a party to bring an action to obtain possession of vessels, cargo or other maritime property. *See* Fed. R. Civ. P. Supp. R. D. To invoke Rule D, the parties’ claim to possession must arise out of a matter within the court’s admiralty jurisdiction. *See Cary Marine, Inc. v. Motorvessel Papillon*, 872 F.2d 751, 757 (6th Cir. 1989).

The Limitation of Liability of Shipowners Act

The Limitation of Liability of Shipowners Act, 46 U.S.C. §§ 30501-30512, is unique to admiralty law. This statute permits

the owner of a vessel involved in a maritime casualty to file a lawsuit in federal district court requiring all claimants to try their claims against the vessel and owner in one forum. In the limitation action the court, sitting without a jury, determines whether the owner is liable for the casualty and, if liable, whether the acts creating liability were within the “privity or knowledge” of the owner. *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988). If the acts creating liability were not within the owner’s “privity or knowledge,” then the owner’s liability as to all claimants is limited to the value of the vessel immediately following the casualty, plus the vessel’s then-pending freight (i.e., the amounts then owed to the vessel for the carriage of cargo, if any). See 46 U.S.C. § 30505. This limitation procedure is referred to as a “concurus.” *In re Dammers*, 836 F.2d at 755.

Rule F of the Supplemental Admiralty Rules governs the procedure for seeking limitation of liability. The limitation of liability lawsuit must be filed within six months of the owner’s receipt of a written claim. Fed. R. Civ. P. Supp. R. F. The owner seeking limitation of liability is required to post security equal to the post-casualty value of the vessel and pending freight, and the owner must provide notice of the limitation action to potential claimants. *Id.* The filing of a limitation action results in an immediate cessation of all claims against the vessel owner arising out of the casualty, and the vessel owner is entitled to an injunction against any claim being brought outside of the limitation action against the owner or its property with respect to the casualty. See *id.*

While on its face the limitation of liability action would appear to have widespread application to vessel casualties, in practice its application is more limited because of the “saving to suitors” clause in 28 U.S.C. § 1333(1). Because of the “saving to suitors” clause, in cases where the total of all claims is less than the limitation fund, the admiralty court must allow claimants to pursue their claims in the forum of their choice. See *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150-54 (1957). Similarly, where claimants agree on a suitable stipulation preserving the vessel owner’s limitation rights, courts generally allow the claimants to pursue their claims in their chosen forum, subject to the limitation court’s ultimate jurisdiction to limit liability. See *Magnolia Marine Transp. Co., Inc. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575-76 (5th Cir. 1992). Therefore, while limitation of liability is an important procedural device for the owner of a vessel involved in a casualty resulting in multiple potential large-value claims, it likely has little practical application outside of that context.

In addition to the right to bring a separate limitation of liability action, courts have held that limitation of liability may be raised as an affirmative defense by a vessel owner in a state court action, although by asserting limitation of liability as a defense, rather than in a limitation action, the vessel owner loses the benefits of the concurus procedure. See, e.g., *Mapco Petroleum v. Memphis Barge Line, Inc.*, 849 S.W.2d 312, 318 (Tenn. 1993).

Rule 14(c) Impleader

Federal Rule of Civil Procedure 14(c) permits a federal admiralty court defendant to “implead” a third-party defendant, making the third-party defendant a direct defendant of the claims

brought by the plaintiff. See Fed. R. Civ. P. 14(c). This right of impleader is broader than the right of a defendant to assert a third-party claim for indemnity under Rule 14, as the impleaded defendant actually becomes a defendant of the plaintiff’s claims.

Prejudgment Interest Under Admiralty Law

One final note concerns prejudgment interest. Unlike Alabama law, which allows prejudgment interest only in limited circumstances, under admiralty law the general rule is that a prevailing plaintiff is entitled to recover prejudgment interest absent “peculiar” or “exceptional” circumstances. See *City of Milwaukee v. Cement Div., Nat’l Gypsum Co.*, 515 U.S. 189, 195 (1995). This rule applies regardless of the forum of the lawsuit, as the availability of prejudgment interest is a matter of substantive admiralty law. See *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1052-53 (1st Cir. 1973). One important exception to the general rule is a seaman’s personal injury claim against an employer; depending on the jurisdiction, the claims brought and the forum, prejudgment interest may be unavailable, discretionary or compulsory in a seaman’s personal injury claim. See Michael F. Sturley and David C. Frederick, *Prejudgment Interest in Seaman’s Personal Injury Cases: Supreme Court Precedent Lost in a Sea of Procedural Confusion*, 33 J. Mar. L. & Com. 423 (2002).

Conclusion

Admiralty law is an intellectually-challenging field that covers a wide range of subjects. While no single article can adequately cover the entire scope of admiralty law, it is hoped that this brief review of admiralty law and how it might apply to some common areas of practice will be of some benefit to the land-side Alabama lawyer who may encounter the “law of the sea” far from the shores of the Gulf of Mexico. ▲▼▲



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MISSISSIPPI
ALABAMA



Attributing One Party's Contacts with the Forum State to Another: Conspiracy Jurisdiction in Alabama

by Professor
McKay Cunningham

Your Contacts are My Contacts

You don't reside in the forum state. You have no office there, no personal representative to receive service on your behalf, no advertising targeted toward the forum state and you have not personally conducted business in the forum state, but you have a business associate who has. When your business associate is sued, can the court attribute his contacts with the forum state to you? What if the claimant alleges that you and your business associate *conspired* or are agents of one another? In other words, what effect does one defendant's personal relationship with a foreign defendant have on the constitutional limits articulated in the "minimum contacts" analysis?

