

SEPTEMBER 2010 • VOL. 71, NO. 5

# THE ALABAMA LAWYER



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- 15 Business and Nonprofit Entities *Birmingham*
- 22 Real Estate *Birmingham*
- 22/23 Retreat to the Beach *Orange Beach*
- 29 Alabama Probate Law *Birmingham*

**NOVEMBER**

- 3 Professionalism *Birmingham*
- 3 Professionalism (live satellite) *Montgomery*
- 5 Social Security Disability *Birmingham*
- 12 Estate Planning *Birmingham*
- 19 Bankruptcy *Birmingham*

**DECEMBER**

- 1 Alabama Update *Montgomery*
- 1 Alabama Update (live satellite) *Mobile*
- 3 Employment Law *Birmingham*
- 9 Tort Law Update *Birmingham*
- 16 Civil Litigation *Birmingham*
- 17 Trial Skills *Birmingham*
- 20 Alabama Update *Birmingham*
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*Pictured on the cover are Alabama State Bar President Alyce Spruell and her husband of 29 years, Bruce, along with their son, Taylor, who is 23 and works with D-I Sports in Birmingham, and their daughter, Cameron, who is 20 and a student at the University of Alabama studying family and adolescent counseling. The photo was taken on the campus of the University of Alabama, which is only appropriate since the Spruells are Tuscaloosa residents and loyal 'Bama fans (RTR)!*

*—Photo by Crosby Thomley Photography, Northport, [www.crosbythomley.com](http://www.crosbythomley.com)*

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

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**November 12  
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Commercial Real Estate Law Seminar  
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**December 3  
December 10**

17th Annual Employment Law Update  
Constructive Cross Examination-The Next Generation  
*featuring Roger J. Dodd*

**December 17  
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ALYCE M. SPRUELL

## Building Better Citizens: Why the Alabama State Bar should support and participate in Civics Education

- 74 percent of Americans said they knew at least one of the three branches of government. When asked to name them, only 36 percent could correctly name one of them.
- 15 percent of Americans knew that John Roberts is the Chief Justice of the United States Supreme Court, while 66 percent could name one of the judges on the panel of "American Idol."
- 91 percent of Americans said state judges interpret state laws and the constitution, while 87 percent believe, to a great or moderate extent, that it is the state legislators responsibility – an overlap of 81 percent.

2007 Annenberg Public Policy Center, Public Understanding of and Support for the Courts, Survey details available at [www.annenbergpublicpolicycenter.org](http://www.annenbergpublicpolicycenter.org)

Civics education has received high-profile support in the last few years, with both the Hon. Sandra Day O'Connor and the Hon. David Souter devoting their energies and influence to increase the effective teaching of civics education in our schools. A recent report commissioned by the ABA Division for Public Education and the Campaign for the Civic Mission of Schools demonstrates how interactive discussion-based civics education helps develop the skills that young Americans need to succeed in the 21st century workforce. In addition, providing students a basic understanding of our government and the rights and responsibilities of individual citizens has proven effective in enhancing educational opportunities and reducing the incidence of school bullying.

*"There is  
no higher  
office than  
that of  
citizen."*

Justice Louis Brandeis

## PRESIDENT'S PAGE

Continued from page 335

*“There’s nothing that will take us down sooner as a nation than a nation of young people who don’t understand the justice system.”*

Honorable Sandra Day O’Connor

During my year of service as your bar president, I will highlight how active involvement from our bar membership can impact both student and community understanding of the basic tenets of our government, and add to the rich discussion of citizens’ rights and responsibilities. I have also appointed a committee to focus on this issue during the coming year, with the goal of identifying resources that can be used by schools and community education programs for civics education.

### Why civics education?

Stating the obvious, people will not support nor will they respect what they do not understand. In my practice, I invariably hear from clients and witnesses that they think the “fix” is in for certain lawyers or interest groups in our Alabama courts. When I ask them why, their answers usually center on their perception of how cases are handled within our court system. Their feelings are fueled by what they “learn” from judicial campaign ads or information. Perception about our profession and judiciary is also blurred by the fictional characterization of justice in the entertainment industry or by reality television shows. Add to this mischaracterization of our profession the lack of fundamental understanding of our general population due to the lack of civics instruction in our schools, and it is clear we have a problem that could soon reach crisis level.

Respect for the separation of powers established by the Constitution cannot just be instantly “created” through a 30-minute video or even a one-semester course in middle or high school. Instead, it must be taught in our schools throughout the years of primary

and secondary education. We must also include in this educational approach our adult and community-based programs so that those who may not have had the chance to receive education about the rule of law and the necessity of an independent judiciary in their formative years can now gain an understanding in their adult education programs. (For more information, visit [www.abanet.org/judind/toolkit/impartialcourts](http://www.abanet.org/judind/toolkit/impartialcourts).)

### What do we hope to achieve?

The ASB committee is comprised of lawyers, judges, educators and even a member of the Alabama Public Television leadership. Our goal is to both create original materials and content that can be provided to our schools and community education programs as well as to lobby for a commitment to increase civics instruction on a consistent basis. The goals are high but the stakes are high as well. If our bar does not speak out and support the rule of law in our community, who will? We must take this responsibility seriously now, not later. If we don’t, the future consequences are obvious for our state, nation and profession.

Please contact me if you are interested in being involved in this effort. We want and need your help! I will report during the year regarding our progress through this publication, in the *Addendum*, and through our bar Facebook page. Please also follow me on Twitter @amspruell.

Thank you again for the tremendous honor of serving you this year as your president. I look forward to seeing you in my travels throughout our state this year. If I can provide a program to your local bar, civic group or community event, please let me know. ▲▼▲



# Want to know more?

Please visit the following websites for educational materials and to find out how you can get involved:

## **Alabama Center for Law & Civics Education: [aclce.org](http://aclce.org)**

The Center's 7th edition of *Play by the Rules* is partially funded by a grant from the Alabama Law Foundation. This wonderful publication is used in middle schools in Alabama but needs local support and funding to reach more students.



## **The Center for Civics Education: [civiced.org](http://civiced.org)**

The Center's website also has a Facebook and Twitter link. The materials on this website include their Public Citizen project that encourages interactive involvement of both middle and high school students by teaching them how to do public policy problem-solving through group interaction and activity.

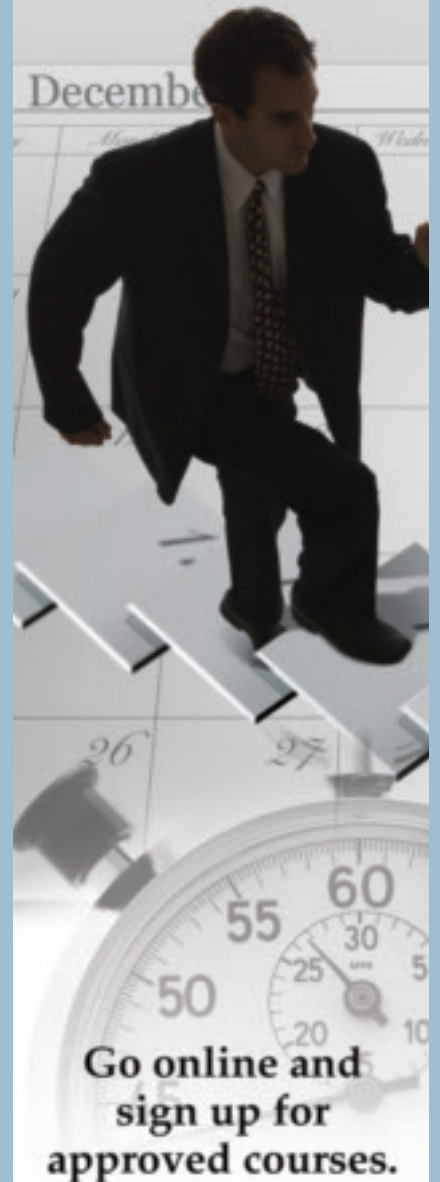


## **ICIVICS.ORG**

iCivics.org is a web-based education project designed to teach students civics and inspire them to be active participants in our democracy. iCivics is the vision of Justice Sandra Day O'Connor, who is concerned that students are not getting the information and tools they need for civic participation, and that civics teachers need better materials and support. Games include "Do I have a right?" that allows the student to run their own law firm that focuses on constitutional law issues; "Supreme Decision" where the student can cast the deciding vote in a real Supreme Court case; and "Executive Command" that allows the student to be President of the United States for a day. Other interactive games involve participation in making laws as a member of Congress or arguing a case in front of the Supreme Court. Teacher links are provided and encouraged for classroom usage and application.




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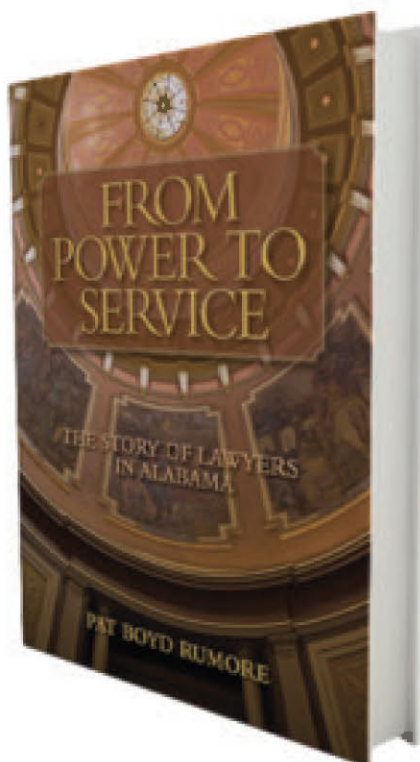


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When it comes to a  
history of the profession,  
we wrote the book.



## From Power to Service: The Story of Lawyers in Alabama

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

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

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

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

The cost is \$40 per copy.

Order your copy today using a credit card, go online to: [www.alabar.org/historybook](http://www.alabar.org/historybook)





KEITH B. NORMAN



## The Challenges Ahead

At this year's Grand Convocation, during the Alabama State Bar's Annual Meeting, **Alabama Supreme Court Chief Justice Sue Bell Cobb** gave her yearly "State of the Judiciary" address and highlighted the challenges that lie ahead for our state's judicial system. It is no secret that funding for our state's judicial system has not kept pace with increasing costs and caseloads.

Increased filing fees have helped but there is a limit as to how high court filing fees should be raised. As lawyers we should not accept, and Alabama citizens do not deserve, a "pay-as-you-go" system of justice.

In view of the critical lack of funding and dire prospects for the legislature to provide meaningful increases for the court system any time soon, Chief Justice Cobb reported on the work of a committee of district and circuit judges she appointed almost a year ago to study



*Chief Justice Sue Bell Cobb and ASB Past President Sam Crosby visit during the annual Bench & Bar Luncheon.*



# EXECUTIVE DIRECTOR'S REPORT

Continued from page 339

the issue of dealing with the increasing caseloads of Alabama judges. They specifically addressed the disparity in caseloads among the state's district and circuit judges. She estimated that it would take more than 130 new judges to equalize caseloads statewide at a cost of more than \$50 million extra, a sum which the legislature simply does not have to appropriate.

In explaining the committee's recommendations, the chief justice reminded everyone that there were no easy solutions. She then outlined the basic elements of those recommendations which included the creation of a single-tier trial court system. Under this plan, all district court judges would become circuit judges and district court judgeships would be eliminated. Small claims and the limited jurisdiction of district court would be retained and jurisdiction in those matters exercised by circuit judges.

To address the disparity of caseloads in the various circuits, a Judicial Allocation Commission would be created. The commission would be authorized to eliminate a vacated judgeship in a circuit resulting from a judge's death, retirement, resignation or removal from office and transfer the judgeship to another circuit. This decision would be based not on politics but statistical data in order to equalize the caseloads among the circuits. Under the plan the committee has recommended, every county would have at least one circuit judge who would run for reelection from the county of his or her residence.

Obviously, this plan would be a fundamental change to our court system. Not since the adoption of the Judicial Article championed by Chief Justice Howell Heflin nearly 40 years ago has restructuring the court system been attempted. Naturally, this is an issue which is of tremendous interest to the public and especially to the bar. **Alabama State Bar President Alyce Spruell** has appointed a committee which will be examining this plan and will work with the chief justice to address any concerns of the legal profession.

The plan is more complex than I have recounted above but you will hear more details about it over the next few months. The contemplated changes will require the legislature to approve a constitutional amendment that will have to be ratified by the voters. I encourage you to keep an open mind regarding this plan and any others that might be offered to address the grave financial issues facing our court system and that are causing an inordinate delay in many parts of the state for those wanting their day in court. Some individuals might consider this to be a problem for the courts to address on their own. In reality, lawyers must join with the courts to resolve this problem on behalf of all Alabama citizens. ▲▼▲

## Student Loan UPDATE

**Of the 411 first-time takers of the July 2010 bar exam, 70 percent had student loans. The average student loan amount for those having loans was \$87,588 or an increase of 4.3 percent over the July 2009 average.**





**Bivens, John Alan**  
Birmingham  
Admitted: 1976  
Died: May 7, 2010

**Blinn, George Anderson, III**  
Santa Fe  
Admitted: 1953  
Died: April 19, 2010

**Clark, Mary Anne Westbrook**  
Birmingham  
Admitted: 1976  
Died: April 7, 2010

**Clower, James Gibson**  
Troy  
Admitted: 1948  
Died: October 2, 2004

**Danley, Joel Franklin**  
Mobile  
Admitted: 1971  
Died: May 24, 2010

**Eyster, John Charles**  
Decatur  
Admitted: 1954  
Died: April 16, 2010

**Farley, Joseph McConnell**  
Birmingham  
Admitted: 1952  
Died: May 24, 2010

**Ketcham, Carleton Putnam, Jr.**  
Birmingham  
Admitted: 1974  
Died: April 22, 2010

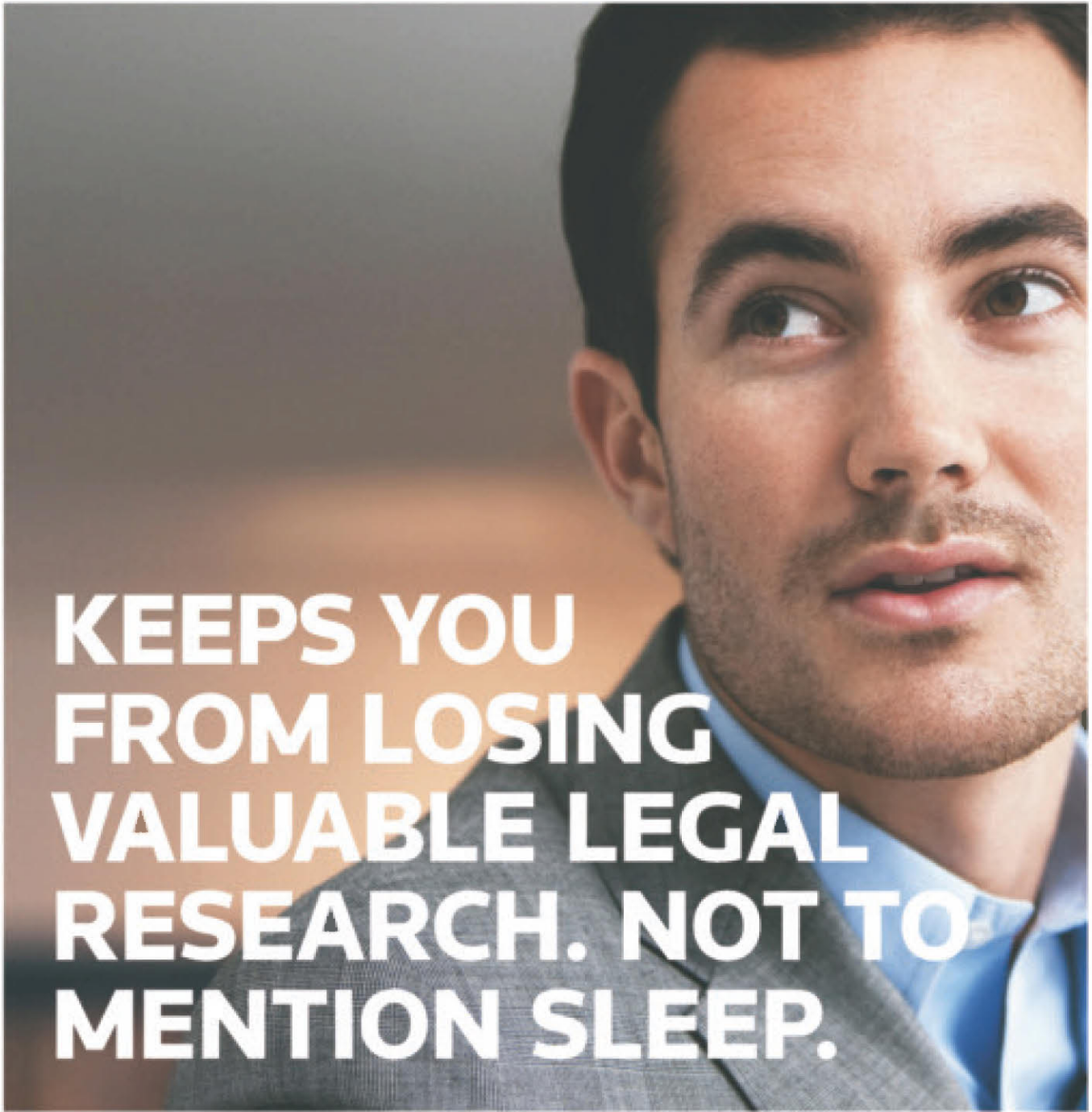
**McEniry, Thomas Robinson**  
Bessemer  
Admitted: 1945  
Died: May 18, 2010

**McRae, Claude Bennett, Jr.**  
Birmingham  
Admitted: 1962  
Died: April 15, 2010

**Pope, Max Cleveland**  
Birmingham  
Admitted: 1962  
Died: May 13, 2010

**Proctor, Grady Burns, Jr.**  
Birmingham  
Admitted: 1952  
Died: April 18, 2010

**Slate, Ralph Edward**  
Decatur  
Admitted: 1949  
Died: April 16, 2010



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CLAY A. LANHAM

*clanham@vickersriis.com*

# Get Involved!

Two months ago, at this year's ASB Annual Meeting, the Young Lawyers' Section (YLS) wrapped up a successful year and elected new officers for 2010–2011. New officers are:

Clay A. Lanham (Mobile), president  
 Navan Ward, Jr. (Montgomery), vice president  
 Katherine R. Brown (Birmingham), secretary  
 W. Chris Waller, Jr. (Montgomery), treasurer

I am proud to take over and look forward to serving as president of the YLS of the Alabama State Bar. Many thanks go to the section's immediate past president, Robert N. Bailey, II. Without Bob's leadership, your YLS would not have had such a successful year.