Minimum Contacts Jurisdiction

Of course we all remember the first year of law school and the well-established line of cases beginning with *International Shoe. International Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945). But before revisiting the constitutional minimum, we must determine

whether Alabama's long-arm statute extends to the constitutional limit. An Alabama court's personal jurisdiction over a person or corporation is governed by Rule 4.2, *Ala. R. Civ. P.* As amended in 2004, Rule 4.2(b) states:

"(b) Basis for Out-of-State Service. An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States...."

Under the plain language of Rule 4.2, Alabama's long-arm rule has been interpreted by the Alabama Supreme Court to extend the jurisdiction of Alabama courts to the permissible limits of due process. *See e.g., Duke v. Young*, 496 So.2d 37 (Ala. 1986); *DeSotacho, Inc. v. Valnit Indus., Inc.*, 350 So.2d 447 (Ala. 1977). Driving home the point, the court reiterated in *Ex parte McInnis*, 820 So.2d 795, 802 (Ala. 2001) that "Rule 4.2, *Ala. R. Civ. P.* extends the personal jurisdiction of the Alabama courts to the limit of due process under the federal and state constitutions."



For example, if a Texas rifle manufacturer, a Georgia gunsmith and a Mississippi salesman conspire to sell old rifles as new rifles and the gunsmith, while on an unrelated trip to Alabama, decides to sell one such rifle to an Alabama resident, the jurisdictional conspiracy theory would operate to give Alabama courts jurisdiction over all three members of the conspiracy, despite the fact that only one conspirator purposefully availed himself of the privilege of conducting activities within Alabama.

As noted above, the Due Process Clause of the Fourteenth Amendment permits a forum state to subject a nonresident defendant to its courts only when that defendant has sufficient “minimum contacts” with the forum state. *International Shoe*, 326 U.S. 310, 316 (1945). The critical question with regard to the nonresident defendant’s contacts is whether the contacts are such that the nonresident defendant “should reasonably anticipate being hauled into court” in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

Two types of contacts can form a basis for personal jurisdiction: general contacts and specific contacts. General contacts, which give rise to general personal jurisdiction, are unrelated to the cause of action and are both “continuous and systematic.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9, 415 (1984) (citations omitted). Specific contacts, which give rise to specific jurisdiction, are directly related to the cause of action. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-75 (1985). Although the related contacts need not be continuous and systematic, they must rise to such a level as to cause the defendant to anticipate being hauled into court in the forum state. *Id.*; *Ex parte Phase III Constr., Inc.*, 723 So.2d 1263, 1266 (Ala. 1998). In the case of either general jurisdiction or specific jurisdiction, “[t]he ‘substantial connection’ between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State.” *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987); *Elliott v. Van Kleeef*, 830 So.2d 726, 730-31 (Ala. 2002).

The well-established minimum contacts analysis defines the outer boundaries of due process. Conspiracy jurisdiction—by imputing contacts from one party to another—arises outside of and independently from the minimum contacts analysis. Although the courts that recognize conspiracy jurisdiction usually reiterate the minimum contacts standard above, they do not apply it.

Agency Jurisdiction

Some liken conspiracy jurisdiction to agency law, but this analogy is an imperfect

one. Certainly, the jurisdictional contacts of one can be attributed to another in some cases. But, usually, this attribution of jurisdictional contacts is justified because one party is expressly acting on behalf of the other. For example, the parent-subsidiary relationship has been considered by several courts when determining personal jurisdiction. In most parent-subsidiary disputes one entity is subject to jurisdiction, the other arguably is not and the claimant argues the affiliation between them establishes jurisdiction that would not exist independently. *See e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). While the existence of a parent-subsidiary relationship alone is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ contacts with the forum, a court will impute the subsidiaries’ contacts to the parent if the parent exercises a sufficient amount of control over the subsidiary. *See Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1094-96 (9th Cir. 2009).

Courts increasingly rely on agency law when determining whether to attribute personal contacts to a parent that would not otherwise be amenable to jurisdiction. “To impute the subsidiaries’ contacts to the parent on an agency theory, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent.” *Lisa McConnell, Inc. v. Idearc, Inc.*, 2010 WL 364172 (S.D. Cal. 2010) (internal citation omitted); *see Worthy v. Cyberworks Technologies, Inc.*, 835 So.2d 972 (Ala. 2002). Imputation of contacts based on agency is not confined to the parent-subsidiary relationship. In a widely criticized case, an art collector (the foreign defendant) participated in an auction by telephone. He placed bids through an employee of the art gallery over the phone. The court said that the gallery employee was “loaned” to the foreign art collector such that the gallery employee became the art collector’s agent. Since the art collector had transacted business in the forum state through a borrowed employee, jurisdiction extended to the collector. *Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506 (N.Y. 1970). Of course, imputing contacts based on

agency has been reined-in to a large extent. Generally speaking, only acts of the agent *that are directed by the principal* may serve as a basis to assert jurisdiction over the principal. See Restatement (Third) of Agency § 1.01 cmt. c (2006) (“A relationship is not one of agency within the common-law definition unless ... the principal has the right . . . to control the agent’s acts.”). Requiring that the principal control the agent’s actions restricts a claimant’s ability to impute contacts by alleging agency. See *Worthy v. Cyberworks Technologies, Inc.*, 835 So.2d 972 (Ala. 2002).

Conspiracy Jurisdiction

This requirement—that the principal control the agent’s acts—is *not* a factor when claimants seek to impute contacts to a foreign defendant based on conspiracy. Conspiracy jurisdiction relies on the conspiracy itself as an *independent* source of jurisdiction over a nonresident defendant—regardless of the nonresident defendant’s own contacts with the forum. One conspirator with sufficient contacts with a forum can subject all other conspirators to the personal jurisdiction of the forum even if the co-conspirators otherwise lack sufficient minimum contacts. *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001).