I also take this opportunity to recognize the members of the section's Executive Committee for the upcoming year:

Mark Bledsoe	J. Bradford Boyd Hicks	Andrew S. Nix
Gray M. Borden	Brandon D. Hughey	Jon H. Patterson
David S. Cain, Jr.	Brett A. Ialacci	Larkin H. Peters
Louis M. Calligas	William J. Long, IV	Kathryn O. Pope
Nathan A. Dickson, II	Elizabeth J. Kanter	William H. Robertson, IV
Hallman B. Eady	Rodney E. Miller	Nathan A. Ryan
Sancha Epiphane	Harold D. Mooty, III	Mitesh B. Shah
Cleophus Gaines, Jr.	Clifton C. Mosteller	Charles E. Tait
Katie L. Hammett	D. Brian Murphy	Scott Tindle
Walton W. Hickman	S. Hughston Nichols	

# YOUNG LAWYERS' SECTION

Continued from page 343

The YLS has an exciting year full of events to come. Among them are:

- the Fall Admissions Ceremony in October;
- the Iron Bowl CLE in November;
- the Minority Pre-Law conferences in March and April;
- the YLS Annual Sandestin CLE Seminar in May; and
- the Spring Admissions Ceremony in June.

In addition, there are several other projects which the YLS provides support to and/or is involved in:



- **Special Grants Program**, which provides grants to law-related projects and/or law-related non-profit organizations in Alabama;
- **Appleseed Heir Property Project**, which is designed to address the inequities inherent in collective land ownership through research, community education and awareness and pro bono representation of underprivileged affected parties;

- **ABA Affiliate Outreach**, which sends up to five delegates from Alabama to the annual and mid-year meetings of the ABA; and
- **Lawyer in Every Classroom**, which provides schools throughout the state with a young lawyer volunteer to teach one session of its *Play by the Rules* educational program.

As a reminder, the YLS is open to anyone licensed to practice law in Alabama who is age 36 or younger or who has been admitted to the bar three years or less. There is no charge or membership fee to become a member of the YLS. To join, just check the box on the Section Membership Application. I encourage all eligible lawyers to become involved in the YLS. It's a great way to keep up with your law school classmates and take advantage of programs targeted specifically at young lawyers.

For more information on anything I've mentioned, feel free to contact me or any of the officers or members of our Executive Committee. ▲▼▲

## Just One Look

 <p>Just One Look ON-DEMAND Trial Court Records</p> <p><a href="http://www.AlacourtAccess.com">www.AlacourtAccess.com</a></p> <div style="background-color: #333; color: white; padding: 5px; text-align: center;"> <span style="font-size: 2em; font-weight: bold;">A</span>  <span style="font-size: 2em; font-weight: bold;">C</span> </div> <p style="font-size: 0.8em;">Alabama Administrative Office of Courts</p>	<b>ON DEMAND Access to Alabama's Trial Court Records... One Case at a Time</b>				
	<b>Type of Searches</b>	<b>Alabama Court Records Available</b>		<b>Report Information</b>	
	Name Case Number	Criminal Records Civil Records Small Claims Records	State Traffic Records Domestic Relations Child Support	Setting Dates Court Action Party Information	Summary Financial Info Images

"Just One Look"

**Case Detail Report** includes basic court information, court action, case status, setting dates, party information, financial history and a detailed case action summary.

**Case Monitoring** allows a subscriber to monitor future changes in a case record. The subscriber receives an email notification anytime a change is entered into the state system. The notification email shows the old information, along with the change.

**Just One Look** is an application that allows attorneys and the general public to monitor and track case filings and details.

The general public, most of whom will not subscribe to Alacourt.com on a monthly basis, are able to electronically access State Court documents through this On DEMAND website.

A flat fee is charged per case instead of the monthly fee that Alacourt.com subscribers pay for access to court documents.

The Just One Look link can be accessed from the Administrative Office of Courts website at [www.Alacourt.gov](http://www.Alacourt.gov) or directly at [www.AlacourtAccess.com](http://www.AlacourtAccess.com).



Commission and department members include Paul Butler (Department of Human Resources—Children and Family Services), Sharon Ficquette (chief counsel, Department of Human Resources), Senator Roger Bedford, Nancy Buckner (commissioner, Alabama Department of Human Resources), Tom Methvin (president, Alabama State Bar), Buddy Hooper (president, Alabama Foster and Adoptive Parents Association), and Ted Hosp (chair, Access to Justice Commission) in Montgomery on the occasion of signing the Partnership Letter

- The **Alabama Access to Justice Commission** announces a new partnership with the **Alabama Department of Human Resources** to assist foster parents in filing petitions to adopt children.

The Alabama Access to Justice Commission was created by the Alabama Supreme Court in April 2007 to serve as a coordinating entity for the legally underserved, the legal community, social service providers and the private and public sectors. This partnership brings together the Alabama State Bar and the Alabama Department of Human Resources to help foster parents with the legal procedures in adopting children.

- **LaVeeda Morgan Battle**, former member of the Obama transition team, was selected to serve on the Presidential Search Advisory Committee for the Legal Services Corporation (LSC). The LSC is the single largest provider of civil legal aid for low-income persons in the nation. This year, the LSC received over \$400 million in funding from Congress. She is a board member of Legal Services Alabama, a grantee of LSC.



Battle

- Adams & Reese Partner **Reggie Copeland** has been chosen vice chair of the newly created Alternative Dispute Resolution Section of the Alabama State Bar.

Copeland is the partner in charge of the firm's Mobile office and his practice focuses on mediation, product liability, medical malpractice, nursing home, insurance, bad faith, and commercial litigation, representing both plaintiffs and defendants.



Copeland

## ALABAMA ACCESS TO JUSTICE COMMISSION

## ALABAMA DEPARTMENT OF HUMAN RESOURCES

LAVEEDA MORGAN BATTLE

REGGIE COPELAND

LANE FINCH

TRIPP HASTON

JIM PRATT

JIM THOMPSON

CAROL ANN SMITH

JANINE L. SMITH

GEORGE WALKER



## BAR BRIEFS Continued from page 345

- **Lane Finch**, a member of Hand Arendall's Birmingham office, has been appointed to the Steering Committee for the Defense Research Institute's 2011 Insurance Coverage and Claims Institute.



Finch

Finch has advised on insurance coverage, defended bad-faith claims and litigated first-party and third-party claims in Alabama and California for 22 years.

- At its recent annual meeting in Barcelona, **Tripp Haston**, a partner with Bradley Arant Boult Cummings LLP, was selected as a new member of the International Association of Defense Counsel's (IADC) Board of Directors. Founded in 1920, the IADC serves an international membership of corporate and defense attorneys.



Haston

- **Jim Pratt** and **Jim Thompson**, partners with Hare, Wynn, Newell & Newton, have been selected as two of the 2010 Lawdragon 500 Leading Lawyers in America.



Pratt



Thompson

Pratt and Thompson were chosen from a field of more than 25,000 outstanding lawyers in America. The 500 selected lawyers embody the "best of lawyering in 2010."

- The Women Lawyers' Section of the Birmingham Bar Association (BBA) awarded Birmingham attorney **Carol Ann Smith** the distinguished Nina Miglionico *Paving the Way* award in June. The Women Lawyers' Section established this leadership award in 2005 to recognize and honor individuals who have actively paved the way to success and advancement for women



Smith

lawyers. It honors Nina Miglionico who was one of the state's first female lawyers, having been engaged in the private practice of law from 1936 until her death in 2009. Smith was a founding member of the Women Lawyers' Section.

In 1984, Smith was elected by her peers to become the first female president of the state bar's Young Lawyers' Section. In 1996, she became the first woman elected president of the BBA in its 100+ years of existence. In 1999, she became the first woman president of the Birmingham Bar Foundation. In 1997, the Alabama Defense Lawyers Association elected her their first female president of the statewide organization. Her excellent service in all of these capacities opened doors for the women attorneys who followed her.

- **Janine L. Smith**, with Burr & Forman LLP's Birmingham office, has been named to the 2010 roster of the *Birmingham Business Journal's* "Top Birmingham Women." This year, ten women professionals were named by the publication based upon their business and civic accomplishments. Smith was the youngest recipient at 34.



Smith

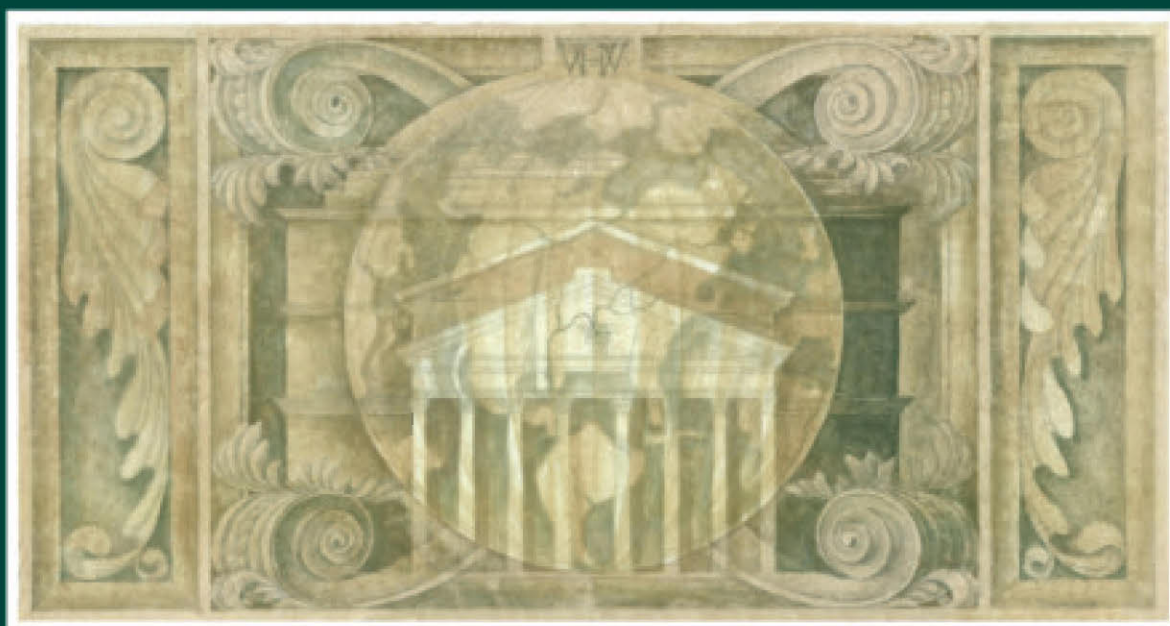
- **George Walker**, of Hand Arendall in Mobile, was elected president-elect of the Association of Defense Trial Attorneys (ADTA) during its recent annual meeting. The ADTA's purpose is to bring together selected trial lawyers whose practices consist substantially in the defense of claims at the request of insurance companies and self-insured companies and who have demonstrated possession of knowledge and skills necessary to provide legal services of the highest standard. Walker will assume the presidency of the association following its 2011 annual meeting. ▲▼▲



Walker

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# Spring 2010 Admittees

(Photograph by FOUTS COMMERCIAL  
PHOTOGRAPHY, Montgomery,  
photofouts@aol.com)



## STATISTICS OF INTEREST

Number sitting for exam .....	208
Number certified to Supreme Court of Alabama .....	105
Certification rate* .....	50.5 percent

### **Certification Percentages**

University of Alabama School of Law .....	76.96 percent
Birmingham School of Law .....	47.5 percent
Cumberland School of Law .....	38.1 percent
Jones School of Law .....	78.64 percent
Miles College of Law .....	12.5 percent

*\*Includes only those successfully passing bar exam and MPRE*

For full exam statistics for the February 2010 exam, go to [www.alabar.org](http://www.alabar.org), click on "Regulatory" and then check out the "Admissions" section.

# Alabama State Bar Spring 2010 Admittees

Ainsworth, Alicia Marie  
Alexis, Kathy-Ann Marcia  
Altazan, Blake Anthony  
Atkinson, John Wesley  
Balch, Matthew James  
Bates, Brandon Wade  
Bell, Matthew Kendrick  
Belvin, Mi Wu  
Biggiani, Brianne  
Blount, Edward Henry  
Boyd, John Bradley  
Boyles, Nathaniel Dodson  
Brackett, Carol Leigh  
Brinkley, Kathryn Hazelrig  
Brinkley, Thomas Wesley  
Brogden, Jason Robert  
Broussard, Lauren Landry  
Brown, Zane Nasif  
Brown, Stephen Andrew  
Brown, Erin Elise  
Bryant, Marcus Charles  
Brymer, Michael David  
Buggé, Jessica Elaine  
Burrell, Christopher Levar  
Burton, Richard Gilbert  
Carmack, Teela Smith  
Chang, Se Hun  
Chesnut, Holly Michelle  
Chuaychoo, Monchai  
Courville, Bethany Cobb  
Cox, Erica Vanessa  
Curtis, James Peter  
Cushen, Milford Lee  
Davis, Matthew Steven  
Dennis, Joseph Stewart  
Dillard, Michael Ardis  
Dorcey, Joshua Owens  
Doty, Tamra Janae  
Douglas, Heather Dawn  
Drake, Robert Alexander  
Dunuwila, Andrea Emerson  
Elijah, Kristen Leigh  
England, Jeremy Thomas  
Ezell, Christopher Hollis  
Flores, Ronald Salvador

Fuller, Joseph Robert  
Garrett, DeLesha Shanna  
Glenn, Stephen Beason  
Gossett, Matthew Ethan  
Green, Michael George  
Hamilton, Lindsay Brooke  
Hammond, William Luke  
Harold, Edward Francis  
Harper, Tristan Kent  
Hay, Davy Mack  
Hays, Bradley Adam  
Head, Mary Katherine  
Hearn, Cassandra Thompson  
Hickman, Charles Franklin  
Hinton, Chinita Ann Heard  
Hollis, Marshall Allen  
Howard, John Gordon  
Jackson, Avery Singleton  
Johnson, Travis Ryan  
Johnston, Vivian Gaines  
Kemmer, Richard Michael  
Kemp, John Arthur  
Khan, Zainab Jawad  
Klug, John Herbert  
Koskey, Alexander Frank  
Lacy, Mary Ellen  
Love, Jeremy Brian  
Markham, Meredith Woods  
Marlow, Michael Lynn  
Marshall, Amy Cauthen  
Martin, Patrick Schuyler  
Massey, Erin Leanne  
Matthews, Stephanie Kate  
McCants, Terrell Eugene  
McCormack, Catherine Ann  
McCurdy, Jeffery Blaine  
McMahan, Laura Maureen  
McWilliams, Edward Vaughn  
Meyer, Scott James  
Middlebrooks, Betty Spidell  
Mirza, Noreen  
Moneyham, Matthew Robert  
Moore, Shirley M.  
Moorhouse, Colin George  
Morris, Zachary Clay

Morse, Kristopher Jeremiah  
Newton, Wayman Antoninus  
Nix, David Bradford  
Owens, Joseph Merlin  
Parker, Steven Wayne  
Patrick, Jason Edwin  
Perkins, Michael Andrew  
Perry, Richard Carl  
Pettway, Felecia Zigler  
Phillips-McCray, Tanyanika Nicole  
Powers, David Michael  
Quallio, Karen Jnelle Bland  
Reeves, Timothy Dylan  
Rice, Richard Allan  
Roberts, Arthur Jacob  
Romeo, Bruce Walton  
Rowan, Kathryn Housh  
Rygiel, Stephen Dennis  
Salsman, Micah Edward  
Sanders, Leigh Ellen  
Schlichtman, Barbara Sue  
Schonemann, Raoul Dieter  
Shamsie-McCabe, Tammy Kay  
Sharp, Jason Eric  
Sickler, William Robert  
Simmons, Carl Wayne  
Stricklin, Kristen Elise  
Tatum, Chad M.  
Teague, William Clay  
Thiry, Renee Elizabeth  
Thompson, Emily Paige  
Thuston, William Lee  
Turnipseed, Charles Ted  
Tyler, Temberly Renee  
Van Uden, Mary Emily  
Vester, Jennifer Ray  
Walker, April Nicole  
Wallace, John Clint  
Watson, Bradley Joseph  
Whisonant, Michael Wayne  
Williams, LaTonia Marie  
Wood, Whitney Rebecca  
Wright, John Philip



# LAWYERS IN THE FAMILY



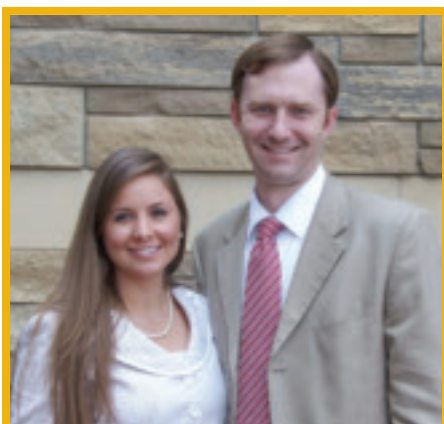
*Michael Wayne Whisonant, Jr. (2010),  
Michael Wayne Whisonant, Sr. (1980)  
and Brooke Whisonant Patterson (2005)  
Admittee, father and sister*



*Mary Emily Van Uden Monroe (2009)  
and Walter H. Monroe (1971)  
Admittee and father-in-law*



*Will Thuston (2010) and  
Lee Thuston (1974)  
Admittee and father*



*Jessica Elaine Buggé (2010) and  
Brian Christopher Buggé (2000)  
Admittee and husband*



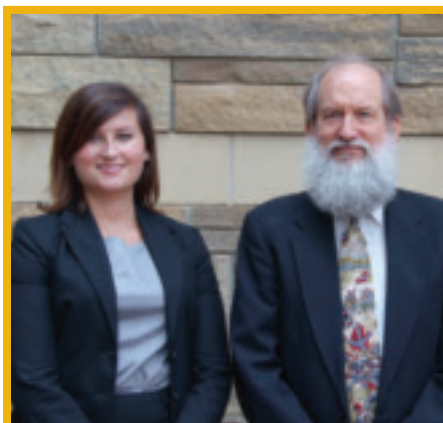
*Bradley J. Watson (2010) and  
Mark Hopper (1998)  
Admittee and uncle*



*Kathy-Ann Alexis (2010) and  
Patricia Ann Stephens (2000)  
Admittee and godmother*



*William Luke Hammond (2010) and  
Jan Schroeder Grant (1985)  
Admittee and mother*



*Bethany Cobb Courville (2010) and  
LeRoy Alan Cobb (1994)  
Admittee and father*



*Jason Robert Brogden (2010) and  
Robert H. Brogden (1972)  
Admittee and father*



# LAWYERS IN THE FAMILY



*Marshall Allen Hollis (2010), Erin Elise Brown Hollis (2010), Gregory Delona Brown (1990) and Judge Laura Phillips (1993)  
Husband/wife co-admittees, father/father-in-law and aunt*



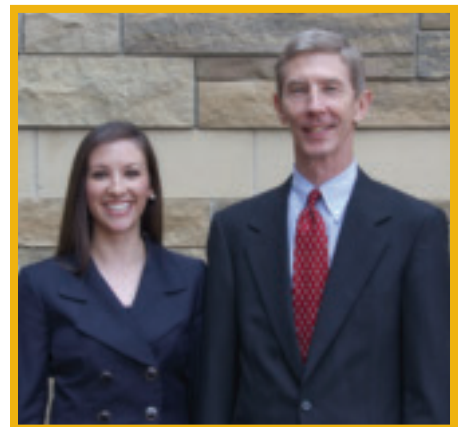
*Vivian Gaines Johnston, V (2010), Vivian G. Johnston, III (1977) and Neil C. Johnston (1978)  
Admittee, father and uncle*



*Joseph Stewart Dennis (2010), LaBella Stewart Alvis (1984) and Joseph Gordon Stewart, Jr. (1994)  
Admittee, aunt and uncle*



*Richard M. Kemmer, III (2010), Richard M. Kemmer, Jr. (1984) and Stephanie W. Kemmer (1996)  
Admittee, father and stepmother*



*Mary Katherine Head (2010) and Judge Thomas E. Head, III (1979)  
Admittee and father*



*Felecia Zigler Pettway (2010) and Judge Jo Celeste Pettway (1982)  
Admittee and sister-in-law*



*Karen Quallio (2010) and Donna Bland (1995)  
Admittee and mother*



*William Clay Teague (2010) and Matthew Patrick Teague (2002)  
Admittee and brother*



# Celebrate Alabama's Pro Bono Week 2010

*By Phil D. Mitchell*

In 2009, the American Bar Association approved the first-ever National Pro Bono Celebration. This year, the Standing Committee on Pro Bono and Public Service of the American Bar Association will sponsor the second National Pro Bono Celebration, which is scheduled for October 24–30, 2010. This is an opportunity to celebrate the difference lawyers make in communities, to recruit and train more pro bono volunteers and to acknowledge the partnerships that form the basis for so many of the private bar's successful pro bono efforts.