For example, if a Texas rifle manufacturer, a Georgia gunsmith and a Mississippi salesman conspire to sell old rifles as new rifles and the gunsmith, while on an unrelated trip to Alabama, decides to sell one such rifle to an Alabama resident, the jurisdictional conspiracy theory would operate to give Alabama courts jurisdiction over all three members of the conspiracy, despite the fact that only one conspirator purposefully availed himself of the privilege of conducting activities within Alabama. Under the conspiracy theory of personal jurisdiction, *all three* conspirators would be liable to the plaintiff, because the gunsmith’s sale of the rifle to the plaintiff “accomplished the common purpose.” Notably, the rifle manufacturer and the salesman did not act purposefully toward Alabama. In such a circumstance, many argue that due process as to the rifle

manufacturer and the salesman has not been satisfied.

Obtaining jurisdiction over a nonresident through conspiracy likely grew out of a 1940s venue dispute. In *Giusti v. Pyrotechnic Industries, Inc.* the Ninth Circuit imputed the acts of one party to another based on conspiracy. 156 F.2d 351 (9th Cir. 1946). Even though *Giusti* was a venue dispute in an antitrust action under the Clayton Act, the court’s classification of conspiracy as a form of agency facilitated migration of imputing contacts into the realm of jurisdiction by the 1970s. In *Leasco Data Processing Equipment Corp. v. Maxwell (Leasco II)*, the Second Circuit considered applying the conspiracy theory of venue to a question of personal jurisdiction. 468 F.2d 1326 (2d Cir. 1972). Although *Leasco II* was once considered to be the “leading case on the conspiracy theory of jurisdiction,” see, e.g., *McLaughlin v. Copeland*, 435 F. Supp. 513, 530 (D. Md. 1977), it failed to address the theory’s constitutionality.

Several courts began recognizing conspiracy jurisdiction after *Giusti* and *Leasco II*. But the theory was applied inconsistently and without clarity. See *In re Arthur Treacher’s Franchisee Litig.*, 92 F.R.D. 398, 411 (E.D. Pa. 1981). To promote consistency, many courts require that the mere allegation of a conspiracy, without some proof of the conspiracy’s actual existence and the non-resident defendant’s participation in it, will not serve as a basis for jurisdiction over its alleged members. The plaintiff must make a threshold prima facie showing of a conspiracy. See, e.g., *Baldridge v. McPike, Inc.*, 466 F.2d 65, 68 (10th Cir. 1972); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 43 F.Supp.2d 904, 912 (D.C. Ill. 1999); *Gilday v. Quinn*, 547 F.Supp. 803, 806 (D. Mass. 1982); *Lehigh Valley Indus. v. Birenbaum*, 389 F.Supp. 798, 807 (S.D.N.Y.), *aff’d*, 527 F.2d 87 (2d Cir. 1975). But these procedural and proof precautions presuppose a clear articulation of conspiracy jurisdiction itself—which was still lacking. The court in *Cawley v. Bloch* sought to provide that clarity. 544 F. Supp. 133, 135 (D. Md. 1982). Recognizing “the need for a simplified articulation of the conspiracy theory of jurisdiction,” the court announced a definition:

- (1) When two or more individuals conspire to do something
- (2) that they could reasonably expect to lead to consequences in a particular forum, if
- (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and
- (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no [other] direct contacts with the forum.

Id. at 135.

This “simplified articulation” has been adopted by a number of courts, including the Tennessee Supreme Court in *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001). Alabama, however, has not adopted the simplified articulation—at least not yet.

Conspiracy Jurisdiction in Alabama

Where does Alabama stand with regard to imputing personal jurisdiction based on conspiracy? Nobody knows. Three years ago, in *Ex parte Reindel*, the Alabama Supreme Court “recognized, at least in theory, the concept of conspiracy jurisdiction.” 963 So.2d 614, 621—22 (Ala. 2007). The court cited three prior decisions that tangentially addressed conspiracy jurisdiction, but all three avoided substantive review in favor of procedural nuance. See *Ex parte United Ins. Cos.*, 936 So.2d 1049 (Ala. 2006); *Ex parte Bufkin*, 936 So.2d 1042 (Ala. 2006); and *Ex parte McInnis*, 820 So.2d 795 (Ala. 2001). In fact, the *Reindel* court also declined “to define the contours of conspiracy jurisdiction,” relying instead on faulty affidavits. The court’s refusal to define the contours of conspiracy jurisdiction leaves the practitioner with many

questions. At minimum though, practitioners know that Alabama accepts conspiracy jurisdiction—“in theory.” Upon a showing of certain (undefined) specific facts, conspiracy theory would be available to establish personal jurisdiction.

Interestingly, the Alabama Supreme Court revisited conspiracy jurisdiction three months after issuing *Reindel*. In *Ex parte Barton*, 976 So.2d 438, 443-44 (Ala. 2007), the court repeated the now-familiar “minimum contacts” test, including the framework of purposeful-availment, continuous and systematic contacts, and general versus specific jurisdiction. The court then proceeded to ignore that framework because the claimants alleged a civil conspiracy and fraud scheme. Conspiracy jurisdiction is an independent source of jurisdiction and one that the court expressly condoned. “Allegations of fraud or a civil conspiracy, in certain circumstances, have been held sufficient to establish personal jurisdiction over an alleged out-of-state conspirator.” *Id.* at 443. Like *Reindel*, the court offered little guidance on the “contours of conspiracy jurisdiction.” But unlike *Reindel*, the court allowed the exercise of jurisdiction over a non-resident based on a conspiracy jurisdiction theory. To better understand the reach of conspiracy jurisdiction, the facts of the *Barton* case are helpful.

Conspiracy Jurisdiction Applied (*Ex parte Barton*)

The claimants, Alabama residents, were approached by Stephen Shannon, an Alabama resident and owner of Shannon Systems, Inc. Shannon proposed that he and the plaintiffs enter into a joint venture to buy a piece of property in Florida and develop it into a condominium complex. Claimants and Shannon formed Gulf Development, LLP, the stated purpose of which was to acquire and develop land in Alabama and Florida. Gulf Development was to buy the proposed Florida parcel; the claimants were to fund the purchase; and Shannon Systems, Inc. was to manage the construction project. The claimants were to receive 50 percent of the “final proceeds” after completion of the project, and Shannon was to receive the remaining

50 percent. Gulf Development was registered in Florida. Its “chief executive office” was in Gulf Shores.

To provide the necessary loan, Shannon selected a bank in Pensacola. The claimants assert that on the eve of the closing on the property Shannon falsely represented to them that the bank required additional obligors on the loan because the claimants and Shannon were not sufficiently creditworthy. Shannon suggested that “he had a friend in Mississippi,” David Kelly, who could bring in a “Utah group” as an additional investor in the project. Relying on Shannon’s representations, the claimants agreed to allow Greenway Properties, LLC to become partners in Gulf Development. Greenway was owned by David Kelly and by KMJ Commercial Funding, LLC.

Claimants alleged that Keith Barton—a Utah resident—was an owner of KMJ.

Although KMJ and Greenway contributed no capital, they were granted a 25 percent interest in the partnership. The claimants’ ownership interest in Gulf Development was thereby reduced from 50 percent to 37.5 percent. Eventually, a new partnership agreement for Gulf Development was executed adding Greenway and KMJ as partners. Gulf Development executed a note with the bank for a million-dollar loan and used the proceeds to purchase the property. Gulf Development, the plaintiffs and Barton were listed on the note as borrowers and their address was shown as Gulf Shores.

Shortly thereafter, claimants sued seeking damages against Shannon, Greenway, Kelly, KMJ, and Barton, for fraud, suppression and civil conspiracy. Specifically, the claimants alleged that Shannon falsely represented that additional investors were necessary to obtain financing for the project, and that by adding Greenway and KMJ as partners, the claimants’ interests in the partnership decreased. The plaintiffs further alleged that Greenway, Kelly, KMJ and Barton were aware of and ratified the representation made by Shannon and that all the defendants intended that the claimants’ ownership interests would be diluted to the defendants’ benefit. *Id.* at 440-41.

In his defense, Barton said he was a Utah resident; that he had not visited Alabama; that he had not conducted any business in Alabama sufficient to create “minimum contacts;” that he was not a principal or shareholder of KMJ; that

KMJ is wholly owned by a different entity, National Contract Servicing, LC; and that that he never met Shannon. *Id.* at 445. Barton did guarantee the loan, but the loan came from a Florida bank and was tied to a Florida property.

The critical question is whether Barton can be hauled into an Alabama court due to his alleged conspiracy with Shannon when Barton was not otherwise amenable to Alabama’s jurisdiction under the minimum contacts test. And, if so, what are the parameters for conspiracy jurisdiction? Unfortunately, the court did not tackle these questions head-on. Instead, the court allowed jurisdiction over Barton based on a procedural point.

Defining Conspiracy Jurisdiction Through Procedure

How could the court confer conspiracy jurisdiction without defining its contours? As noted above, the court has continuously avoided a definition or clarification of conspiracy jurisdiction by disposing of such disputes on procedural grounds. In personal jurisdiction challenges, Alabama employs a complex burden-shifting scheme.

- (1) The plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant;
- (2) The court must consider as true the allegations of the plaintiff’s complaint not controverted by the defendant’s affidavits;
- (3) Where the plaintiff’s complaint and the defendant’s affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff; but
- (4) If the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.

See *Ex parte Excelsior Financial, Inc.*, 2010 WL 245585 (Ala. 2010) (internal citations omitted).

The Alabama Supreme Court has disposed of every conspiracy jurisdiction dispute in recent history based on this procedure, including:

- *Ex parte McInnis*, 820 So.2d 795 (Ala. 2001);
- *Ex parte Puccio*, 923 So.2d 1069 (Ala. 2005);
- *Ex parte United Ins. Cos.*, 936 So.2d 1049 (Ala. 2006);
- *Ex parte Bufkin*, 936 So.2d 1042 (Ala. 2006);
- *Ex parte Reindel*, 963 So.2d 614 (Ala. 2007);
- *Ex parte Barton*, 976 So.2d 438, 443-44 (Ala. 2007);
- *Ex parte Excelsior Financial, Inc.*, 2010 WL 245585 (Ala. 2010).

In each case, the court refused to define conspiracy jurisdiction but instead either remanded for jurisdictional discovery or ruled that one of the parties failed to contest the other's evidence in the burden-shifting scheme.