## One in four needs help

Currently, 873,000 Alabamians live in poverty, and of these, one in every four experiences legal problems. This number includes over 300,000 Alabama children. The majority of these problems are civil problems, consumer issues (creditor harassment, utility non-payment, bankruptcy), health issues (Medicaid, government insurance, nursing home), family law issues (divorce, child support/custody, abuse), employment issues (unemployment benefits, pension, lost employment), and housing issues (unsatisfactory repairs, foreclosure, eviction, poor living conditions). Many of these issues are critical to the safety and independence of these citizens.

## Increase and expand pool of volunteers

The celebration is a coordinated national effort to showcase the great difference that pro bono lawyers make to the nation, its system of justice, its communities and, most of all, to the ever-growing needs of this country's most vulnerable citizens. Although national in its breadth, this celebration provides an opportunity for local legal associations across the country to collaboratively commemorate the contributions of America's lawyers and also to recruit additional lawyers to meet the growing need. To this end, Alabama State

Bar (ASB) Immediate Past President Tom Methvin saw the need to extend this celebration in our state and appointed the second Pro Bono Celebration Task Force and charged it to plan and coordinate Alabama's activities during this important week. In fact, the major initiative of his term as president was to increase and expand our state's volunteer lawyer pool. Current ASB President Alyce Spruell is continuing these efforts with the goal of protecting the legal rights of all people living in poverty in Alabama.

## Alabama spends less on the poor than rest of country

Who qualifies for such services? Families making 125 percent of the Federal Poverty Level are eligible for free legal aid through Legal Services Alabama (LSA) or through Alabama's four organized volunteer lawyers programs affiliated with the Alabama State Bar, Birmingham, Mobile and Madison County Volunteer Lawyers programs. For a family of four, this 125 percent figure equates to an annual income of only \$27,500. LSA is a federally-funded statewide provider of free civil legal services funded through the U.S. Government by Legal Services Corporation. Its funding is based upon Alabama's poverty population. It currently receives approximately \$6 million annually to provide these services in all 67 Alabama counties. To fully fund a program to handle all of the civil legal issues for the state's poverty population would cost \$35 million annually. Together with LSA's funds, Alabama spends only \$8 million annually on civil legal services for the poor. This equates to an average of \$12 per poor person. This is the lowest amount spent for the poor in the entire nation, including Puerto Rico. Nationally the average is \$20 per poor person. It would take \$35 per poor person to fully fund a program to meet all the needs of Alabama's poorest citizens. As is abundantly clear, volunteer lawyers performing pro bono work are essential to fill the gap if

Alabama is even to partially meet the needs of its poor citizens in this area.

In efforts to combat these problems, the Alabama State Bar will conduct its second "Celebrate Pro Bono Week" during the week of the national celebration. As chair of this year's Pro Bono Celebration Task Force, our goal is to develop projects around the state that will increase awareness within the bar of the need for and ways to participate in pro bono work, to provide an opportunity for lawyers to contribute to their local communities, to provide an opportunity to showcase the pro bono work provided by attorneys throughout the year around the state, and to identify and celebrate the positive work of bar members. Although statewide in breadth, Alabama's Celebrate Pro Bono Week is an opportunity for local bar associations and attorneys across the state to plan events in recognition of individuals who currently do pro bono work and to encourage others to do the same.

## Want to help?

What does it take to be a volunteer lawyer? Our state's volunteer lawyer programs refer cases to volunteer private attorneys who agree to provide free civil legal assistance to low-income clients in two cases or for up to 20 hours per year. Currently, there are approximately 4,400 attorneys statewide who have volunteered. Last year, these attorneys provided over 10,000 hours of pro bono service to the poor. Additionally, volunteer lawyers provided free wills to hundreds of police officers, firefighters and other first-responders through the Wills for Heroes clinics.

Last year, Alabama's aggregate Celebrate Pro Bono Week activities included it among the top celebrations in the country. With governmental proclamations in support of pro bono efforts, legal aid clinics, recruitment and recognition events, and service projects throughout the state helping lawyers and law students make volunteer connections with legal aid





organizations serving Alabamians, every one of the 42 judicial circuits of the state participated in the celebration.



the criminal defense system, the constitutional guarantee of funding for low-income Alabamians who need civil legal



assistance has not yet been met. Consequences of a lack of access to civil justice are devastating for the poor and

## A collaboration of all segments of the legal community

This year, the task force is working again with all segments of the legal community, from law students to judges. Local bar associations, Alabama's judicial associations, Alabama's volunteer lawyer programs, LSA, Alabama's law schools, individual lawyers, and others will collaborate with the Alabama State Bar, through the task force, in publicizing and holding events locally as well as statewide.

Last year, the task force obtained proclamations by Alabama Governor Bob Riley, by each of the three Alabama judges' associations, by the ASB Board of Bar Commissioners and by cities and counties throughout Alabama recognizing Pro Bono Week and encouraging participation in the Alabama State Bar's efforts in recognizing the contributions of our legal community helping those most in need. Governor Riley has already issued a proclamation declaring October 24-30, 2010 as Pro Bono Week in Alabama. Many more such proclamations are coming this year, further advancing the publicity of Alabama's Pro Bono Week Celebration 2010.

During the celebration, the task force will work with local bar presidents and bar commissioners to speak on pro bono and "Access to Justice" to various local civic organizations throughout the state. Other events planned include advice and assistance clinics, including Wills for Heroes events, events providing assistance to the elderly, events providing assistance on identity theft, and continuing legal education events.

## Weakens our democratic society

The need for civil legal assistance to our impoverished citizens is dire. Unlike

*Do you represent a client who has received medical benefits, lost wages, loss of support, counseling, or funeral and burial assistance from the Alabama Crime Victim's Compensation Commission?*



When your client applied for benefits, a subrogation agreement was signed pursuant to §15-23-14, *Code of Alabama* (1975). If a crime victim received compensation benefits, an attorney suing on behalf of a crime victim must give notice to the Alabama Crime Victims' Compensation Commission, upon filing a lawsuit on behalf of the recipient.

For further information, contact Kim Martin, staff attorney, Alabama Crime Victims' Compensation Commission at (334) 290-4420.





weaken our democratic society as a whole. Last year, more than 422,000 households experienced more than 733,000 legal issues. Low-income households had legal assistance for only about 16 percent of these legal problems. If you know of someone who may need these services, please refer them to the Alabama State Bar's Volunteer Lawyers Program, (888) 857-8571, or to a local office of LSA.

We *are* making progress with increased pro bono efforts such as:

- The supreme court's approval of mandatory IOLTA which increased funding for the provisions of civil legal services to the poor;
- The supreme court's approval of an increase in *pro hac vice* fees from \$100 to \$300 with the increase devoted to Access to Justice;
- The supreme court's approval of Rule 6.6 to allow attorneys with special licenses, often retired attorneys, to accept pro bono cases;
- The supreme court's approval of Rule 6.5 relating to conflicts checks to facilitate the provision of legal services in a clinic setting;
- The legislature included, and the governor approved, the first ever state appropriation specifically for "Access to Justice" issues in the FY 2008-09 budget, which was included again in the FY 2009-10 budget;
- A new board of directors of the Birmingham Volunteer Lawyers Program, which includes Birmingham Bar leadership, as well as the presiding judge of Jefferson County, was appointed in 2009;
- The Access to Justice Commission funded the state bar Pro Se Forms Committee for the development of approximately 20 forms, which are available to the public on LSA's website, [www.alabamalegalhelp.org](http://www.alabamalegalhelp.org);
- With the help of an Alabama State Bar Task Force, a new board of directors was established and a new executive director was hired to revitalize the Madison County Volunteer Lawyers Program in 2009 and it has more than tripled the number of cases referred to volunteer lawyers in Madison County from the previous year; and
- Committees are being appointed to assist and coordinate with the state bar's Volunteer Lawyers Program in Montgomery, Tuscaloosa and Dothan.

### All the tools you need to help

More successful efforts must be undertaken. You, too, can celebrate Pro Bono Week through your local bar. You don't have an event planned for Celebrate Pro Bono Week 2010 through your local bar? No problem! The task force has prepared a CD and materials available free to you,

containing all the tools needed to put on an event to celebrate pro bono, including quick and easy ideas and strategies for organizing events including:

- Sample letters to your city and county leaders with proclamations for you to customize and present to local governments to recognize Alabama's Celebrate Pro Bono Week 2010;
- Speeches, materials and handouts to give a presentation to your local civic clubs to raise awareness of Alabama's pro bono activities;
- Recruitment drive materials, activities and enrollment forms to increase the number of Alabama's volunteer lawyers;
- Materials to hold a Wills for Heroes Clinic, a Counsel & Advise Clinic or a Family Law Community Education Clinic; and
- All-inclusive materials to hold a continuing legal education program on "Professional Responsibility in Pro Bono Practice," recognized by the ASB for 1.0 hour ethics credit, for volunteer lawyers and those willing to volunteer through a VLP program.

Contact Linda Lund, director of the ASB Volunteer Lawyers Program, at (888) 857-6154 to obtain these materials and continue to check "Celebrate Pro Bono Week" at [www.alabar.org](http://www.alabar.org) for information on events and how you can be a part of the celebration.

Please join the task force's efforts in Celebrating Pro Bono Week this October 24-30, to commend Alabama's attorneys for their ongoing pro bono contributions and, if you have not already done so, continue the celebration by joining one of the volunteer lawyer programs in the state to provide the much-needed legal services to those otherwise unable to obtain justice. ▲▲▲

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*Phil D. Mitchell is a shareholder with Harris, Caddell & Shanks PC in Decatur. He serves as the ASB Pro Bono Celebration Task Force chair, as a Bar Commissioner for the 8<sup>th</sup> Judicial Circuit and as a board mem-*

*ber of Legal Services Alabama.*

# Thank You, Alabama's Pro Bono Mediators




*Robert Creveling from Birmingham is presented with the ASB/VLP Pro Bono Award for mediators by 2009-10 President Tom Methvin.*

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Daniel Banks  
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# Get Plugged In, Stay Passionate, Make a Difference

*By Rebecca G. DePalma*

**T**his past year, I have had the privilege of being a member of Class 6 of the Alabama State Bar Leadership Forum. This program is an extraordinary opportunity for attorneys who have been practicing law between five and 15 years to experience firsthand the level of skill and commitment required to become leaders in our state and in our communities. Under the guidance and leadership of Ed Patterson, ASB assistant executive director, my classmates and I explored the meaning of servant leadership and how best we

could live up to our bar's motto, "Lawyers Render Service."

As part of the application process for the Leadership Forum, we were asked to write what we hoped to gain from this program. Although I, along with my classmates, attempted to answer this question, it is not until now, looking back on my experience, that I feel I can adequately respond. As my contracts professor used to tell us, the best way to learn contract law is already to have had it. I never quite understood this at the time (and actually am still a bit mystified—

sorry Professor Bolla), but I believe this logic applies. Having completed the Leadership Forum, I now have the words to express both what I was seeking and what I received from this program. Before I give away the ending, though, I will share with you the process I went through to arrive here.

My journey began in January at the Grand Hotel in Point Clear. Members of our class spent several days getting to know each other, exploring what skills were required to become good leaders and learning how proven leaders had met specific challenges that they faced. Some of the highlights of that session included a leadership workshop with consultant and leadership trainer Allison Black Cornelius, where we explored our leadership styles and how we interacted with others.

We also heard from a variety of speakers. David Bronner, chief executive officer of Retirement Systems of Alabama, told us "if you have to ask permission you are not a leader." Joey Jones, University of South Alabama head coach, challenged us to have a moral compass as we go through life. Dr. Wayne Flynt, author of *Alabama in the Twentieth Century*, discussed the issue of Alabama's Constitution and advised us that unless we were able to sit down in small groups and really listen to one another and build a consensus, nothing at any level or in

*"A great leader's courage to fulfill his vision comes from passion, not position."*

—John Maxwell







any group would change. Both the former mayor of Mobile, Mike Dow, and the current leader, Sam Jones, reminded us that to be successful leaders, we had to be willing to make the hard choices and the necessary changes. Our tour of Mobile's shipbuilding facility, Austal USA, served to emphasize this point by illustrating the caliber of business interests our state could attract with the right leadership.

In February, we attended the second session in Montgomery, "The Legislative Process and Economic Development." We toured the state capitol and heard from several legislators. We concluded the session with a tour of one of Alabama's biggest economic development success stories, the Hyundai Plant.

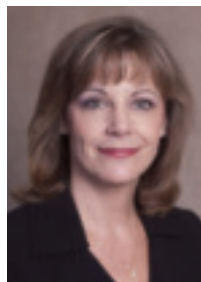
Our third session, in March, "Black Belt: Struggles & Triumphs," took us to Tuskegee, where we confronted the past and current challenges of that region. Fred Gray, attorney for Rosa Parks, spoke to us about what it was like to practice law during the Civil Rights era. Gray reminded us that as lawyers it was up to us to continue to stand up for the rights of individuals.

We returned to Montgomery in April for our fourth session, "Leadership through Education." We learned about the educational challenges facing our state and observed how E. D. Nixon Elementary School had met these challenges to receive the prestigious Torchbearer Award.

In May, our final session, "Access to Justice," was held in Birmingham. We focused on the problems facing our own profession in meeting the needs of those less fortunate than ourselves. Several ASB members shared their experiences in providing legal services to the poor, including ASB President-Elect Alyce Spruell, who challenged us to do our part in providing legal services for indigent Alabamians by joining the Volunteer

Lawyers Program. Later, we attended a graduation banquet and were officially recognized as the sixth graduating class of the Leadership Forum of the Alabama State Bar.

After five sessions in four different cities and listening to numerous proven leaders examine what leadership entails, finally I was able to answer the question posed to me on the Leadership Forum application. What I was seeking when I applied to be a member of Class 6 of the Alabama State Bar Leadership Forum was a connection with others who shared a passion for making a difference and a commitment to doing so. I have had the great privilege of becoming acquainted with many individuals who are both passionate and committed to serving the needs of others, whether through elected office, education or volunteer programs. And, in particular, I have had the honor of sharing this journey with the remarkable group of individuals who make up Class 6 of the Leadership Forum. I believe that together our passion and commitment can and will make a difference, and I encourage anyone who shares these to consider applying to become a member of Class 7 of the ASB Leadership Forum. ▲▼▲



sents clients in civil litigation, including state and federal class actions, mass torts, campaign finance matters and environmental law.

**Rebecca G. DePalma** is a shareholder with the Birmingham firm of White Arnold & Dowd PC. She is a graduate of Queens College and the Cumberland School of Law. She repre-

## COMMENTS FROM CLASS 6 ALUMNI

*"The Leadership Forum is relevant, energizing and infectious!"*

*"The speakers/content, etc. have been terrific. Continue to maintain/improve the quality level, particularly quality level of speakers which has been outstanding. It has made me engage in self-examination as a leader and as a person. The forum has also allowed me to meet and spend time with some awesome people."*

*"The Leadership Forum is well-crafted, organized and well done. I don't regret having entered [into] it, and I genuinely looked forward to each meeting we had."*

*"The introduction to other like-minded attorneys who want to move their state and bar forward is the most useful aspect of the forum to me. I have been inspired by the leaders who helped change Alabama for the better, and have enjoyed meeting other attorneys from around the state who have the same goals."*



# Answering the Call to Leadership

By Derrick A. Mills



What do attorney Fred Gray, Retirement Systems of Alabama CEO David Bronner and Thomasville Mayor Shelton Day have in common? They are all strong and effective leaders who care about the future of Alabama. They were also among the speakers who addressed Class 6 of the Alabama State Bar Leadership Forum. I was fortunate to have been one of 30 lawyers chosen to participate in this year's Leadership Forum.

Please forgive the cliché, but the ASB Leadership Forum is not another typical leadership class. Like many of you, I have been involved in several "leadership training" workshops and seminars. Let's face it—lawyers are usually tapped for these seminars because we are smart, hardworking and typically a bit more socially adept than nuclear physicists or arborists (no offense to anyone). Most of the other "leadership training" seminars in which I participated were how-to lectures on specific leadership skills. The ASB

Leadership Forum is fundamentally different. Rather than start from the premise that leadership can be taught, the Leadership Forum focuses on selecting and then challenging individuals who have shown an interest and ability to reject the status quo and have a desire to really make a difference in the bar and our communities. In other words, the goal of the Leadership Forum is to "promote" leadership, not to "teach" it.

During the opening session, we were introduced to the concept of "servant leadership." We learned that servant leadership is the ultimate, selfless practice of leadership, where servant leaders are *responsible* for the group, organization and/or *people* they are leading/serving. Put another way, servant leaders are purpose-driven advocates who seek transformational results for the people they are serving. Martin Luther King, Jr., one of the best known servant leaders, said, "Life's most persistent and urgent question is, 'What are you doing for others?'"



Both King and his poignant question embody what servant leadership is all about. Servant leadership is the theme of the Leadership Forum.

Class 6 of the Leadership Forum was exposed to a diverse group of established leaders who have all sacrificed on behalf of our state in government, business and education, as well as in the practice of law. Each month, from January through May, our class gathered in different locations to learn about the issues facing the state bar and the state of Alabama. Our challenge was not necessarily to debate the best solutions for society's problems, but, rather, to answer the call to leadership.