The court's most recent ruling, a 2010 decision, rejected the plaintiff's efforts to assert jurisdiction via conspiracy. *Ex parte Excelsior Financial, Inc.*, 2010 WL 245585 (Ala. 2010). The court began with the premise that "where the complaint alleges conspiracy-based jurisdiction with particularity, failure to deny by affidavit or deposition the existence of, or participation in, a conspiracy will result in denial of a motion to dismiss for lack of jurisdiction." *Id.* at *5 (quoting *Ex parte Reindel*, 963 So.2d 614, 624 (Ala. 2007)). Indeed, the defendant argued on appeal that it denied via affidavit the plaintiff's conspiracy allegations and that as a result, the burden shifted back to the plaintiff to substantiate their allegations. Instead of wading through the competing pleadings and affidavits, the court truncated the dispute by finding that the plaintiff failed to plead conspiracy with sufficient particularity. Here, the court relied on *Ex parte Barton*:

"Bald speculation or a conclusory statement that individuals are co-conspirators is insufficient to establish

personal jurisdiction under a conspiracy theory. Instead the plaintiff must plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy."

Id. at *5 (quoting *Ex parte Barton*, 976 So.2d 438, 443-44 (Ala. 2007)).

This is all well and good, but how does one allege conspiracy jurisdiction with sufficient particularity, when the court—for over a decade—refuses to define conspiracy jurisdiction? The complex burden-shifting approach to personal jurisdiction in Alabama presumes the parties know which allegations and evidence count and which allegations and evidence do not. In

Excelsior, the court does not reproduce plaintiff's pleadings, but we are told that paragraphs 8-9 and 19-20 allege the commission of fraudulent acts among the parties and that paragraph 16 states:

[E]ach defendant was an agent and/or representative of each other Defendant, and that [i]n committing the acts alleged herein, the Defendants acted within the scope of their agency and/or employment and were acting with the consent, permission, authorization and knowledge of all other Defendants, and perpetrated and/or conspired with and/or aided and abetted the unlawful, improper, and fraudulent acts described herein.



[E]ach defendant was an agent and/or representative of each other Defendant, and that [i]n committing the acts alleged herein, the Defendants acted within the scope of their agency and/or employment and were acting with the consent, permission, authorization and knowledge of all other Defendants, and perpetrated and/or conspired with and/or aided and abetted the unlawful, improper, and fraudulent acts described herein.

Without the benefit of the pleadings, the helpfulness of this opinion is dubious, at best, for attorneys hoping to properly plead conspiracy jurisdiction. But the court's heavy reliance on procedure to the detriment of substance may be purposeful. Perhaps the court's reticence in defining conspiracy jurisdiction stems from the fact that the jurisdictional theory is arguably unconstitutional.

Criticism for Conspiracy Jurisdiction

If the Alabama Supreme Court followed the Tennessee Supreme Court by adopting the *Cawley* court's "simplified articulation" of conspiracy jurisdiction, practitioners would no longer worry about the theory's contours. Practitioners would know what to allege and the evidence necessary to meet the burden shifting procedures in Alabama. But what about the theory's constitutionality? Several courts and scholars question whether imputation of one party's contacts to another party based solely on civil conspiracy theory violates the due process protections articulated under *International Shoe* and its progeny. See *Coopers & Lybrand v. Cocklereece*, 157 Ga.App. 240, 246, 276 S.E.2d 845, 850 (1981); see also *Weinstein v. Norman M. Morris Corp.*, 432 F.Supp. 337, 345-46 (E.D.Mich. 1977); *I.S. Joseph Co. v. Mannesman Pipe & Steel Corp.*, 408 F.Supp. 1023, 1025 (D.Minn. 1976); *Tiffany Records, Inc. v. M.B. Krupp Distribs., Inc.*, 276 Cal.App. 2d 610, 619-21, 81 Cal.Rptr. 320, 327-28 (1969); Matt N. Thomson, Jr., *Chenault v. Walker*, 69 TENN. L. REV. 221 (2001); Stuart M. Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984).

The United States Supreme Court has defined the due process limitation to require "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The due process standard is quite clear: "The requirements of *International Shoe* [mandating minimum contacts of defendant with the forum] must be met as to each defendant over whom a state court exercises jurisdiction."

Rush v. Savchuk, 444 U.S. 320, 332 (1980) (emphasis added). Conspiracy jurisdiction, however, looks to the contacts of the conspiracy with the forum, rather than to the contacts of each conspirator.

Thus, the conspiracy theory of personal jurisdiction, premised on the imputation of jurisdictional contacts from one conspirator to another, is likely unconstitutional. If a court, by imputing a co-conspirator's jurisdictional contacts, exercises jurisdiction over a non-resident defendant who would not otherwise be subject to jurisdiction in the forum state, then the due process requirement of purposeful availment has not been met as to that defendant. Use of the conspiracy theory, therefore, is only constitutional for situations in which all of the conspirators have met the due process requirements. However, if this is the case, reliance on the conspiracy theory is unnecessary; jurisdiction over the defendant exists regardless of whether the theory is applied. Furthermore, tort conspiracy is merely a means of imposing liability on a wider group of defendants than would otherwise be liable. Of course the fact of liability does not confer jurisdiction, yet, by endowing a conspiracy with an independent jurisdictional significance, the conspiracy theory does just that.

Conclusion

Attributing the jurisdictional contacts of one conspirator to his co-conspirator as an independent source of jurisdiction is deceptively attractive. It greatly simplifies the jurisdictional analysis. Instead of evaluating contacts under due process standards (*International Shoe* etc.), the court simply decides whether there was a conspiracy—a question more easily answered. But serious constitutional questions cloud its validity.

Perhaps that is why the Alabama Supreme Court goes out of its way to avoid defining the scope of conspiracy jurisdiction in this state. While it is clear that Alabama recognizes conspiracy jurisdiction, it is unclear what that means. One elegant exit from the court's conundrum (recognizing a concept that is likely unconstitutional) is to define conspiracy jurisdiction in constitutional terms. That is precisely what the court did in *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972). By defining conspiracy to require that each defendant know or should have known that his

actions would affect the forum state, the court essentially required that each defendant purposefully avail himself of the forum state before jurisdiction could be conferred. This interpretation of conspiracy jurisdiction effectively eliminates its salient quality—imputation of contacts.