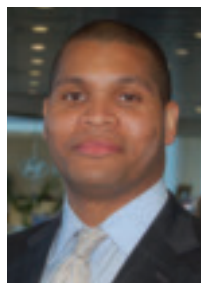
In January, we learned about the remarkable progress Mobile has made under the leadership of former Mayor Mike Dow and current Mayor Sam Jones. We also observed the passion of Dr. David Bronner, as he shared his vision of what Alabama could achieve over the next decade with strong leadership, and, on the other hand, where Alabama is headed absent fundamental change. Our February meeting was conducted in Montgomery and focused upon government. We intimately witnessed the law-making process, as our session coincided with several bingo rallies that took place at the capitol. We also engaged in question-and-answer sessions with several legislators, including Senator Rodger Smitherman and Representative Paul DeMarco.

Tuskegee University graciously hosted our March session, and Alabama's Black Belt was our focus. We heard from noted civil rights' attorney Fred Gray and the innovative Mayor Shelton Day. Through extraordinary vision and leadership, these gentlemen have truly made the lives of Alabamians better. During our April session, we learned from Alabama leaders in education. One of the highlights of the education session was the story of E. D. Nixon Elementary School in Montgomery. Through Anthony Lewis's leadership, the school literally transformed from a typical "inner-city school" into a Torchbearer School, a statewide recognition of being a "high-poverty, high-performing school." Our last class was inspired by Justice Bernard Harwood, Bobby Segall, Dean Charles Gamble, Alyce Spruell, and other leaders of the state bar regarding access to justice and professionalism. Each of them passionately pleaded for us to use our

talents for more public good, through community service, pro bono work, etc.

After having observed some of the great leaders in this state, I believe the common thread that binds together strong leaders is their commitment to service. During Fred Gray's presidency, the Alabama State Bar appropriately adopted the motto, "Lawyers Render Service." To me, this motto is special. Not only do we lawyers render service to our clients, but we render service to our state bar, our communities, our state and our nation. Lawyers are committed to service, but true leadership—that unique, transformational leadership that reaches people and actually makes a difference in their lives—starts with caring. True leaders (servant leaders) are hardworking, passionate and results-oriented, but, most importantly, they care. Leaders care about the communities, the causes and the people they serve. If you truly care about your state bar, your communities, your state, and nation, please consider answering the call to leadership and "Render Service."

If you are an ASB member who has practiced not less than five and not more than 15 years, I recommend that you apply for membership in the 2011 class of the Leadership Forum (Class 7). Applications are available at [www.alabar.org](http://www.alabar.org) under the programs/department link "Leadership Forum." The deadline for applications is November 1, 2010 and applicants will be notified on or before December 13, 2010. Applications will be reviewed in the order in which they are received. Mandatory attendance is required for all sessions. Session dates and locations will be announced.



*Derrick A. Mills is currently the president of the Magic City Bar Association, was a participant in the inaugural class of the Birmingham Bar Association Future Leaders' Forum and is an alumnus of Class 6 of the Alabama State Bar Leadership Forum. He was recently elected to the Board of Bar Commissioners, Circuit 10, Place No. 9.*

**Derrick A. Mills**  
practices with Marsh, Rickard & Bryan PC in Birmingham. He graduated from the University of North Alabama and the University of Alabama School of



## COMMENTS FROM CLASS 6 ALUMNI

*"I have been greatly impressed by the combination of servant-leadership theory and practice included in the Leadership Forum experience, the truly unique opportunity to explore leadership issues with other aspiring bar leaders and a coming-together of servant-minded lawyers who bring an optimistic attitude toward the challenges that face our state bar now and in the future."*

*"In my view, there is no other group leadership learning opportunity that brings together more servant-minded lawyer-leaders from such a diverse cross-section of our state than the ASB Leadership Forum."*

*"I think the forum is building a solid base of people in our profession who want to continue to work to change and improve our state. Our group could produce the future governors, legislators, judges, business leaders, etc. of Alabama."*



## COMMENTS FROM CLASS 6 ALUMNI

*"The forum hasn't just pitched a 'laundry list' of generic 'how-to-be-a-leader' topics at us. The forum has gone the additional step of presenting us with the issues and areas in our state that need our leadership. After leaving each session, I have felt motivated and inspired to continue to work hard and learn more so that I will be ready for whatever opportunities there are for me to serve."*

*"The amazing speakers and field trips and extraordinary experiences this class offers set it apart. In addition, the opportunity to interact with established leaders from all over the state and to build relationships that will last for years to come makes this program very special."*

*"The most useful aspect of the Leadership Forum is the opportunity to see different styles of leadership which have been successful in various arenas. The speakers are very inspiring and the tours are informative. I highly recommend the program."*

*"What has changed is that I am now better informed about a wide variety of issues facing the state and therefore can more effectively engage others in discussions about looking for solutions to those issues."*



# Selection Criteria

## Background and Mission

The Alabama State Bar (ASB) Board of Bar Commissioners initiated the Alabama State Bar Leadership Forum in 2005. The mission of the Leadership Forum is to: (a) form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations and community organizations can draw upon for leadership and service; (b) build a core of practicing lawyers to become leaders with respect to ethics and professionalism, resulting in raising the overall ethical and professional standards of lawyers in the community; and (c) raise the level of awareness of lawyers as to the purpose, operation and benefits of the Alabama State Bar.

With six years of graduates, the Leadership Forum continues not only to meet, but exceed, its mission. The overwhelming response of the 172 former graduates about their Leadership Forum experience includes praise for the program and enthusiasm about relationships fostered during the forum. Leadership Forum alumni include a member of the state house of representatives, bar commissioners, local bar presidents, candidates for public office, judges, a pastor, former military officers, a mayor, and leaders of our state bar organizations, specialty bars and sections.

## 2010 Leadership Forum (Class 6)

The sixth class graduated May 20, 2010 and 100 graduates, alumni and guests attended the affair. Following an invocation by Class 6 member **L. Benjamin**

**Morris**, ASB President **Thomas J. Methvin** introduced **Lt. Col. Bruce Bright**, USMC (Ret.), CCIM, director of business development at The Sanders Trust, who spoke on "Your Future is Looking BRIGHT." President Methvin and Edward M. Patterson, ASB assistant executive director, presented each graduate with a certificate and a compass commemorating their participation in the forum. **Andrew S. Nix**, member of Class 6, then made a special presentation in memory of **Lee Huffaker**, an honorary member of Class 6. Two graduates of Class 6, **Rebecca G. DePalma** and **Derrick A. Mills**, shared their experiences.

Also in attendance were **Alyce M. Spruell**, ASB president-elect; **Phillip W. McCallum**, vice president; **J. Mark White**, immediate past president; 10<sup>th</sup> Circuit Bar Commissioners **Augusta S. Dowd** and **Jack Neal, Sr.**, and his wife, Carolyn; **Gregory H. Hawley**, president, Birmingham Bar Association; and **Mike and Mickey Turner**, forum corporate sponsors from Freedom Court Reporting. Family and special guests representing the Huffaker family included **Caroline Voitier Huffaker**, **Robert Huffaker**, **R. Austin Huffaker**, **Maibeth Jernigan Porter**, **James P. Naftel, II**, and his wife, Kappi. Forum alumni attending included **Jenna Bedsole**, **Teresa Minor** and **Rhonda Wilson** (Class 1); **Matt Minner** (Class 2); **Brent Irby** and **Sandra Reiss** (Class 3); **Anne Durward**, **John England**, **Clay Ryan**, **Brian Strength**, **Ashley Swink**, and **Tom Warburton** (Class 4); and **Lara McCauley Alvis**, **John Dana**, **Brandon Falls**, **Othni Lathram**, **Erin May**, **Chris Mixon** and **Hays Webb** (Class 5).

## Selection Process and Criteria

The 2011 Steering Committee is actively involved in planning Class 7. The Leadership Forum will continue to honor its mission through an evolving and expanded program designed to introduce participants to leadership opportunities in the state, the legal profession, education, business, industry, and social services. Key benefits of the program include (a) exploring the dimensions of executive leadership to strengthen personal and organizational effectiveness and enhance career potential, (b) understanding the role of a lawyer-servant leader in an increasingly global business/ legal environment and (c) experiencing action learning that focuses on teamwork, problem-solving and self-discovery.

Each year, the Selection Committee seeks to draw a broad and representative class of 30 members from throughout the ASB membership. Those suggested by the Selection Committee are then reviewed by the ASB Executive Committee, and the final selection is made and approved by the Board of Bar Commissioners. A nomination is not required for applicants to submit their application. One letter of substantial recommendation must be attached to the application.

If you have been a member of the ASB for more than five years but no more than 15, please consider applying to become a member of the ASB's 2011 Leadership Forum. Following receipt of all applications, the Selection Committee reviews the applications for the following criteria in making the initial selection decisions, with special emphasis upon the first two criteria:

1. Leadership ability based on past accomplishments and current engagements;
2. An understanding of the importance of servant leadership as shown in the applicant's narrative;
3. Previous application to the Leadership Forum;
4. Practice diversity (criminal, civil, governmental and corporate);
5. Geographic diversity; and
6. Racial and gender diversity.

Class 6 alumni are listed in this article if you would like to find out more about their experiences. To download an application to the 2011 program, go to <http://www.alabar.org/members/leadership-update.cfm>.



*Pictured above are some of the members, speakers, sponsors and planners of the 2010 Leadership Forum.*

## Members of the 2010 Leadership Forum Class

John A. Baty	Jefferson County District Attorney's Office	Birmingham
Robin L. Beardsley	Sirote & Permutt PC	Birmingham
Kevin L. Boucher	Mobile County Attorney's Office	Mobile
Steven M. Brom	The Brom Law Firm LLC	Birmingham
Brian V. Cash	The Perkins Group	Birmingham
Joel D. Connally	Strength & Connally LLC	Montgomery
Christopher W. Deering	Ogletree Deakins	Birmingham
Rebecca G. DePalma	White Arnold & Dowd PC	Birmingham
Nicole S. Diaz	University of Alabama School of Law	Tuscaloosa
Glenda B. Gamble	City of Tuscaloosa, Office of the City Attorney	Tuscaloosa
Monica G. Graveline	BBVA Compass Bank—Legal Department	Birmingham
Brandy O. Hambright	Hicks, Matranga & Hambright	Mobile
Tyrell F. Jordan	Balch & Bingham LLP	Birmingham
Derrick A. Mills	Marsh, Rickard & Bryan PC	Birmingham
Larry B. Morris	Starnes Davis Florie LLP	Birmingham
Anil A. Mujumdar	Haskell Slaughter Young & Rediker LLC	Birmingham
Andrew S. Nix	Maynard, Cooper & Gale PC	Birmingham
Jennifer C. Pendergraft	Ogletree Deakins	Birmingham
William I. Powell	District Attorney's Office	Florence
Angela S. Rawls	Madison County Volunteer Lawyers' Program	Huntsville
Katrina Ross	10th Judicial Circuit, Jefferson County	Birmingham
Joi C. Scott	Christian & Small LLP	Birmingham
Jay E. Stover	Stover, Stewart & Phillips LLC	Gadsden
Brian A. Wahl	Bradley Arant Boulton Cummings LLP	Birmingham
Todd B. Watson	District Attorney's Office	Evergreen
Leslie G. Weeks	Helmsing, Leach, Herlong, Newman & Rouse	Mobile
William C. White, II	Parkman, Adams & White	Birmingham
Tamula R. Yelling	Constangy, Brooks & Smith LLC	Birmingham
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### ◆ Honorary Member (posthumous), 2010 Leadership Forum ◆

Matthew Lee Huffaker





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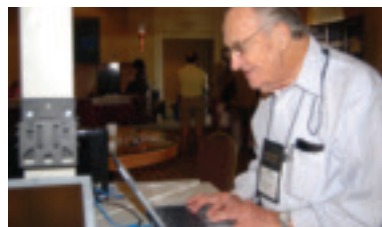
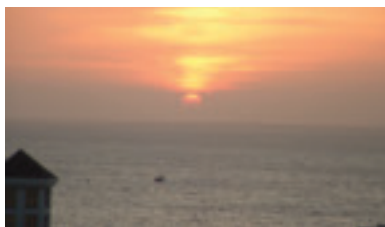
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# 2010 ASB Annual Meeting AWARD RECIPIENTS



**Award of Merit**  
President Tom Methvin with Ted Hosp (left),  
Award of Merit recipient



**Judicial Award of Merit**  
**Chief Justice's Professionalism Award**

Award recipients Chief Justice Sue Bell Cobb  
(Judicial Award of Merit) and Douglas McElvy (Chief Justice's  
Professionalism Award) congratulate each other.



**William D. "Bill" Scruggs, Jr.**  
**Service to the Bar Award**

Kay Scruggs, with two of the William D. "Bill" Scruggs, Jr.  
Service to the Bar Award winners, Dave Boyd (2006) and  
Ben Harris, Jr. (2010)



**Judge Walter P. Gewin CLE Award**  
John Lentine and his daughter, Jennifer, as he accepts the Judge  
Walter P. Gewin CLE Award from President Methvin.



**Local Bar Achievement Awards**  
John Gruenewald (left) and William Broome (right),  
both of the Calhoun/Cleburne County Bar, accept a Local Bar  
Achievement Award from President Methvin.  
  
Other recipients include the Huntsville-Madison County Bar  
and the Tuscaloosa County Bar Association.

# 2010 ASB Annual Meeting AWARD RECIPIENTS



## President's Awards

President's Award recipients were, left to right, Robert Wooldridge, Richard Raleigh, Alan Rogers, Linda Lund, (President Methvin), Phillip McCallum, and Royal Dumas.



## Commissioners' Award

John Wilkerson, clerk, Alabama Court of Civil Appeals, accepts the Commissioners' Award from President Methvin.

## Volunteer Lawyers Program Pro Bono Award Recipients

**Clarence Darrow Award:** Valerie Lynne Goudie, Carey Neal Kirby



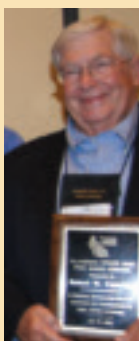
**Al Vreeland Award**  
Henry Callaway



**Firm/Group Award**  
Scott Hetrick, accepting on behalf  
of Adams & Reese LLP



**Law Student Award**  
Anita Hamlett, accepting on behalf of  
Clayton Tartt



**Mediation Award**  
Robert W. Creveling

## Maud McLure Kelly Award

Sara Dominick Clark

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Representative Cam Ward  
Senator Roger Bedford  
Senator Ben Brooks  
Senator Wendell Mitchell  
Senator Arthur Orr

## Special Recognition Awards

Blakely Davis  
Emily Marks  
Kelli Mauro  
Angela Rawls

## Section and Judicial Circuit Awards

Barbour/Bullock counties  
Jefferson County  
Real Property  
Probate & Trust Law Section  
Young Lawyers' Section



## Wednesday



Bar Commissioner Pete Short receives a warm welcome back and standing ovation from fellow commissioners.



Plenary speaker Egil Krogh autographs a copy of *Integrity: Good People, Bad Choices and Life Lessons from the White House* for ASB member Sandee Childress Hughes of Huntsville.



Phil Mitchell, Pro Bono Celebration Task Force chair, and President-elect Alyce Spruell share enthusiasm over the governor's proclamation declaring October 24-30 as Pro Bono Week in Alabama.



It's all smiles for Past President Mark White, his wife, Carol Ann Hobby (left) and President-elect Alyce Spruell.



The Fun Police on patrol at the Family Pizza and Movie night



As the sun went down, all ages found something to enjoy on the pizza buffet.



Everyone loves Grover and Elmo!

## Thursday

*Proof that opposites can attract, and entertain, were U.S. District Judge Thomas Marten and Grammy-winning singer-songwriter Don Schlitz.*



Panelist U.S. District Judge Sharon Blackburn ALI speaker LaVeeda Morgan Battle.



Photographers and VLP directors Blakely Davis (right) and Linda Lund being photographed at the Bench & Bar luncheon.



Even the heat and humidity couldn't keep attendees from enjoying the Bloody Mary and Mimosa Reception.



Debbie McCune (Freedom Court Reporting) "chats" with the GEICO gecko.



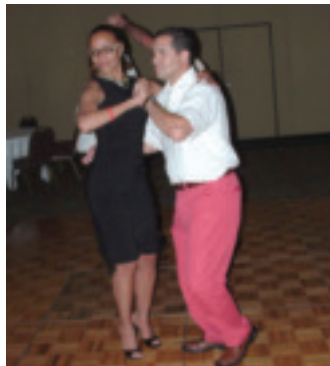
Monet Gaines, at-large board member, is allowed to help a little with her daughter's Paint'n'Place pottery project.



Another aspiring artist is discovered Thursday afternoon!



The music of "Jones & Company" at the Rainbow Reception inspired everyone. . .



to get out on the dance floor. . .



including a past president of the ASB.



All of the past presidents in attendance shared breakfast and "war stories" Friday morning. In order of their year of service were, front row, left to right, Chief Justice Sonny Hornsby, Walter Byars, Ben Harris, Alva Caine, Spud Seale, Johnny Owens, and Wade Baxley. Back row, left to right, were Sam Rumore, Larry Morris, Bill Clark, Doug McElvy, Bobby Segall, Boots Gale, Sam Crosby, and Mark White. (Not pictured was former ASB Executive Director Reggie Hamner, who was working to get everyone in his proper place.)

## Friday



Plenary speaker and Georgia criminal defense lawyer Bobby Lee Cook, right, and Jimmy Fry, director, Legal Services Alabama.



Always popular are Deano Minton and his caricatures of attendees and their children.



Examples of service to the bench and bar are U.S. District Judge Sharon Blackburn and U.S. Attorney Joyce Vance (both Friday morning speakers), President-elect Jim Pratt, Past President Mark White, and Bar Commissioner Anthony Joseph.



Always a crowd-pleaser is Archie Manning, speaker at the Sports Tailgate Party Luncheon, with a winner of one of the three Manning family jerseys.





*Elmo makes another friend (tentatively) before the Build-A-Bear party.*



*Once again, the children's events prove to be a hit with the parents too!*



*Getting stuffed and stitched are the first steps to "Build A Bear."*



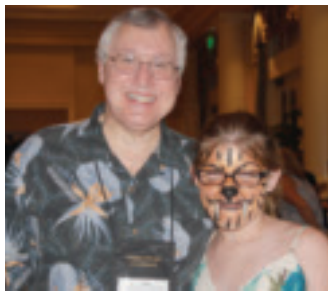
*Having a "twin" is a lot of fun!*



*Appie Millsaps, (foreground), and ALAP director Jeanne Marie Leslie getting everything in place for the Fifth Annual Silent Auction Fundraiser*



*Judge Thomas Marten is considering whether he'll need a reminder of his time in Sandestin once he's back in Witchita.*



*You never know who'll run into at the annual meeting!*



*As his year as ASB President winds down, Tom Methvin and wife Amy enjoy some family time at the Paradise Island Feast with his brother and fellow ASB member, Bob, and his family.*



*After a long day, it's good to relax with friends.*

## Saturday



*Mickey and Mike Turner (Freedom Court Reporting) with Stephen Brown, first-place male attorney winner of the Legal Run-Around*



*The Turners (center) with Cheryl Chapman, first-place female attorney Legal Run-Around winner, and another race participant*



*Looking as young as ever were those honored for 50 years of practice, including, front row, left to right, Boron Martin Ray, William Jennings Benton, Sr. and Judge W. Harold Albritton, III. In the back row, left to right, were R. Kent Henslee, Judge John V. Denson, II (ret.), Broox G. Holmes, Willis Hallman Hendrix, Robert C. Barnett, J. Mason Davis, and former Chief Justice Ernest C. Hornsby.*





*"Behind every great man is a woman" (or two) sums up Amy Methvin and Anna Pender-Pierce's support during Tom Methvin's term as ASB president.*



*Bill Bass (left), president of ISI Alabama, congratulates Patrick Jones, winner of the "Viva Las Vegas" grand prize trip (and a chance to meet Elvis!).*



*ASB President Alyce Spruell gets a hug from her Mississippi counterpart, Nina Tollison of Oxford, who also assumed office as president in July.*



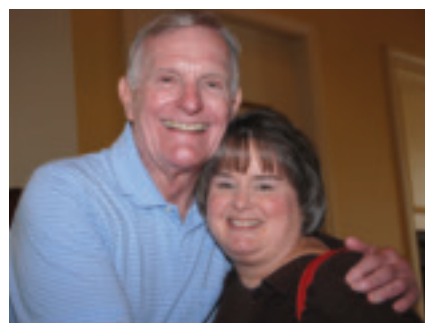
*The Spruell-Manly family together one more time, right after Alyce Spruell starts her term as the 2010-11 president of the Alabama State Bar. Pictured with President Spruell (center) are niece Shannon Manley, nephew Rich Manley, sister-in-law Carol Manley, brother Richard Manley, father (and former ASB bar commissioner) Rep. Rick Manley, husband Bruce Spruell, son Taylor Spruell, and daughter Cameron Spruell. Not pictured is nephew Winston Manley.*



*Three faces of the ASB: President-elect Jim Pratt, President Alyce Spruell and Immediate Past President Tom Methvin*



*"First Husband" Bruce Spruell (right) enjoys the Presidential Reception with Judge Philip Reich.*



*Looking forward to next year's meeting July 13-16, 2011 at the Grand Hotel are former bar commissioner John Gruenewald and VLP Director Linda Lund.*





# Do You Know about the Alabama State Bar's Client Security Fund?

By Julia Smeds Roth

**T**he Alabama State Bar has a Client Security Fund (CSF) which reimburses clients who have been deprived of their funds from lawyers they hired to represent them. The CSF is a valuable service of the Alabama State Bar, and this article will explain the fund, its history and its status. The current fund was established by the Alabama Supreme Court by order dated May 5, 1987. The fund's operating rules, effective October 1, 1987, "govern proceedings conducted upon applications for reimbursement from the Client Protection Fund of the State Bar established pursuant to Rule of the Alabama Supreme Court."

Effective March 30, 1988, the fund is financed through an assessment of \$25 to each lawyer who, on January 1 of each year, holds a current occupational license to practice law. The fee has been assessed for four years for a maximum of \$100 per lawyer. Lawyers who have obtained the age of 65 years and have elected to retire are exempt. A subsequent amendment exempted lawyers with "special memberships" defined in Section 34-4-17 and 18 of the 1975 *Code of Alabama* as "an attorney not engaged in the active practice of law in Alabama" (i.e. judgeships, attorneys general, U.S. Attorneys, district attorneys, etc.). Lawyers entering the jurisdiction pro hac vice and as in-house counsel are also currently exempt. Records indicate that the fund has consistently collected between \$50,000 and \$53,000 in annual assessments since 2003. The fund currently has approximately \$1.8 million in reserve. This reserve is considered small in comparison with other states' reserves. The reserve has not grown in recent years as the number and amount of claims have increased.

The fund supports two types of claims. The first are from those resulting from aggrieved clients of lawyers committing dishonest acts. Pursuant to Rule 29 of the *Alabama Rules of Disciplinary Procedure*, the fund also pays for fees from lawyers assigned as trustees when a lawyer dies, disappears, is disabled or becomes incompetent.

The fund is administered by seven members of the CSF Committee appointed by the president of the Alabama Bar. Presently, all committee members are lawyers. The CSF Committee members are appointed to three-year terms, and may serve two consecutive terms. CSF Committee members are volunteers, but are entitled to reimbursement for all reasonable related expenses. The committee meets three to four times a year as needed and as claims are processed by staff for consideration. Current members are:

#### Officers

Michael E. Ballard,  
chair  
Gerald R. Paulk,  
vice chair

Derrick A. Mills  
Paul. W. Patterson, III  
Bruce F. Rogers  
Sydney S. Smith  
James S. Ward

**Ex-Officio/  
President-Elect**  
James R. Pratt, III

**Staff Liaisons**  
Angela Parks  
Robert E. Lusk

#### Members

Timothy Lee Dillard  
Zondra T. Hutto

**Executive  
Committee Liaison**  
Billy C. Bedsole

A claimant to the fund must complete the fund's application which includes information about the nature of the loss. The applicant must also provide a statement that the loss is not covered by insurance, indemnity or bond. Applicants may also be required to file disciplinary, criminal or civil complaints before recovery is allowed.

The fund will only pay a claim resulting from a lawyer's dishonest conduct acting as a lawyer or as a fiduciary in a matter in which the loss arose, and the lawyer has died or disappeared; been adjudicated bankrupt or incompetent; been disbarred, suspended or voluntarily resigned from the practice of law; become a judgment debtor of the claimant; been adjudged guilty of a crime as a result of dishonest conduct; or the CSF Committee, in its discretion, determined a reimbursable loss has occurred. The lawyer's dishonest conduct must have occurred while as an active member of the Alabama State Bar, although the lawyer's conduct does not necessarily have to have occurred in Alabama.

The maximum amount that a claimant can receive is \$10,000. The aggregate maximum amount paid per lawyer is \$20,000. If multiple claims exist against a single lawyer, claimants may only receive a pro rata share of the \$20,000 maximum. The CSF Committee has no discretion to exceed caps. Rule 29 claimants who are requesting trustee fees may request payment of fees directly from the CSF. The maximum that a Rule 29 claimant can receive in fees is \$10,000. The \$20,000 limit does not include payments made to Rule 29 claimants.

The statistics for the CSF show that from August 22, 2009 to June 20, 2010, 92 claims have been filed. The total dollars in claims paid in that period were \$71,539.48. Claim payments are exceeding current income.

The CSF Committee has determined that the limits placed on the amount of reimbursement are very low, in fact some of the lowest in the nation. There have been many situations where the amounts claimants have requested far exceed the maximum limits, sometimes by many thousands of dollars. In those situations, the CSF Committee must pro rate the reimbursement, and, in some instances, payments to claimants were just cents on the dollar.

In 2008, ASB President Sam Crosby appointed a task force to evaluate the CSF regarding current funding, reimbursement caps and necessary revisions to the CSF Rules of the Alabama State Bar. The original members of the CSF Task Force were Julia Roth, Jim Ward, Timothy Dillard, Zondra Hutto, Mike Ballard, Gilda Williams, bar commissioner Elizabeth Parsons, and ASB staff liaisons Robert Lusk and Laurie Blazer.

On September 12, 2008, the Board of Bar Commissioners approved a request from the CSF Committee and CSF Task Force to allow the American Bar Association (ABA) Standing Committee on Client Protection to send a consultation team to conduct an on-site consultation regarding the Alabama State Bar CSF. This consultant was provided without charge to the Alabama State Bar.




On January 9, 2009, the ABA team conducted the on-site consultation, which included interviews with ASB President Mark White, President-elect Tom Methvin, Executive Director Keith Norman, General Counsel Tony McLain, Assistant General Counsel Robert Lusk, CSF Administrator Laurie Blazer, members of the CSF Committee and Task Force, and Associate Justice Thomas Woodall. In addition, the ABA team reviewed pending and closed files, current rules, policies and procedures.

On February 26, 2009, the ABA team submitted their report, which contained a comprehensive review of the CSF, as well as recommendations and proposed revisions to the CSF rules. (A copy of this report was provided to the Board of Bar Commissioners at its July 2009 meeting.) In April 2009, ASB President Mark White appointed Associate Justice Thomas A. Woodall, J. Bentley Owens, III, Kate Musso and Stanley F. Gray as additional members to the CSF Task Force. Since then, the CSF Task Force and CSF Committee have evaluated each of the recommendations of the ABA team, keeping in mind considerations such as providing adequate client protection, the available resources of our membership, protecting the stability of the CSF and avoidance of unnecessary additional regulation of the practice of law in Alabama.

Recently, the CSF Task Force and the CSF Committee submitted recommendations for approval to the Board of Bar Commissioners, along with a request to authorize the general counsel to petition the Alabama Supreme Court to amend the CSF Rules of the Alabama State Bar to be consistent with these recommendations. The recommendations include:

- Expand the definition of “lawyer” to include all lawyers licensed or authorized to practice law in Alabama, and all lawyers admitted pro hac vice.
- Increase the maximum amounts of recovery of \$10,000 per claimant and \$20,000 for the aggregate to \$75,000 per claimant and an aggregate of \$200,000 per lawyer.
- Require that all lawyers authorized to practice law in Alabama, including occupational and regular license-holders, special license-holders and authorized in-house counsel, be assessed \$25 annually. Recommend that the exemption for retired lawyers, who are 65 years or older, be maintained.
- Recommend that the CSF Committee review the annual assessment and report to the Board of Bar Commissioners on the sufficiency of the annual assessment in relation to claims history and the financial stability and integrity of the CSF.
- Recommend that two non-lawyers be added to the CSF Committee.
- Recommend that the definition of dishonest conduct be amended to include failure to refund unearned fees.
- Prepare an annual report to the Board of Bar Commissioners and the supreme court.




Now you can pay your **2010-11 ASB occupational license fee** and **special membership dues** online.

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The 2009-10 occupational licenses and special memberships expire on September 30, 2010. Payment of license fees and membership dues for 2010-11 is due in the Alabama State Bar office by October 31, 2010 and are considered delinquent after that date. Occupational licenses purchased after October 31st will have a 15 percent late fee penalty added to the license fee.

Payments may be mailed to the Alabama State Bar or made online at [www.alabar.org](http://www.alabar.org). Contact the Membership Department by e-mail, [ms@alabar.org](mailto:ms@alabar.org), or via telephone at 334-269-1515.



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These recommendations are currently being considered by the Board of Bar Commissioners, who was presented with the recommendations at the ASB's annual meeting two months ago. The CSF Task Force and the CSF Committee firmly believe that in order to ensure public confidence in lawyers, the maximum amounts paid to those claimants who have been wronged by their lawyer must be increased. Such an increase will instill confidence in the Alabama State Bar's ability to police its own and to make those claimants whole for the terrible wrong caused by their lawyer. ▲▼▲



**Julia Smeds Roth** is a partner at Eyster, Key, Tubb, Roth, Middleton & Adams LLP in Decatur. She served as chair of the Alabama State Bar Client Security Fund Task Force appointed by President Sam Crosby in 2008, which completed its work in May of this year. She also served as chair of the ASB Client Security Fund Committee.

She concentrates her practice in the areas of general civil litigation, wills, trusts and estate planning, and family law. Roth is a graduate of the University of Alabama (with honors) and the University of Alabama School of Law. She served as law clerk to the Honorable Sam C. Pointer, Jr., chief judge of the United States District Court for the Northern District of Alabama.

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# The Coming Wave of Gulf Coast Oil Spill Litigation

by Stephen Gidiere, Mike Freeman and Mary Samuels

When the *Deepwater Horizon* oil rig exploded and sank in the Gulf of Mexico April 22, 2010, few imagined the environmental disaster that was brewing below the surface. To be sure, early reports of missing and presumed dead oil rig workers saddened us. And images of fire, thick black billowing smoke and a sinking rig captured our attention. But those in charge assured us that no oil was leaking, and we went on about our lives. Not until days and weeks later did the truth begin seeping out. We now know that hundreds of millions of gallons of oil have been released into the Gulf, easily eclipsing the 1989 *Exxon Valdez* spill in Alaska.

The on-the-ground response to the spill by the responsible parties, chief among them BP, was chaotic at best. The proposed “fixes” to stop the leaking oil proved unsuccessful and sometimes comical—like the “top kill” that involved shooting golf balls into the well. As we write this article, the leaking well still spews oil into the Gulf—closing fisheries, killing marine life and destroying the

livelihoods of those who rely on a healthy Gulf of Mexico.

The legal landscape surrounding the oil spill, like the response, can also be described as confused and uncertain. Many individuals and businesses are unclear where to turn for legal relief. Scores of class-action lawsuits have been filed on behalf of various interested parties, including commercial fishermen, hotel owners, charter boat captains and marinas. BP set up and administered a claims process, as required by the federal Oil Pollution Act, paying millions of dollars to claimants. Later, the Obama Administration forced BP to cough up \$20 billion to fund an “independent” claims process administrated by former federal pay czar and 9/11 fund administrator Ken Feinberg. The federal government and Gulf Coast states are conducting their own investigations into the incident and will pursue their own legal claims, which could include criminal charges.

With all of these moving parts, it is difficult to predict how this disaster will play out from a legal perspective.

Hundreds of millions of dollars have already been spent in clean-up costs and interim claims payments. Undoubtedly, billions of additional dollars will trade hands but how will this process proceed? Will Feinberg take over the BP claims process? What types of claims will he pay and what criteria will he use? What documentation will be required? This last question is particularly important to the tourist-related businesses along the Gulf, many of which are cash-, not record-, driven. While claims have been paid to many for lost past wages and income (there are issues as to amount), for how long will these payments continue? Will there be a “final” claim submittal process? Will acceptance of the offered amount preclude the claimant from later pursuing judicial relief?

And those are some of the easier questions. What about damages for lost rental income? Payments have reportedly been made where claimants can show reservations and cancellations due to the spill. But what about all those reservations that were never made as potential tourists





watched images of oil-soaked pelicans and oil-soiled beaches and decided this was the year for Six Flags, a Braves game and the Coca-Cola museum? What about all the Gulf Coast businesses (restaurants, theme parks, fishing stores, charter boat captains, etc.) whose businesses have been damaged or destroyed? Are they going to be able to collect future lost profits? That brings us to the thousands of property owners up and down the Gulf Coast and along its bays and estuaries. These individuals and businesses face their own unique legal and economic issues. While many of these owners rent their property for profit, others do not. But all of them have one thing in common—they have lost the use and enjoyment of their property for at least one season and have seen the value of their rental, retirement, investment and vacation properties decline precipitously. In fact, some Florida tax officials have already suggested assessing property owners based on new lower property values caused by the diminution in value from the spill.

“But that is not all. Oh, no. That is not all,” to quote Dr. Suess’s Cat in the Hat. The overarching question is where and who will decide all these questions, issues and disputes. Will it be BP through its claims process, or the Coast Guard as administrator of the Oil Spill Liability Trust Fund? Could it be Obama’s “independent” pay czar Ken Feinberg? Our bet is that for many, the ultimate answer will be none of the above. While some claims will be submitted to and paid by BP and Feinberg, many more will be resolved by and through the judicial system, at least in the end. While the process will be suitable for handling claims for cleanup costs, lost past wages and rents, and some well-documented business interruption losses, it will not provide a meaningful avenue for full recovery to all those who have seen and will continue to see their property generate less in income and decline in value.

One thing is for certain—lawyers and judges will be wrestling for years with a

complex web of federal and state statutory and common law, all in the context of what many have already called the greatest environmental disaster in the history of the United States.

## Federal Law

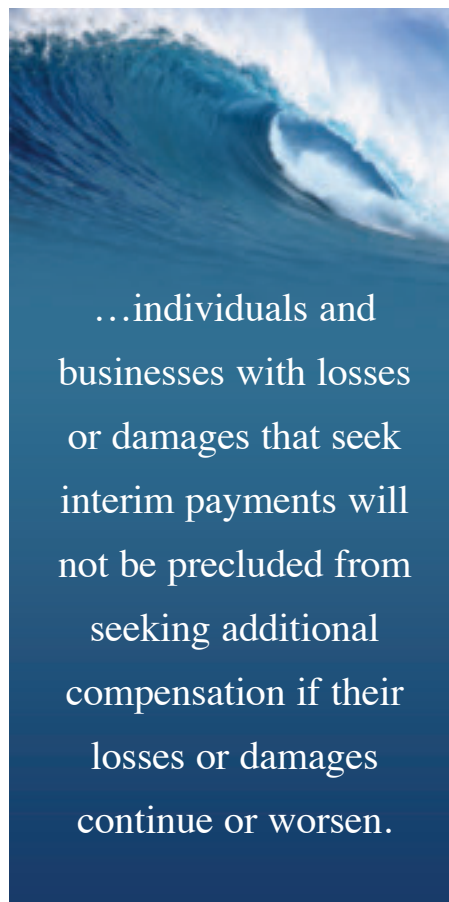
The touchstone and starting point for an analysis of the legal liabilities and responsibilities associated with the Gulf Coast oil spill is the federal Oil Pollution Act of 1990 (“OPA 90”), 33 U.S.C. §§ 2701-2762. OPA 90 was passed on the heels of the *Exxon Valdez* disaster in 1989. It sought to prevent future spills and mitigate the damages they caused by mandating that oil companies develop and maintain oil spill prevention plans and clean-up technology and equipment. It also established a fund paid for by oil companies that could help pay for the clean-up of future spills and pay damage claims. In addition, OPA 1990 also created a strict liability cause of action on behalf of public and private parties damaged from discharges of oil, including petroleum. Under OPA 90, designated

“responsible parties” are liable for damages caused by an oil spill and the clean-up of it. With respect to a release or spill from an offshore facility (other than a pipeline or deepwater port), the responsible party is the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable state law or the Outer Continental Shelf Lands Act. *See* 33 U.S.C. § 2701(32).

With respect to the Gulf Coast oil spill, the U.S. Coast Guard has officially designated BP Exploration & Production Inc. (lessee of the well) and Transocean Holding Inc. (owner of the rig) as responsible parties under OPA 90. As a result of this designation, BP was required to establish and administer a claims process for impacted individuals and businesses. Importantly, before a claimant can sue in court for damages under OPA 90, she must first file a claim with the responsible party. If the claim is denied or not settled by the responsible party within 90 days, then a claim can be filed in court or made against the Oil Spill Liability Trust Fund (“the Fund”). *See* 33 U.S.C. § 2713(c).