The "effects test" is another option for retaining conspiracy jurisdiction while drawing closer to due process requirements. Under the effects test, each defendant must know that its individual actions will cause injuries in the forum state. See *Gutierrez v. Givens*, 1 F.Supp.2d 1077 (D.C. Cal. 1998). In New York, for example, a plaintiff must demonstrate a prima facie factual showing of a conspiracy to commit a tort within New York and allege facts warranting the inference that the defendant was a member of the conspiracy. Specifically, the plaintiff must show that the out-of-state co-conspirator had an awareness of the effects of the activity in New York, the New York co-conspirators' activity was for the benefit of the out-of-state co-conspirator, and the New York co-conspirators acted on behalf of the out-of-state co-conspirator. *Cleft of the Rock Foundation v. Wilson*, 992 F.Supp. 574 (D.C. N.Y. 1998) (nonresident attorney was member of conspiracy and thus subject to personal jurisdiction in New York).

While global communication, business and travel boost societal fluidity, due process remains tied to each individual's contacts with the forum state. Until the U.S. Supreme Court absorbs imputation of contacts into the minimum contacts analysis, claimants and courts are on uncertain ground when they seek and exercise jurisdiction over nonresidents based on conspiracy jurisdiction theory. ▲▼▲



Professor McKay Cunningham is an assistant professor of law at Phoenix School of Law. He graduated in 2000 from Baylor University School of Law, where he served as managing editor of

the Baylor Law Review, and then clerked for Judge Joel F. Dubina, Eleventh Circuit Court of Appeals. Professor Cunningham also served as a staff attorney to Justice Scott A. Brister on the Supreme Court of Texas and worked with Rose Walker LLP in Dallas.



J. ANTHONY MCLAIN

Relegating Present Client to “Former Client” Status to Avoid Conflict of Interest

QUESTION:

“I have found myself in a situation where my opponent in litigation contends that my law firm must withdraw from representation of a long-time client, A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the new *Rules of Professional Conduct* which became effective January 1, 1991. I would appreciate receiving a confidential opinion from you as to whether we can take advantage of the comments to Rule 1.7 and withdraw from representing client C and continue to represent client A under Rule 1.9.

“The situation arose when I filed suit on behalf of our long-time client A against B, an Alabama general partnership and its general partners C and D, for breach of a construction contract and fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

“Shortly after filing suit, I learned that another lawyer in our firm, Jane Doe, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved preparing the necessary legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose.

OPINIONS OF THE GENERAL COUNSEL Continued from page 311

Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

“Legal work commenced in April 1989 on the condominium project for C. For several years prior to this date, my law firm had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which was not in any way related to the condominium project. In November 1989, client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B and in November 1990, A asked us to file suit against B. C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990.

“In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

“In January 1991, we were advised by counsel for C (Law Firm X) that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a copy of the complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the *Rules of Professional Conduct* and cites a portion of the comments thereto (under subtitle “Conflicts in Litigation”) which states: “Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.”

Since the matter involving C is wholly unrelated to the construction litigation, it seems to me that other comments to Rule 1.7 control how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comments under “Loyalty to a Client” states:

“Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.” Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

“This resolution of the asserted conflict was mentioned to C’s counsel who responded by citing *Wolfram’s Hornbook on Modern Legal Ethics* and the California bankruptcy case *In re California Cannery and Growers*, 74 f.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to who he would represent. However, the bankruptcy case seems to be distinguishable from our situation since the two matters involved here are totally unrelated and the case deals with the old code. Additionally, the portions of *Wolfram* cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

“Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent our longtime

client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and to continue to represent C in the condominium project, or whether we should do something else? We would appreciate your confidential opinion as to what we should do in this situation and whether we can withdraw from representation of C and continue to represent A in the construction litigation.”

ANSWER:

Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

DISCUSSION:

Rule 1.7 of the *Rules of Professional Conduct* provides the following:

“Rule 1.7 Conflict of Interest: General Rule (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.”

As pointed out in the Comment to Rule 1.7, “loyalty is an essential element in the lawyer’s relationship to a client.” In the situation where a lawyer takes part in litigation against an existing client “the propriety of the

conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.” *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the *Rules of Professional Conduct* provides the following:

“Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.”

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client. In the instant situation there is no question that you could not continue to represent both client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9). Indeed the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that,

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“Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.”

We do not believe that this Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise, would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, (9th Cir. 1981) where the Court held that:

“The present-client standard applies if the attorney simultaneously represents clients with different interests. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a ‘former client’ by choosing when to cease to represent the disfavored client.”

(Supra at 1345, N.4, citing, *Fund of Funds Ltd. v. Arthur Anderson & Co.* 567 F.2d 225(2d Cir. 1977). For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to your client C. [RO-1991-08] ▲▼▲

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Being a Legislator

Here in the middle of the election cycle, where the initial primary was held June 1 and the runoff is six weeks later on July 13, a person wanting to be in the legislature has already expended great time and effort, knowing that there are almost four more months to go until the general election November 2.

Senators Bobby Denton, Kim Benefield, Charles Bishop, Larry Dixon, Hank Erwin, Hinton Mitchem, and Myron Penn all chose not to run for reelection. With 20 percent of the senate members certain to change, these will definitely be Alabama's most contentious and expensive senatorial races in state history.