A broad range of costs and damages is recoverable under OPA 90. Anyone who helped clean up the spill (including states, local governments and Indian tribes) can recover their costs to prevent, minimize, mitigate or clean up the spill—these are called “removal costs.” 33 U.S.C. § 2702(a). OPA 90 also grants the United States, individual states, Indian tribes and foreign trustees the right to recover damages for injury to or destruction of natural resources, including the costs of assessing the damages—called “natural resource damages.” *Id.* § 2702(b)(2). The owner or lessee of real or personal property can recover damages for injury to their property or economic losses from the destruction or injury of such property. *Id.* Any person can recover damages for the loss of profits or earning capacity due to the injury or destruction of real or personal property or natural resources (even if they are not the owner of the property or resource). States and their political subdivisions can recover lost revenues such as taxes, royalties, rents, fees, and costs for providing increased or additional public services during or after removal activities. *Id.*

Although OPA 90 provides liability caps for responsible parties—including a \$75,000,000 cap on damages for offshore



...individuals and businesses with losses or damages that seek interim payments will not be precluded from seeking additional compensation if their losses or damages continue or worsen.

facilities for “each incident”—importantly, the cap does not apply if the incident was caused by gross negligence, willful misconduct or a violation of an applicable federal safety, construction or operating regulation. 33 U.S.C. § 2704(c)(1). The available evidence to date strongly suggests that, at a minimum, gross negligence was involved in the events that led to the oil spill and perhaps even in the subsequent attempts to stop the spill. In fact, Anadarko Petroleum Corporation (part owner of the leaking well) issued a public statement on June 18, in which its chair and CEO was quoted as saying that “[t]he mounting evidence clearly demonstrates that this tragedy was preventable and the direct result of BP’s reckless decisions and actions.” Thus, the “cap” on damages that many were initially concerned about will likely not be an issue.

OPA 90 also establishes the Oil Spill Liability Trust Fund (“the Fund”). *See* 26 U.S.C. § 9509. The fund is a back-up only and not a primary source of recovery. In other words, the statute is structured so that the responsible parties pay if at all possible, not the fund. The U.S. Coast Guard administers OPA 90, and its National Pollution Funds Center has issued detailed

regulations for filing, processing, settling and adjudicating claims on the fund. *See* 33 C.F.R. Part 136. Except under limited circumstances, all claims for damages must first be presented to the responsible party before filing a claim against the fund. *See* 33 U.S.C. § 2713(a).

There has been a fair amount of conflicting advice and information about whether a claimant should immediately make a claim with BP (or, now, the “independent” administrator), or wait until the full extent of the damage is known. OPA 90 provides for partial payments by a responsible party for interim, short-term damages representing less than the full amount of damages and states that such interim payments “shall not foreclose a claimant’s right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.” 33 U.S.C. § 2716(b)(2). Thus, individuals and businesses with losses or damages that seek interim payments will not be precluded from seeking additional compensation if their losses or damages continue or worsen.

In addition, the savings clauses of OPA 90 allow states to enact laws establishing liability for oil spills in excess of OPA 90’s limits of liability. *Id.* § 2718(a), (c); *U.S. v. Locke*, 529 U.S. 89, 105 (2000); *Bouchard Transp. Co., Inc. v. Updegraff*, 147 F.3d 1344, 1347 (11th Cir. 1998). The State of Florida, for example, has enacted such a law. *See* Fla. Stat. Ann. §§ 376.011 *et seq.*

In addition to OPA 90, there is a body of federal common law that may prove relevant to the Gulf Coast oil spill. After the *Exxon Valdez* spill in 1989, many affected individuals relied on federal maritime law as the basis for their claims. (OPA 90 did not exist at the time.) Federal maritime tort law allows for the recovery of punitive damages on top of compensatory damages, including damages for economic loss. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611 (2008). The amount of such punitive damages that could be awarded under federal maritime law was a hotly contested issue that came to a head in the *Exxon Valdez* cases. In these cases, the lower court certified a mandatory class of plaintiffs seeking punitive damages, and, at the close of evidence, charged the jury to consider the reprehensibility of the defendants’ conduct, its financial condition, the magnitude of the harm and any mitigating facts, emphasizing that the purpose of



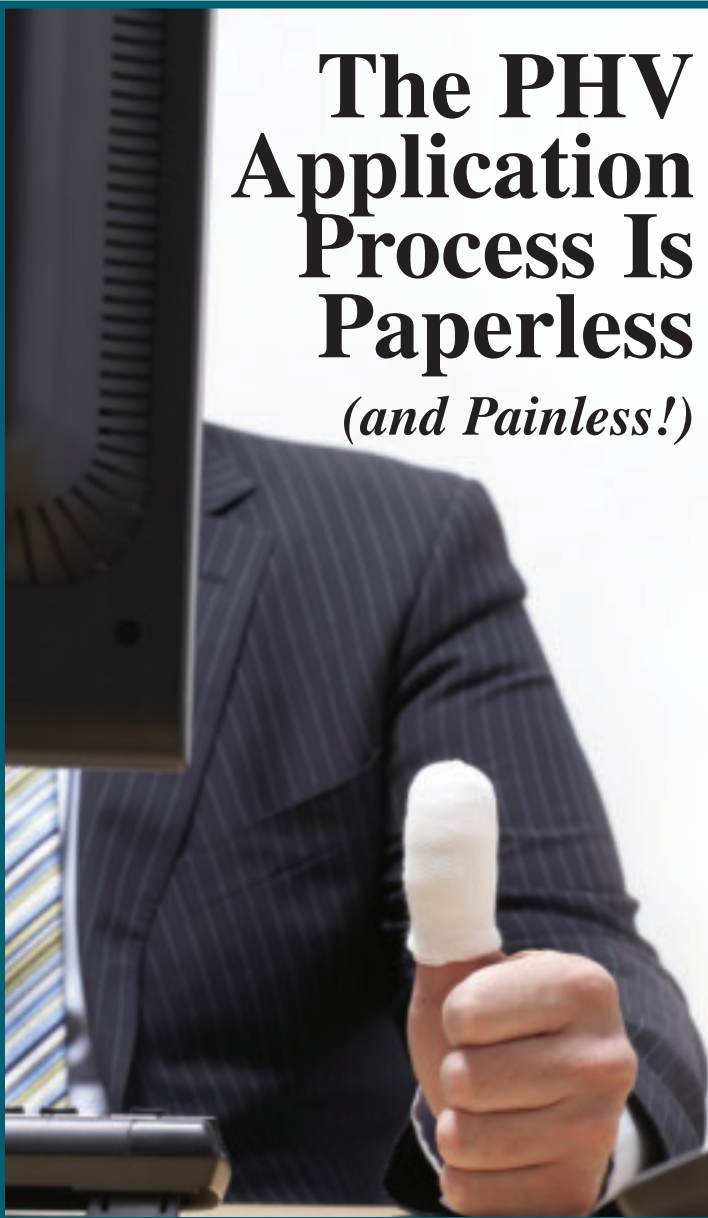
punitive damages is to punish and deter the defendants. *Id.* at 2613-2614. The jury awarded \$5 billion in punitive damages against Exxon. The case then bounced back and forth between the district court and the Ninth Circuit over the amount of the punitive award, which was ultimately remitted to \$2.5 billion. The U.S. Supreme Court granted certiorari to consider whether \$2.5 billion in punitive damages was excessive as a matter of maritime common law.

The Court ruled, in a five-to-three decision, that the punitive damages were excessive and should be reduced to \$500 million. The Court emphasized its concern with fairness, consistency and due process and the need to protect against awards that are unpredictable and unnecessary, either for deterrence or retribution. *Id.* at 2625-

2627. The Court held that punitive damages in maritime tort cases were not warranted in amounts greater than the amount of the compensatory damages award. *Id.* at 2633. This case is important to consider when deciding on what claims to file, as the difference in punitive damages awarded under federal maritime tort law versus state common law tort law could be significant. Although state law on punitive damages varies, most states allow awards greater than a strict 1:1 ratio of punitive to compensatory damages, and federal due process certainly does not mandate a 1:1 ratio. *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 425 (2003) (stating that “each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction,” and that there is

no “bright-line ratio which a punitive damages award cannot exceed” but that “single-digit multipliers [*i.e.* 9:1] are more likely to comport with due process. . . than awards with ratios in ranges of 500 to 1. . . or, in this case, of 145 to 1.”).

The Limitation of Liability Act of 1851, 46 *U.S.C. App.* §§ 181-196, is another federal statute involved in the Gulf Coast oil spill litigation. This statute is traditionally used by vessel owners to limit their damages. Under the terms of the Limitation of Liability Act, a shipowner can limit its liability for a casualty to the post-accident value of the vessel and its cargo, provided that the accident did not result from the owner’s negligence. However, since passage of OPA 90, courts have consistently held that the Limitation of Liability Act does not apply to claims



## 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’).

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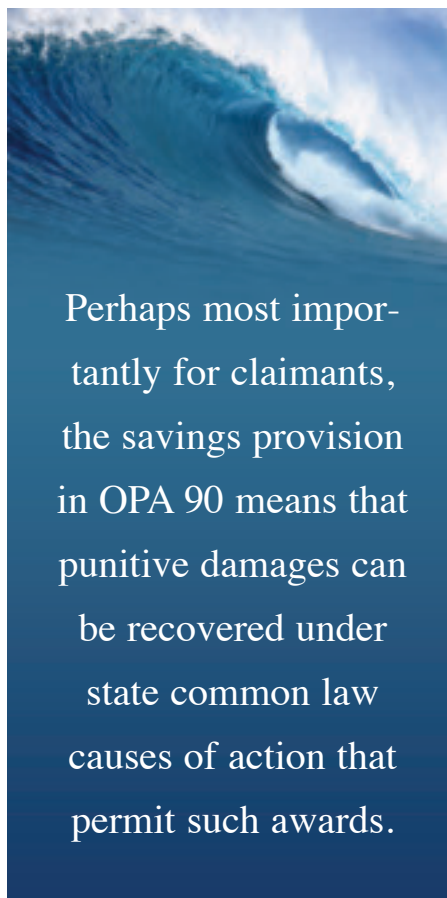


for damages from oil spills under OPA 90. See *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1348 (11th Cir. 1998); *In re Metlife Capital Corp.*, 132 F.3d 818, 819 (1st Cir. 1997); *In re Complaint of Jahre Spray*, 1996 U.S. Dist. LEXIS 11594, \*16 (D.N.J. 1996).

This clear precedent, however, has not stopped oil-spill defendants from invoking the statute. In response to lawsuits over the Gulf Coast oil spill, Transocean (owner of the rig) filed a complaint and petition seeking to limit its liability to \$27 million in the U.S. District Court for the Southern District of Texas. The same day, the Texas court issued an order enjoining any and all other suits relating to the oil spill until a hearing could be held on the issue. Given the existing OPA 90 precedent, many viewed the Transocean filing as simply a delay tactic or venue shopping. Accordingly, many claimants challenged this filing and the court's order, and on May 25, 2010, Transocean "clarified" its position regarding its filing under the Limitation of Liability Act, stating that it never intended to limit claims under the Oil Pollution Act. On June 1, 2010, the United States Department of Justice requested that the court lift or modify its injunction to clarify that, with respect to the *Deepwater Horizon* incident, the Limitation of Liability Act does not apply to: (1) claims made under OPA 90; (2) claims made by federal, state or municipal governments; or (3) any claims brought pursuant to the Park System Resource Protection Act, the National Marine Sanctuaries Act, the Clean Water Act, the Rivers and Harbors Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. On June 13, the court issued a second amended order, clarifying that such claims are not precluded by the Limitation of Liability Act.

## State Laws

While OPA 90 may be the starting point for oil spill liability, it is by no means the last or final word. OPA 90 contains an important savings clause that provides: "Nothing in this Act or the Act of March 3, 1851 [i.e., the Limitation of Liability Act] shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law." 33 U.S.C. § 2718(a)(2). This single provision tucked into OPA 90 drastically alters the litigation equation



Perhaps most importantly for claimants, the savings provision in OPA 90 means that punitive damages can be recovered under state common law causes of action that permit such awards.

with respect to the Gulf Coast oil spill.

The savings provision means that state common law claims may also be brought in response to the spill. Common law claims that have already been asserted in individual and class action complaints against BP and others include claims for negligence, gross negligence and/or willful, wanton and careless disregard, both in the operation of the *Deepwater Horizon* that resulted in the oil spill and the later failure to timely control the oil. Another available common law claim is nuisance, given that the oil and other pollutants (for example, the chemical dispersants used by BP) have interfered with the use and enjoyment of properties and businesses, and have diminished the value of properties and businesses. *Ala. Code* § 6-5-120; *Blue Water Yacht Sales and Serv., Inc. v. Transocean Holding Inc.* (S.D. Ala., Case No. 1:2010-cv-00224). In addition, trespass claims have been asserted against BP and others for allowing oil to escape their facility and contaminate real and personal property along the coast. *Ala. Code* § 6-5-210 (real property); § 6-5-262 (personal property); *Sarah H. Moore, et al. v. BP PLC, et al.* (S.D. Ala, Case No. 1:2010-cv-00293). Because any damages caused by

the oil are the result of BP's abnormally dangerous and/or ultrahazardous activities, strict liability claims may also be asserted. Perhaps most importantly for claimants, the savings provision in OPA 90 means that punitive damages can be recovered under state common law causes of action that permit such awards.

In addition to state common law claims, some state statutes may provide for liability against BP and others. For example, the Alabama Water Pollution Control Act ("AWPCA"), *Ala. Code* §§ 22-22-1 to -14, requires every person discharging any new or increased pollution into any waters of the state to obtain a permit from the state prior to discharging such pollution. *Ala. Code* § 22-22-9(i)(3). Section 22-22-9(m) of the AWPCA provides that the attorney general may bring a civil action for damages for pollution of the waters of the state, including reasonable costs to prevent, minimize or clean up the damage. Compensatory damages are available for negligent acts or omissions under this section. *Id.* Both punitive and compensatory damages are recoverable when the pollution resulted from willful or wanton conduct on the part of the defendant. *Id.* In addition, Section 22-22-9(n) provides that any person who causes the death of fish or other wildlife is liable for other appropriate civil penalties and additional amounts equal to the sum of the cost to restock such waters or replenish wildlife, including punitive damages.


State statutes also will influence how common law claims are decided. For example, the AWPCA provides that "[a]ny and all pollution" is a public nuisance. *Id.* § 22-22-9(i)(4). And Alabama and other Gulf Coast states have statutes that confer riparian ownership of certain coastal resources on private landowners. For example, the *Alabama Code* includes an oyster statute that gives shore owners riparian rights over oyster cultures that extend out to 600 yards from the shoreline. *Id.* § 9-12-22. This means that private owners of coastal lands can bring common law claims, like trespass, nuisance and negligence, for damage to cultured oyster beds adjacent to their property. Mississippi has a similar statute, see *Miss. Code Ann.* § 45-15-9, while other Gulf Coast states grant oyster bed leases and allow leaseholders to recover damages to these state-created property interests. See *La. Rev. Stat. Ann.* § 56:423; *Fla. Stat. Ann.* § 379.232; *Tex. Parks and Wildlife Code Ann.* § 1.011.

## Class Actions

Given the broad extent of the damages from the spill, class action lawsuits were inevitable. Over 200 class action lawsuits already have been filed in response to the oil spill. Most of the complaints are filed against BP, Transocean, Halliburton (the company that performed the cementing operations to cap the well), Cameron International (the company that supplied the blowout preventer valves that failed to operate and prevent the spill), and various other parties, including co-owners of the leaking well (for example, Anadarko Petroleum Corporation). The jurisdictional basis for most of the suits is 28 U.S.C. § 1332(d)(2) (part of the Class Action Fairness Act), because the matter in controversy exceeds \$5,000,000 and the plaintiffs are citizens of states that are different from the state where at least one of the defendants is incorporated or does business.

The majority of the class actions are currently pending in either the U.S. District Court for the Southern District of Alabama, Eastern District of Louisiana, Northern District of Florida, Southern District of Mississippi, or Southern District of Texas. The complaints assert common law claims, OPA 90 claims, state statutory claims or a combination of these three. The suits seek certification of a variety of classes, including commercial fishermen, seafood harvesters, charter boat operators, real estate owners, condominium owners who rent their properties, business owners on the Gulf coast, restaurant owners, and oyster bed owners, among others.

In early May, BP filed a motion with the U.S. Judicial Panel on Multidistrict Litigation (JPML) to consolidate all the oil



In early May, BP filed a motion with the U.S. Judicial Panel on Multidistrict Litigation (JPML) to consolidate all the oil spill cases.

spill cases. BP has asked the JPML to transfer all of the pending cases to the U.S. District Court for the Southern District of Texas, Houston Division. Plaintiffs in the various class actions have opposed this venue (in part because that district is not in the impact zone of the spill and is perceived to be “home base” for the oil companies). Instead, various plaintiffs’ groups are advocating venues in the affected Gulf Coast states, including the Eastern District of Louisiana and the Southern District of Alabama. The JPML held a hearing on the matter July 29 in Boise. *See In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, MDL-2179. Assuming the

cases are consolidated and an MDL judge is assigned, new cases would be transferred as “tag-along” actions to the MDL. The scope of the consolidated proceedings would likely include initial motions, discovery, class certifications and perhaps some bell-weather trials.

## Conclusion

It was a sad day when the *Deepwater Horizon* blowout preventer failed, causing death, contamination of the Gulf and economic destruction of so many coastal communities. While BP’s multi-million dollar ad campaign assures us that they “will make this right,” many wonder what BP means when it says all “legitimate” claims will be paid and what level of proof it will require for quick payment. Given the financial stakes, lawyers and judges, not “independent” fund administrators, will ultimately decide just where to draw the lines between “legitimate” and “illegitimate” claims. And it will not be a quick process. The *Exxon Valdez* spill took a decade to resolve, and the lingering legal questions were ultimately answered by the U.S. Supreme Court. Given the massive scope of the Gulf Coast oil spill and the complex legal issues it raises, this environmental disaster promises to keep lawyers and judges busy for a long time to come. ▲▲▲

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# When Doing Business Internationally Becomes a Crime:

## Assisting Clients in Understanding and Complying with the Foreign Corrupt Practices Act

*By William C. Athanas*

As global markets expand and economic turmoil increases, American companies of all sizes and types have initiated or intensified efforts to sell their products and services in foreign countries, particularly in emerging markets such as Brazil, Russia, India, China, and Africa. Those doing business overseas face a host of operational, cultural and legal challenges. Compliance with the Foreign Corrupt Practices Act (FCPA) had rapidly ascended toward the top of that list as a result of the recent proliferation of criminal prosecutions and civil enforcement actions under the statute.

The FCPA prohibits improper payments to foreign officials for the purpose of obtaining or retaining business and creates a thicket of legal issues impacting virtually every aspect of international commerce. From obtaining permits and licenses necessary to do business to securing contracts from foreign governments to hiring intermediaries to participating in joint ventures overseas, any interaction with those vested with official discretion and authority creates an opportunity for payments which may be intended to or interpreted as attempts to improperly influence official action. Failing to understand or comply with the FCPA's framework carries potentially severe civil and criminal consequences, including fines, disgorgement of profits, debarment from eligibility to receive government contracts, prohibition on receiving or revocation of export licenses, and, perhaps most significantly, substantial terms of imprisonment for violators.

Originally enacted in 1977 to combat corruption in the wake of Watergate, the FCPA received relatively little attention during much of its first three decades of existence. To the extent the statute was enforced, large corporations were the most frequent target, with civil and criminal actions typically resulting when those entities discovered and self reported violations to the government. Everything changed in 2005, when the Department of Justice dramatically increased its commitment to investigate and prosecute foreign bribery. Those efforts triggered a virtual explosion of activity under the statute, producing more criminal enforcement actions in the last four years than in the previous 29 of the statute's existence, with the rate of increase likely to continue to grow.

This striking surge in the volume of FCPA enforcement actions coincides not just with a substantial increase in the volume of investigative and prosecutorial resources dedicated to the statute, but also with a dramatic overhaul in the investigative tools employed to build cases. As the world continues to get smaller and American businesses continue their efforts to expand into countries where corruption runs rampant and bribes to government officials represent the status quo, these efforts will only continue to develop, causing the FCPA's impact to swell in breadth and depth. Those unprepared to adhere to the statute's mandates—or, even worse, those unaware of their existence—face an environment of elevated risks and dangerous consequences.



## ELEMENTS OF THE STATUTE

The FCPA contains two main components, commonly referred to as the “anti-bribery” and “accounting” provisions. The anti-bribery provisions speak in prohibitive terms, forbidding anyone—including American companies of all sizes, U.S. citizens and permanent residents—from corruptly offering, promising or giving anything of value, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business anywhere in the world. 15 U.S.C. §§ 78dd-1, dd-2 and dd-3. In contrast, the accounting provisions create affirmative obligations, requiring those companies registered with the Securities and Exchange Commission to maintain “books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions . . . of the issuer,” and to devise and maintain internal controls designed to provide reasonable assurances that financial transactions are executed in accordance with generally accepted accounting standards. 15 U.S.C. § 78m(b)(2). Recognizing that corrupt activity flourishes when concealed, the accounting provisions seek to negatively reinforce compliance with the anti-bribery prohibitions by imposing separate and additional penalties where any registered company pays a bribe and fails to declare and disclose it as such in the company’s books, records and accounts.

While the process of understanding of the FCPA starts with its language, as with any statute, achieving a full grasp of the provision involves review of interpretive sources. Normally, reported decisions from courts serve to offer practical guidance on statutory requirements, and facilitate compliance. Because prosecutors invoked the FCPA against individuals on a limited basis for much of its existence, trials were few and far between, resulting in a striking scarcity of judicial opinions illuminating the contours of the statute’s sometimes murky mandates.

In place of the reservoir of reported decisions which typically illuminate the contours of a criminal statute, those struggling to understand and comply with the FCPA have been left to rely on two sources of information: opinions issued by the Department of Justice in response to specific inquiries, 15 U.S.C. § 78dd-1(e), and the terms of negotiated settlement agreements executed between corporate violators and the government. Because criminal indictment, must less conviction, often represents the death knell for corporations, the government has long enjoyed a substantial advantage in negotiating leverage which has resulted in settlement terms reflecting a liberal interpretation of the FCPA’s elements and a broad view of its scope. While this means that those settlement agreements do not necessarily represent the definitive standard for measuring conduct, they often represent the best information currently available.

## THE ANTI-BRIBERY PROVISIONS

While some dispute exists regarding the precise elements of an anti-bribery violation, most courts and commentators agree that the government must show the corrupt offer, payment or promise to pay anything of value to a foreign official for the purposes of securing any improper advantage, influencing any act or decision of that foreign official in his official capacity, or inducing the foreign official to do or omit any act in violation of his lawful duty. Which each of these elements raises particularized concerns, the intent requirement constitutes the most notable component of the anti-bribery provisions, as the statute contains dense language regarding the various alternative methods of proving a violation. All violations must involve corrupt intent, a term the FCPA’s legislative history defined to “connote an evil motive or purpose; an intent to wrongfully induce the recipient.” S. Rep. No. 95-114 at 10 (1977). Intent is typically proven circumstantially, and may be demonstrated by the amount of a payment, its temporal relationship to a particular decision by a foreign official or its lack of transparency. For example, a \$50,000 payment by an American company to a foreign official characterized as an “advance consulting fee” made just days before that official approves the company’s bid for a \$10 million contract with a state-run entity creates a compelling circumstantial evidence of an effort to corruptly influence the recipient in the performance of his official duties.

In those situations where enforcement is premised on payments through intermediaries, the FCPA allows for conviction where an individual or company corruptly transfers money or a thing of value to an intermediary “while knowing that all or a portion of [that money or thing of value]” will then be offered, given or promised to a foreign official in order to obtain or retain business. 15 U.S.C. § 78dd-1(a)(3). Under the statute, a person’s state of mind is “knowing” if the person has actual awareness or even just a “firm belief” that the result is “substantially certain” to occur. The statute also provides that when proof of a particular circumstance is required, that knowledge may be deemed established “if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2).

In theory, the relatively minimal showing necessary to establish an FCPA violation in this context seeks to prevent individuals and companies from circumventing the statute’s prohibitions by simply funneling money to third parties operating overseas in an effort to outsource the actual payment of bribes. In practice, this language transforms the process of divining the requisite level of intent into an evaluation of a calculus made up of factors

The FCPA contains two main components, commonly referred to as the “anti-bribery” and “accounting” provisions.



including various “red flags” which suggest that a person purposely avoided learning certain facts in order to escape liability. These red flags are numerous, and include such circumstances as operating in countries where there is widespread corruption (according to rankings compiled annually by Transparency International, an international non-governmental organization aimed at fighting global corruption), contracting with third parties at the insistence of government customers, making payments which are secretive or unusual to third parties (including payments in cash), and dealing with parties who have a history of improper payment practices. Designed to prevent individuals and companies from simply “putting their head in the sand,” the FCPA’s reduced and amorphous intent requirement serves to create a separate due diligence obligation to investigate intermediaries and also to monitor their activities on an ongoing basis.

## DEFENSES TO THE ANTI-BRIBERY PROVISIONS

In 1988, 11 years after enactment of the FCPA, Congress amended the anti-bribery provisions to recognize an exception and two affirmative defenses. While these modifications carve out safe harbors from liability, their narrow scope and infrequent application effectively serve to reinforce the breadth of the statute.

The exception authorizes the payment of “facilitating” or “grease” payments to foreign officials made to secure or speed the performance of routine, nondiscretionary government functions. 15 U.S.C. § 78dd-1(f). The statute defines these functions to include “processing governmental papers, mail pickup and delivery, providing phone service, and protecting perishable products.” *Id.* True facilitation payments not only must relate to ministerial acts, they must also be small in amount—the Department of Justice has only authorized payments of less than \$1,000 in previously issued opinions.


The FCPA recognizes an affirmative defense to liability where “the payment, gift, offer, or promise of anything of value that was made was lawful under the written laws and regulations of the [foreign official’s] country.” 15 U.S.C. § 78dd-1(c)(1). As a practical matter, this defense offers little shelter. “Lawful under written law” is fundamentally different from “consistent with local custom and practice,” and no country in the world—even those with the most pervasive cultures of corruption—authorizes bribery under its written laws.

It is also an affirmative defense that a payment to a foreign official “was a reasonable and bona fide expenditure, such as travel or lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services. . . .” 15 U.S.C. § 78dd-1(c)(2). The government strictly construes this defense, wary that companies will utilize it as a means of concealing excessive payments under the guise of legitimate promotional activities. Enforcement actions have rejected efforts to include the payment of extravagant expenditures such as first-class travel, lodging at exclusive hotels and payment for families of government officials under this defense. Because hard and fast guidelines are difficult to articulate in this context, common-sense standards remain the guiding principles for evaluating the legitimacy of payments of this type.

Although not specifically referenced in the original or amended versions of the statute, extortion may also constitute a viable defense under the FCPA. But “extortion” can cover a wide range of activity, from demands for payment before the lights are turned on to threats of physical violence against employees. While the dearth of judicial guidance on this topic complicates matters, the legislative history of the statute recognizes that payments in the latter category are clearly exempted from the statute because “while the FCPA would apply to a situation in which a ‘payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,’ it would not apply to one in which payment is made to an official ‘to keep an oil rig from being dynamited,’ an example of ‘true extortion.’” *United States v. Kozeny*, 582 F.Supp.2d 535, 539 (S.D.N.Y. 2008) (quoting S. Rep. 114, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977) at 11). Thus, it would seem that “economic extortion” is different not only in degree, but in kind, from “true extortion” and therefore is unlikely to resonate as a defense to bribery allegations where the facilitation payment defense does not apply.

## THE ACCOUNTING PROVISIONS

In contrast to the wide range of companies and individuals subject to the anti-bribery provisions, the accounting provisions apply only to “issuers”—those companies who register securities under § 12 of the Securities and Exchange Act of 1934 or are required to file reports under § 15(d) of that Act. This group consists primarily of those companies that list shares on U.S. stock exchanges. As noted above, the accounting provisions



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mandate that issuers maintain books, records and accounts which accurately record transactions and the disposition of assets. This component of the statute aims to prevent companies from disguising bribe payments in their books as “commissions,” “rebates,” “consulting fees,” “local taxes,” or some other apparently innocuous label. The accounting provisions also direct issuers to implement and maintain a system of internal controls calculated to provide reasonable assurances that the issuer’s transactions are executed in accordance with management’s general or specific authorization and recorded in a manner necessary to allow for preparation of financial statements according to generally accepted standards. Notably, the accounting provisions’ requirements are not limited to those transactions or assets which relate to the payment of bribes—any inaccurate or misleading entry or failure to fulfill the obligations suffices to impose liability.

## STRATEGIES FOR COMPLIANCE

A robust compliance program represents the most effective means to mitigate the risks the FCPA presents. A properly designed, implemented and maintained program must contain elements which manage internal and external threats, as assessed by the company in the most searching and candid fashion possible. Internal threats involve actions by employees—whether undertaken with or without improper intent—which expose companies to liability under the statute.

To implement this element of the program, companies should commit to construct a program which:

- provides education and training about the FCPA, including development and distribution of written standards of conduct;



**This component of the statute aims to prevent companies from disguising bribe payments in their books as “commissions,” “rebates,” “consulting fees,” “local taxes,” or under some other apparently innocuous label.**

- is overseen by a designated individual who is accessible to employees and has clear channels of communication to senior management;
- encourages and provides avenues for reporting of violations;
- identifies and enforces sanctions for noncompliance;
- utilizes audits and other techniques to monitor compliance, identify problem areas and assist in the reduction of identified problems; and
- provides for the non-employment or retention of excluded individuals who have violated corporate or compliance policies, applicable statutes and regulations.

External threats arise when outside individuals or entities—intermediaries, consultants or agents (including distributors, customs brokers and freight forwarders)—are retained to perform functions on behalf of the company, or when the company participates in joint ventures or merges with or acquires other entities. Because the FCPA recognizes a violation where a composite of factors demonstrates conscious avoidance of certain facts, doing business with unknown individuals or entities heightens the risk under the statute. In this context, individuals and companies need to undertake meaningful efforts to learn whether red flags exist—not just in their own organ-

ization but also as to those they do business with—and recognize that they will be held responsible for the failure to do so. As a practical matter, this means drafting joint venture and agency agreements which insist on representations and warranties pledging compliance with the FCPA (including those which require assurances that the individual or company has and will continue to comply with the statute and provides the right to inspect the party’s books and records), securing remedies for violations of those warranties (including “claw-back” provisions which allow for recovery of amounts paid or render the agreement void *ab initio*), and committing to conduct thorough due diligence when acquiring or joining with another entity.

On this issue, it is vital to note that compliance programs are not “one size fits all” and cannot remain static after implementation. Nor may companies simply employ rigid and shallow due diligence procedures when dealing with outside entities in order to “paper the file.” The scope of the risk defines the necessary scope of the compliance plan or the due diligence obligation. A business with \$10 million a year in gross revenue is not expected to create and maintain a compliance program on the level of Exxon/Mobil or Boeing, nor is a company which exports books to Switzerland expected to build and operate the same program as a company which runs an oil refinery in Nigeria. But while the scope of the obligation for smaller companies operating in

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traditionally recognized “safe” industries or countries may be reduced, it is not eliminated. The government expects all individuals and companies doing business overseas to undertake genuine efforts to comply with the FCPA—simply going through the motions will not prevent violations or insulate the company or individual from government sanctions when they occur.

## THE FUTURE OF FCPA ENFORCEMENT

Practice under the FCPA promises to continue to present dynamic challenges. In late 2008, the DOJ’s chief of FCPA enforcement announced that “the number of individual prosecutions [under the FCPA] has risen—and that’s not an accident . . . It is the [DOJ’s] view that to have a credible deterrent effect, people have to go to jail.” That warning coincided with the DOJ, SEC and FBI dramatically ramping up the resources allocated for FCPA enforcement, increasing the number of attorneys and agents assigned to investigate and prosecute cases.

These commitments rapidly produced real results. Not only has the government increased the number of individuals and companies charged, it has also consistently sought substantial penalties—in the form of lengthy prison sentences and hefty fines—for those who violate the FCPA. In April 2009, the government charged eight employees of Control Components, Inc., a California-based corporation which designed and produced valves for oil and gas production, with authorizing or paying over \$5 million in bribes in 36 countries over a 10-year period. This was the largest number of individuals charged in one FCPA case until January 2010, when the government arrested 22 individuals after conducting a massive, Abscam-inspired undercover investigation in which federal agents posed as officials from the defense ministry of the African nation of Gabon and pretended to solicit bribes from suppliers of products in the law enforcement and tactical equipment industry.

The government has also altered its approach once individuals are indicted and convicted. In April 2010, the government secured a sentence of seven years’ imprisonment for Charles Jumet, a Virginia man who bribed Panamanian officials to secure maritime contracts on the Panama Canal. That sentence—which is currently the longest ever imposed in an FCPA case—is likely to be dwarfed by subsequent cases as the government continues to intensify its efforts to prosecute international corruption by prosecuting larger cases and seeking lengthier prison sentences for violators. In fact, this year alone, the government sought a sentence of 10 years for Frederic Bourke, an investor convicted of paying bribes in furtherance of a failed venture to secure the privatization rights to Azerbaijan’s state-owned oil industry, and

over 20 years for Gerald and Patricia Green, two film producers convicted of paying \$1.8 million in bribes to a Thai official in exchange for \$13.5 million in contracts to produce the Bangkok Film Festival.

The scope of the government’s focus will continue to expand as well. While the oil and gas, defense and telecommunications industries have long been breeding grounds for corrupt activity, the government has announced a plan to widen the scope of FCPA enforcement to target additional sectors. In late 2009, the government declared its intention to focus on the pharmaceutical industry, especially in those countries with state-run health systems (where every employee would theoretically meet the definition of “foreign official”). More industries are likely to be targeted, and more cases are likely to be made across the spectrum of industries of all sizes engaged in international commerce.

...the government declared its intention to focus on the pharmaceutical industry, especially in those countries with state-run health systems...



## CONCLUSION

In theory, the FCPA serves a clear purpose: preventing corrupt payments to foreign officials. In practice, the statute’s broad reach and sometimes murky requirements can challenge even the most earnest individual or company doing business overseas. One byproduct of the government’s increased focus on criminal prosecutions in general and individuals in particular will be a dramatic increase in the number of trials and appeals. In time, the rulings which arise from these cases should serve to further clarify the FCPA’s obligations, elements and defenses, and

facilitate the understanding and application of the statute’s terms. In the meantime, however, individuals and companies engaged in international commerce—and the lawyers who advise them—will be forced to chart a course of compliance through treacherous seas.

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# Alabama's New Uniform Guardianship and Protective Proceedings Jurisdiction Act:

## Providing Clear Guidance for the Management and Resolution of Interstate Guardianship and Conservatorship Disputes

**By Hugh M. Lee**

What happens when a client, concerned about the care of his or her incapacitated parent in a Florida nursing home, checks that parent out of the nursing home, relocates the parent to a facility in Dothan, Alabama and petitions the Houston County Probate Court for guardianship and conservatorship? How should a court respond when family members engage in an interstate “tug of war” over the care of an incapacitated family member and control of their estate? How should an Alabama court treat guardianship and conservatorship orders entered by another state? What about the treatment of guardianship and conservatorship decrees issued by the courts of foreign countries?

These myriad questions and others are addressed by the Uniform Guardianship and Protective Proceedings Jurisdiction Act (UGPPJA), a new Act recently passed by the Alabama Legislature which establishes clear guidelines for the resolution of interstate jurisdiction disputes. Such an act is necessary due to the absence of any provision under current Alabama law to resolve these disputes. Under Alabama's current Uniform

Guardianship and Protective Proceedings Act, Alabama's courts may establish jurisdiction and continue to exercise jurisdiction so long as the individual over whom guardianship or conservatorship is sought is present in the state or, in the case of conservatorships, so long as there is property of the protected person's estate in Alabama.<sup>1</sup> However, the current provisions of the *Alabama Code* do not specifically address what happens when incapacitated persons are relocated from one state to another in an attempt to gain a more favorable forum, to have another chance at litigating guardianship and conservatorship issues, or to gain control over the protected person's assets. Nor does current Alabama law provide specific remedies when a protected person is removed from Alabama's jurisdiction and proceedings are filed elsewhere.

To address these issues, the Alabama Law Institute established and convened a drafting committee in late 2007 to review and consider the Uniform Guardianship and Protective Proceedings Jurisdiction Act. After nearly 24 months of work, the proposed UGPPJA was presented to the Alabama Legislature, sponsored by



Representative Tammy Irons in the Alabama House of Representatives and by senators Arthur Orr and Ted Little in the Alabama Senate. Both houses passed House Bill 114. The Alabama Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act<sup>2</sup> was signed into law by Governor Bob Riley on April 22, 2010, to become effective January 1, 2011. The Act sets minimum standards for the acquisition of jurisdiction, continuation of jurisdiction and resolution of interstate jurisdictional disputes between courts.

This article will explain the Act's genesis, its basic operation and the primary provisions of the Act. As an Act which defines the circumstances under which an Alabama probate court may take jurisdiction and which sets the limits of that jurisdiction, the UGPPJA fundamentally changes the process by which jurisdiction over guardianship and protective proceedings is determined and, therefore, merits close examination by those practicing in this area. This article provides a starting point for closer study and examination of the Act.

## *The Act's Genesis: Uniform Child Custody Jurisdiction Laws*

The Uniform Guardianship and Protective Proceedings Jurisdiction Act was drafted by a committee of the Uniform Laws Commission and presented for final approval to the 2007 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>3</sup> The Uniform Act, upon which Alabama's Act is based, derives its guiding operational principles from the

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>4</sup> Prior to the adoption of the UCCJEA (and its predecessor, the UCCJA), similar jurisdictional problems frequently occurred in child custody determinations. Parents in the midst of custody disputes commonly relocated to other states in an attempt to find a more favorable forum, to make litigation of the issues more difficult for the opposing party, to discourage visitation (and thereby prejudice the other party's case), and to gain a second chance at litigating issues which were perhaps lost in the original jurisdiction.