The house of representatives will be losing only nine of its 105 members. Three of those are choosing to run for senate seats. There will be 13 new legislators while, typically, there are around 20 to 25 new members in the two houses.

Generations ago, lawyers dominated the state legislature and congress. Now that the demands of being in public office have become so time-consuming, the number of lawyers in the legislature has dropped to the lowest in history.

LEGISLATIVE WRAP-UP

Continued from page 315

My former law partner, Congressman Albert Rains, often commented that during his 20 years of service in the U.S. House of Representatives, Congress began in January and ended by Labor Day, when they could head back to their home districts to be with their constituents and find out what was on the minds of the voters. In the past 40 years, Congress has steadily met year-round. With the thousands of lobbyists often descending upon Capital Hill, it becomes much harder to know what their voters really want. There is some evidence that in 2010, many incumbents may rediscover their constituents and recognize the disconnection between Washington and their district.

The Alabama legislature met every other year until 1976, when it began meeting annually. The time restraints of being a legislator became much greater and more time-consuming with annual meetings.

Most citizens opt to let someone else run our government, since 39 of the 105 house members are unopposed and nine of the 35 senators are unopposed. It is certain that 47 percent of today's legislators will be next year's legislators.

The session each spring is for 15 weeks, and legislators meet only on Tuesday, Wednesday and Thursday of these weeks. On Monday and Friday, when they are in the district, they are met by their constituents who are their neighbors, fellow church members and friends.

Alabama has only a very limited home rule, which requires state legislators to be involved in legislation that affects just their community. Unlike most states, where a legislator goes to the state capitol to get involved with statewide issues, at least one-third to one-half of all the legislation Alabama legislators will be addressing each year involves just one small segment of the state.

Once elected in November, legislators immediately begin their pursuit of leadership positions, committee assignments and preliminary plans for reorganizing the house and senate. They will meet for the first time for an Orientation Conference December 6-8 at the University of Alabama School of Law in Tuscaloosa where a three-day orientation will be held by the Alabama Law Institute. This will be followed by a one-day training session in Montgomery in January for first-time legislators. And, on January 10, 2011, they will meet for a 10-day organizational session which will culminate with the inauguration of Alabama's new governor.

On March 1, 2011, legislators will begin their first of four legislative regular sessions during their newly-elected term.

New legislators will find they have a small private office, phone, parking space, and the shared use of a secretary but not have any personal staff. They do have three legislative agencies to assist them. The Legislative Reference Service will draft their bills; the Legislative Fiscal Office will give them an analysis of the financial impact of their legislation and the Alabama Law Institute will draft major legislation, provide each of their committees with a lawyer and provide house members with an intern for constituent services.

In the district they only have themselves and their families.

Each week legislators can expect to arrive in Montgomery on Tuesday before noon, check into their hotel and then sometimes head to a committee meeting before the session starts at 1 p.m. The Tuesday session generally ends before dinner. Legislators will typically



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have dinner with other legislators that night. Wednesday is committee meeting day. House and senate committee meetings begin around 9 a.m. and end around 3 p.m. Wednesday evenings are often filled with dinners with of the over 600 legislators or industry groups holding their annual "legislative day" events. Thursday morning the session will begin at 10 a.m. and end in mid-afternoon, in time for legislators to be home before dark.

Friday, while the legislators are trying to go back to their paying jobs, they are typically visited by county commissioners, city councilmen and citizens back in their districts to discuss issues local to the community.

Legislators are constantly being met by their constituents on Saturday while attending their children's ballgames or community fish-fries. On Monday morning, the week starts again exactly like the last week, with only the people and issues changing.

During the period after adjournment of the 2010 Regular Session and the general election, no bill may be pre-filed. Absent the Governor's calling the legislature into special session, all legislative activity ceases. As soon as the November 2nd General Election ballots are certified, the winner can be sworn in as a legislator. The Governor must wait until January 20, 2011. ▲▼▲

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Notices

- **Wayne Harris Smith**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2010 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 05-299(A), 06-61(A), 06-95(A) and 06-94(A) by the Disciplinary Board of the Alabama State Bar.
- **Jacob Calvin Swygert, Jr.**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2010 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 09-1039(A), 09-2552(A) and 09-2758(A) before the Disciplinary Board of the Alabama State Bar.
- **Amy Leigh Thompson Thomas**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2010 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 07-48(A) and 07-93(A) by the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Supreme Court of Alabama entered an order reinstating **Virgil Jackson Elmore, III** to the practice of law in Alabama, effective March 1, 2010. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Elmore had received a three-year suspension effective March 14, 2006. [Rule 28, Pet. No. 09-2500]
- The supreme court entered an order based upon the decision of Disciplinary Board, Panel III, of the Alabama State Bar, reinstating **Richard Charles Frier** to the practice of law in Alabama, subject to certain probationary requirements for a period of five years, effective March 23, 2010. [Pet. No. 09-2346]

Disbarments

- The Supreme Court of Alabama adopted the March 3, 2010 order of the Alabama State Bar Disciplinary Board, Panel III, disbarring Decatur attorney **Garland Clifton Hall, III** from the practice of law in Alabama, effective March 17, 2010. On March 3, 2010, Hall entered a consent to disbarment regarding unauthorized withdrawals from the trust account of the law firm where he was employed. [Rule 23(a), Pet. No. 2010-356; ASB No. 2009-2790]
- On February 25, 2010, the Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Board, Panel II, disbarring Birmingham attorney **Michael John Romeo** from the practice of law in Alabama, effective March 23, 2010. Romeo surrendered his license as a result of having converted client funds from a real estate loan transaction for his personal use and benefit. [Rule 23, Pet. No. 09-2349; ASB nos. 08-1415(A) and 09-2199(A)]



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DISCIPLINARY NOTICES

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- The Supreme Court of Alabama adopted the order filed on January 4, 2010 of the Alabama State Bar Disciplinary Board, Panel III, disbaring Gardendale attorney **John Scott Starkey** from the practice of law in Alabama, effective November 16, 2007. On November 16, 2007, a hearing was held in the below-referenced matters and Starkey failed or refused to appear at the hearing. These matters involved violations of rules 1.3, 1.4, 1.5(a), 1.16(d), 8.1(b), and 8.4, *Ala. R. Prof. C.* Starkey's license to practice law had been summarily suspended effective September 21, 2004. [ASB nos. 04-218(A), 04-219(A), 04-250(A), 04-251(A), 04-281(A), 04-285(A), 04-300(A), 04-308(A), 05-08(A), 05-09(A), 05-24(A), 05-25(A), 05-40(A), 05-41(A), 05-61(A), 05-130(A), 05-168(A), 06-47(A), and 06-69(A)]

Suspensions

- On April 5, 2010, Montgomery attorney **Robert Bozeman Crumpton, Jr.** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Crumpton's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 2010-556]
- On April 6, 2010, the Disciplinary Board of the Alabama State Bar, Panel I, entered an order suspending Birmingham attorney **Thomas A. Fouts** for 45 days.

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DISCIPLINARY NOTICES

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The suspension was held in abeyance and Fouts was placed on probation for one year. The suspension was based upon Fouts's conviction for violating 18 U.S.C. 1030(a)(2), in that Fouts illegally accessed the e-mail account of a third party. [Rule 22(a), Pet. No. 2010-267; ASB No. 05-44(A)]

- Birmingham attorney **Robert Charles Gish, Jr.** was suspended from the practice of law in Alabama for three years by order of the Supreme Court of Alabama, effective March 1, 2010. The supreme court entered its order in accord with the provisions of the February 24, 2010 order of the Disciplinary Commission of the Alabama

State Bar accepting Gish's conditional guilty plea to violations of the *Alabama Rules of Professional Conduct*. In ASB nos. 07-129(A) and 09-2173, Gish began representing Jailbusters, Inc., a bail bonding company, in or around 2001. Gish admitted that during his representation he allowed a disbarred attorney to draft and/or prepare legal pleadings and motions on behalf of Jailbusters. Gish would later sign those legal pleadings and motions as the attorney of record for Jailbusters or allow a non-lawyer to sign his name. The legal pleadings and motions would also be filed electronically by the disbarred attorney utilizing Gish's electronic signature. In doing this, Gish violated rules

3.4(c), 5.3, 5.4(c), 5.5(A)(2), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* [ASB nos. 07-129(A) and 09-2173(A)]

- Alabama attorney **Robert Winthrop Johnson, II**, who is also licensed in Washington, D.C., was suspended from the practice of law in Alabama for 30 days, effective March 15, 2010, by order of the Supreme Court of Alabama. The supreme court entered its order, as reciprocal discipline, pursuant to Rule 25, *Alabama Rules of Disciplinary Procedure*. The supreme court's order was based upon the November 25, 2009 opinion of the District of Columbia Court of Appeals, wherein Johnson was found to be in violation of Rule 1.15(c), *District of Columbia Rules of Professional Conduct*. Johnson failed to safeguard and hold in trust funds which he held when a dispute arose among persons claiming an interest in said funds. [Rule 25(a), Pet. No. 09-2744]

- Anniston attorney **Renee Denise Kirby** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for 91 days. The Disciplinary Commission ordered that said suspension be held in abeyance and Kirby be placed on probation for two years pursuant to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Commission accepted Kirby's conditional guilty plea wherein she pled guilty in three separate cases to violations of rules 1.3, 1.4(a), 1.15(a) and 8.4(a), *Ala. R. Prof. C.* In each of these cases Kirby failed to perform legal work for clients which she was hired to do. [ASB nos. 09-1267(A), 09-1751(A), 09-2236(A) and 09-2736(A)] ▲▼▲

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Among Firms

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Gregory & Hardin LLC announces the opening of the **Gregory & Hardin Bessemer Law Office and Mediation Center**, at 314 18th St. N., Bessemer 35020. This location is in addition to the Birmingham office.

Hand Arendall LLC announces that **Wesley J. Hunter** has become associated with the firm and **Anne G. Burrows, F. Lane Finch, Jr.** and **J. Mark Hart** have become members.

Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP, and **Walston Wells & Birchall LLP** announce the two firms have merged, under the

name **Jones Walker**, with offices at One Federal Place, 1819 Fifth Ave., N., Ste., 1100, Birmingham 35203. The firm announces that **Jerry W. Powell** has joined as special counsel.

Leavell & Associates LLC announces that **Laura Motlow Betts** is now associated with the firm.

Lloyd, Gray & Whitehead PC announces that **E. Britton Monroe** has been added to the firm name which is now **Lloyd, Gray, Whitehead, & Monroe PC**.

Najjar Denaburg PC announces that **J. Todd Miner** has been named a shareholder.

Nakamura, Quinn, Walls, Weaver & Davies LLP announces the appointment of **Patrick K. Nakamura** as commissioner to the Federal Mine Safety and Health Review Commission. The new firm name is now **Quinn, Walls, Weaver & Davies LLP**.

The **Law Office of Andrew M. Skier** announces that **Jacquelyn D. Tomlinson** has joined as an associate. The firm is now known as **Skier & Associates**.

Vernis & Bowling announces that **John B. Welsh** has joined as the managing attorney of workers' compensation. ▲▼▲

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



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