Because the jurisdictional rules in existence prior to the UCCJA allowed courts in more than one state to properly exercise jurisdiction, parties were able to engage in forum shopping for the most favorable jurisdiction. The passage of the UCCJEA, however, set limits on the exercise of jurisdiction and provided courts with a procedure to encourage and require communication, cooperation and resolution of interstate child custody jurisdiction disputes.<sup>5</sup> In light of the success of the UCCJEA and the similar issues raised by interstate guardianship



and conservatorship disputes, it is not surprising that the drafters of the Uniform Act modeled the first two articles of the UGPPJA upon the similar provisions of the UCCJEA.<sup>6</sup>

As a result, attorneys practicing in the family law area will likely be familiar with the terminology of the UGPPJA, which establishes definitions and jurisdictional prerequisites very similar to the UCCJEA. As of the effective date of the Act, jurisdiction of adult guardianship and conservatorship proceedings filed in the Alabama courts shall be determined exclusively through the application of the UGPPJA.<sup>7</sup> Although not the only basis for establishing jurisdiction, most interstate guardianship and conservatorship jurisdiction disputes will be resolved by application of the “home state” concept so prevalent in the UCCJEA. Under the Act, an Alabama court may only exercise jurisdiction of an adult guardianship and conservatorship case if the state of Alabama is the protected person’s “home state”—generally, the state where the protected person has lived continuously for six months prior to the filing of the petition.<sup>8</sup> If Alabama is not the home state, it may only exercise jurisdiction if the court determines that the protected person has “significant connections” with the state of Alabama (and no other court is properly exercising jurisdiction) or determines that it must exercise emergency jurisdiction for a short period of time for the protection of the protected person.<sup>9</sup> This basic jurisdictional framework and terminology is borrowed directly from the UCCJEA.

## Overview of the Act

The Act is broken down into five articles, the most important and substantive of which are the first three articles, which address the scope and operation of the act, the framework for establishing jurisdiction and the transfer and recognition of foreign guardianship and conservatorship orders. Article One of the Act contains definitions as well as guidance to courts

to ensure cooperation and communication between them.<sup>10</sup> Article Two contains critical provisions establishing the framework for determining jurisdiction.<sup>11</sup>

Article Three establishes the method by which guardianship and conservatorship proceedings may be transferred.<sup>12</sup> Article Four addresses the registration and recognition of foreign guardianship and conservatorship orders.<sup>13</sup> Article Five establishes the effective date of the act, the existing laws repealed or amended and other pro forma language common to the passage of new acts.<sup>14</sup>

## Article One: Scope and Operation

The Act is limited in scope to guardianship and conservatorship proceedings concerning adults only.<sup>15</sup> The Act is not intended to address other kinds of “protective” orders nor is it intended to govern proceedings regarding minors, jurisdiction of which is likely governed by the UCCJEA. Though inapplicable to minors, the Act is intended to apply to international adult guardianship and conservatorship orders, when those orders are entered in a manner essentially consistent with Alabama law and in accordance with basic tenets of human rights.<sup>16</sup> The Act provides clear direction concerning the process to be used to resolve interstate jurisdiction disputes. It allows Alabama courts to communicate with foreign courts for the purpose of resolving interstate jurisdiction disputes.<sup>17</sup> At the court’s discretion, the parties may be present to participate in that discussion between the courts. However, the court is required to create a record of any substantive conversations and to make that record available to the parties. If the parties are not privy to the discussion between the courts, each party must be allowed to present arguments concerning jurisdiction.<sup>18</sup> The last two sections of this article authorize and facilitate the taking of testimony and the development of other evidence in foreign jurisdictions

and allow Alabama courts to reciprocate when foreign jurisdictions request such assistance under the Act.<sup>19</sup>

## Article Two: Jurisdiction

Undoubtedly the most important article in the Act is Article Two, which contains the specific rules for determining jurisdiction over adult guardianship and conservatorship proceedings, as well as definitions specific to that determination. This article attempts to accomplish several goals, including ensuring that only one state has jurisdiction to appoint a guardian or conservator (except in emergency situations or where a protected person owns property in multiple states), that the court exercising jurisdiction is the most appropriate court and that courts have a procedure to follow when no clearly superior jurisdiction presents itself. With the passage of this Act, attorneys will rely upon Article Two in every adult guardianship and conservatorship case to determine whether jurisdiction is appropriate in Alabama.

Article Two of the Act establishes four primary bases for jurisdiction. Under the terms of the Act, an Alabama court may only exercise jurisdiction over an adult guardianship and conservatorship petition under the following circumstances: (1) Alabama is the home state of the protected person; (2) the protected person has no home state and has significant connections with Alabama; (3) the respondent’s home state and other significant connection states all decline jurisdiction; or (4) the protected person faces a significant threat to health or safety which justifies the court taking emergency jurisdiction over the matter.<sup>20</sup>

Most petitions for guardianship or conservatorship will be brought pursuant to the “home state” jurisdiction of the court, as defined by Section § 26-2B-201 and established under Section § 26-2B-203. Pursuant to Section § 26-2B-203, an Alabama court may exercise jurisdiction



The Act is limited in scope to guardianship and conservatorship

over a protective proceeding if Alabama is the protected person's "home state." This term is defined under Section § 26-2B-201 of the Act as the state in which the respondent lived for six consecutive months prior to the filing of the petition.<sup>21</sup> If Alabama is not the respondent's home state, an Alabama court nonetheless may exercise jurisdiction if the respondent has a "significant connection" to Alabama and the following criteria are also met: (1) the respondent does not have a home state or their home state has declined jurisdiction; or (2) the respondent has a home state but there is no pending petition in either the respondent's home state or another significant connection state.<sup>22</sup> In the second instance, the Alabama court must find that it is an appropriate forum and must enter its order before either a petition is filed in the home state or an objection is filed to its jurisdiction. In either instance, the court's jurisdiction may be lost by the intervening action.

In addition to home state and significant connection jurisdiction, Alabama courts may exercise jurisdiction over protective proceedings if the respondent's home state and significant connection states have declined to exercise jurisdiction or if emergency jurisdiction is appropriate under Section § 26-2B-204 of the Act.<sup>23</sup> Under Section § 26-2B-204, the court may appoint a guardian for a period of no more than 90 days or may issue a protective order in case of emergency.<sup>24</sup> An emergency is defined as a circumstance which "will likely result in substantial harm to the respondent's health, safety or welfare, in which there is no other person with authority and willingness to act."<sup>25</sup> The court's special jurisdiction, however, must end if a request for dismissal is received from a court in the respondent's home state.<sup>26</sup> Successive petitions may be filed so long as the respondent's home state does not request dismissal.<sup>27</sup> Thus, it stands to reason that, by exercising its special jurisdiction under Section § 26-2B-204, an Alabama court may eventually acquire home state jurisdiction under Section § 26-2B-203.

In addition to providing clear guidelines for establishing jurisdiction, the Act also authorizes the court to decline to exercise jurisdiction under certain conditions. Section § 26-2B-206 authorizes a court to decline jurisdiction if it determines that another court provides a more appropriate forum. Factors to be considered include the preference of the respondent, the occurrence of abuse or neglect and the ability of each forum to protect the respondent therefrom, the length of the respondent's presence within the state, the distance of the respondent from each court, the condition of the respondent's estate, the location of pertinent evidence, the court's familiarity with the respondent, and other factors.

Pursuant to Section § 26-2B-207, the court may also decline jurisdiction if the court acquired jurisdiction by "unjustifiable conduct," a term which is not defined by the Act. The Act provides the court with several options in the face of unjustifiable conduct, including continuing to exercise jurisdiction under certain circumstances. When the court finds that a party's conduct is unjustifiable, it may further impose attorney's fees and other costs.<sup>28</sup> Sections § 26-2B-206 and § 26-2B-207 of the Act should be carefully read and incorporated into the practitioner's understanding of the UGPP-JA. Without the right to decline jurisdiction established under these sections, competing courts could only resolve certain jurisdictional disputes by resorting to the first-in-time rule—for instance, when two different courts are both attempting to assert significant connection jurisdiction. These provisions of the Act give Alabama courts the discretion to defer to another court when that court is in a better position to conduct or administer the guardianship or conservatorship proceeding, or when a party's conduct makes declining jurisdiction in favor of another state more appropriate.

To summarize, an Alabama court may obtain jurisdiction to hear a guardianship or conservatorship case under the following circumstances:

a) if it is the home state;

- b) if the respondent has a significant connection to Alabama, and
  1. the respondent has no home state or their home state has declined jurisdiction;
  2. there is no pending action in their home state or in another significant connection state, and Alabama determines that it is an appropriate forum for the matter;
- c) if Alabama is neither the home state nor a significant connection state, but neither the respondent's home state nor significant connection states will accept jurisdiction and jurisdiction is otherwise constitutional;
- d) if there is an emergency as defined by Section § 26-2B-201 and the respondent's home state has not requested dismissal of the emergency petition.

So the question then is how to resolve interstate jurisdiction disputes when multiple petitions for protective proceedings are pending in different jurisdictions? If an Alabama court has accepted jurisdiction of a protective proceeding based upon home state jurisdiction (Section § 26-2B-203), its jurisdiction shall be superior to that of every other court unless another court has previously entered an order establishing home state jurisdiction. In the absence of home state jurisdiction, if a petition is pending in Alabama and in another state, the Alabama court should stay the proceeding and communicate with the other court about which state is the most appropriate forum. Under Section § 26-2B-209 of the Act, if the other court has jurisdiction, the Alabama court must dismiss the action unless the other court determines that Alabama provides a more appropriate forum. By adopting these "rules of engagement," the Act makes it clear which court should decide the jurisdictional issue and establishes a real order of authority between competing courts. Initially, however, figuring out these issues of competing jurisdiction may be difficult.

proceedings concerning **adults** only.





Below is a chart which attempts to explain how a jurisdictional dispute would be resolved between Alabama and a competing jurisdiction under the UGPPJA. Beneath each state is the type of jurisdiction the court is attempting to exercise. The mathematical operator indicates the relative outcome between the two competing states and the right-hand column explains the outcome in each instance.

As a result of these jurisdictional requirements, passage of the UGPPJA required the amendment of the Uniform Guardianship and Protective Proceedings Act to require all protective proceeding petitions to meet the jurisdictional prerequisites of the UGPPJA. In order to ensure compliance with these jurisdictional prerequisites, the Act requires the completion of an affidavit at the time of filing which discloses any pending guardianship or conservatorship actions, the protected person’s residence, their legal status and any voluntary appointments made by them.<sup>29</sup> This requirement mirrors the UCCJE30 requirement but reflects an amendment to the Uniform Act. The affidavit requirement is intended to facilitate the court’s initial determination of jurisdiction.

## Articles Three and Four: Transfer and Registration of Foreign Proceedings and Orders

The next two articles of the Act address the interstate transfer of pending guardianship and conservatorship proceedings as well as the requirements for registration and recognition of foreign decrees. Prior to the drafting of the UGPPJA, few states had procedures in place to govern the transfer of a guardianship or conservatorship from one state to another. Often, a petitioner would simply have to terminate a proceeding in one state and file a new petition for guardianship and/or conservatorship in another. This was both time-consuming and expensive.

By adopting Section § 26-2B-301 of the Act, Alabama courts will be able to transfer and accept the transfer of guardianship and conservatorship proceedings without re-litigating the issue of

incapacity, fitness of the proposed guardian/conservator or scope of the guardianship or conservatorship. In order to complete the transfer of an existing guardianship or conservatorship from one state to another, the transferring state must enter an order transferring the case and the receiving state must enter an order accepting the case.<sup>31</sup>

In order to transfer the case, the transferring court must make specific findings concerning the residency or connection of the respondent to the other state, the adequacy of the care of the person or their estate in the other state and the absence of any objection to the transfer. The guardian or conservator must follow the standard procedures for the termination of the case under the UGPPA and the receiving court must accept the transfer before the transferring court may issue a final order transferring the case. In accepting the transfer of the case, the receiving court must defer to the transferring court’s finding of incapacity and choice of the guardian or conservator.<sup>32</sup>

Article 4 of the UGPPJA provides a procedure for the registration and enforcement of guardianship or protective proceedings decrees from other states. This provision is necessary in light of the fact that the Full Faith and Credit Clause of the United States Constitution does not necessarily mandate that states give full faith and credit to guardianship and protective proceedings held in other states.<sup>33</sup> Because some financial institutions will not recognize the authority of foreign guardians and conservators to act in Alabama, foreign guardians have had to re-file a guardianship action in Alabama in order to conduct their ward’s business.

Sections § 26-2B-401 and § 26-2B-402 of the Act authorize the registration of foreign guardianship and conservatorship orders. Once registered, a guardian or conservator from another state may exercise all of the powers enumerated in the original order, except those powers prohibited under Alabama’s Uniform Guardianship and Protective Proceedings Act.<sup>34</sup>

The UGPPJA has been adopted by 17 states, including Alabama,<sup>35</sup> Alaska, Colorado, Delaware, District of Columbia, North Dakota, Montana, Utah, and Washington. At least 10 additional states have considered or are currently considering passage of the Act.<sup>36</sup> After the approval of the Uniform Act by the

# Which State Has Jurisdiction?

Alabama		Foreign State	Who Has Jurisdiction?
Home State	=	Home State	The state receiving the earliest petition has jurisdiction unless it declines it in favor of a more appropriate forum.
Home State	>	Significant Connection	As the home state, Alabama has a jurisdiction unless it declines it in favor of a more appropriate forum.
Home State	>	Emergency Jurisdiction	As the home state, Alabama has jurisdiction, although a request to dismiss the emergency proceeding would be necessary.
Significant Connection	<	Home State	As the home state, the foreign state has jurisdiction unless it declines jurisdiction in favor of Alabama, as a more appropriate forum.
Significant Connection	=	Significant Connection	Competing significant connection jurisdictions will have to communicate to determine which forum is more appropriate, unless one jurisdiction previously declined jurisdiction.
Significant Connection	<	Emergency Jurisdiction	The foreign state has jurisdiction unless it declines jurisdiction in favor of Alabama, as a more appropriate forum.

This table shows how a jurisdictional dispute between Alabama and another state would be resolved under the proposed UGPPJA. Note the importance of the court’s authority to decline jurisdiction, even when its jurisdiction may be superior under the terms of the proposed act.

Uniform Law Commission in August 2007, the Alabama Law Institute began its study of the Act in December 2007, convening a drafting committee made up of probate judges, lawyers and court officials from throughout the state. That committee reviewed and modified the Uniform Act to draft the Alabama Uniform Guardianship and Protective Proceedings Jurisdiction Act. The committee made slight modifications to the Uniform Act to reflect Alabama practice as well as to ensure that the Act works smoothly in conjunction with the Uniform Guardianship and Protective Proceedings Act.

## Conclusion

With the passage of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act this spring, Alabama adopted a viable solution to the jurisdictional problems often posed by interstate guardianship and conservatorship proceedings. With its adoption, Alabama attorneys who handle these matters now have unambiguous guidelines for determining the appropriate jurisdiction for guardianship and conservatorship petitions as well as clear procedures for contesting that jurisdiction. This Act will also ensure that Alabama guardians and conservators may more easily fulfill their duties in foreign jurisdictions, and foreign guardians and conservators operating in Alabama register their authority and operate within the boundaries of Alabama's Uniform Guardianship and Protective Proceedings Act. ▲▼▲

## Endnotes

1. *Ala. Code* § 26-2A-101 (1975); *Ala. Code* § 26-2A-160 (1975).
2. *Ala. Act No.* 2010-500.
3. See <http://www.nccusl.org/Update/ActSearch/Results.aspx> [http://www.law.upenn.edu/blj/archives/ulc/ugijaea/2007\\_final.htm](http://www.law.upenn.edu/blj/archives/ulc/ugijaea/2007_final.htm) (accessed May 17, 2010) (showing final version of UGPPJA adopted by the Uniform Commission).
4. Codified in Alabama as *Ala. Code* § 30-3B-101, et. seq. (1975).
5. See generally *Ala. Code* §§ 30-3B-201-209 (1975).
6. National Conference of Commissioners on Uniform State Laws, "Prefatory Note to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act," available at [http://www.law.upenn.edu/blj/archives/ulc/ugijaea/2007\\_final.htm](http://www.law.upenn.edu/blj/archives/ulc/ugijaea/2007_final.htm) (accessed on May 14, 2010).
7. *Ala. Act* 2010-500 (codified at *Ala. Code* § 26-2B-202).

8. *Ala. Act* 2010-500 (codified at *Ala. Code* § 26-2B-203(1)).
9. *Ala. Act* 2010-500 (codified at *Ala. Code* § 26-2B-203).
10. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-101 through 26-2B-106).
11. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-201 through 26-2B-210).
12. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-301 through 26-2B-302).
13. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-401 through 26-2B-403).
14. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-501 through 26-2B-503).
15. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-102).
16. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-103).
17. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-101 through 26-2B-106).
18. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-104).
19. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-105 through 26-2B-106).
20. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-202 through 26-2B-205).
21. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-201(a)(2)).
22. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-203(a)(2)).
23. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-203(a)(3)).
24. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-204).
25. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-201(a)(1)).
26. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-204(b)).
27. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-204(c)).
28. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-207).
29. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-210).
30. *Ala. Code* § 30-3B-209 (1975).
31. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-301 through 26-2B-302).
32. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-301 through 26-2B-302).
33. See generally American Law Reports, "Extraterritorial effect and recognition of adjudication of competency or incompetency, sanity or insanity," 102 A.L.R. 1044 (2009 Supp.) (which indicates that the circumstances under which such determinations are entitled to full, faith and credit vary greatly and often depend upon local rule).
34. *Ala. Act* 2010-500 (codified at *Ala. Code* §§ 26-2B-403).
35. See National Conference of Commissioners on Uniform State Laws, "A Few Facts About the Adult Guardianship and Protective Proceedings Jurisdiction Act," at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uagppja.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uagppja.asp) (accessed on May 17, 2010) (which indicates that Alabama, Alaska, Arizona, Colorado, Delaware, the District of Columbia, Illinois, Iowa, Minnesota, Montana, Nevada, North Dakota, Oregon, Tennessee, Utah, Washington, and West Virginia have adopted the Act).
36. See National Conference of Commissioners on Uniform State Laws, "A Few Facts About the Adult Guardianship and Protective Proceedings Jurisdiction Act," at [http://www.nccusl.org/Update/uniformact\\_factsheets/](http://www.nccusl.org/Update/uniformact_factsheets/)

[uniformacts-fs-uagppja.asp](http://uniformacts-fs-uagppja.asp) (accessed on May 17, 2010) (which indicates that the Act has been introduced in Connecticut, Florida, Hawaii, Kentucky, Maryland, Nebraska, Oklahoma, South Carolina, Vermont and Virginia).

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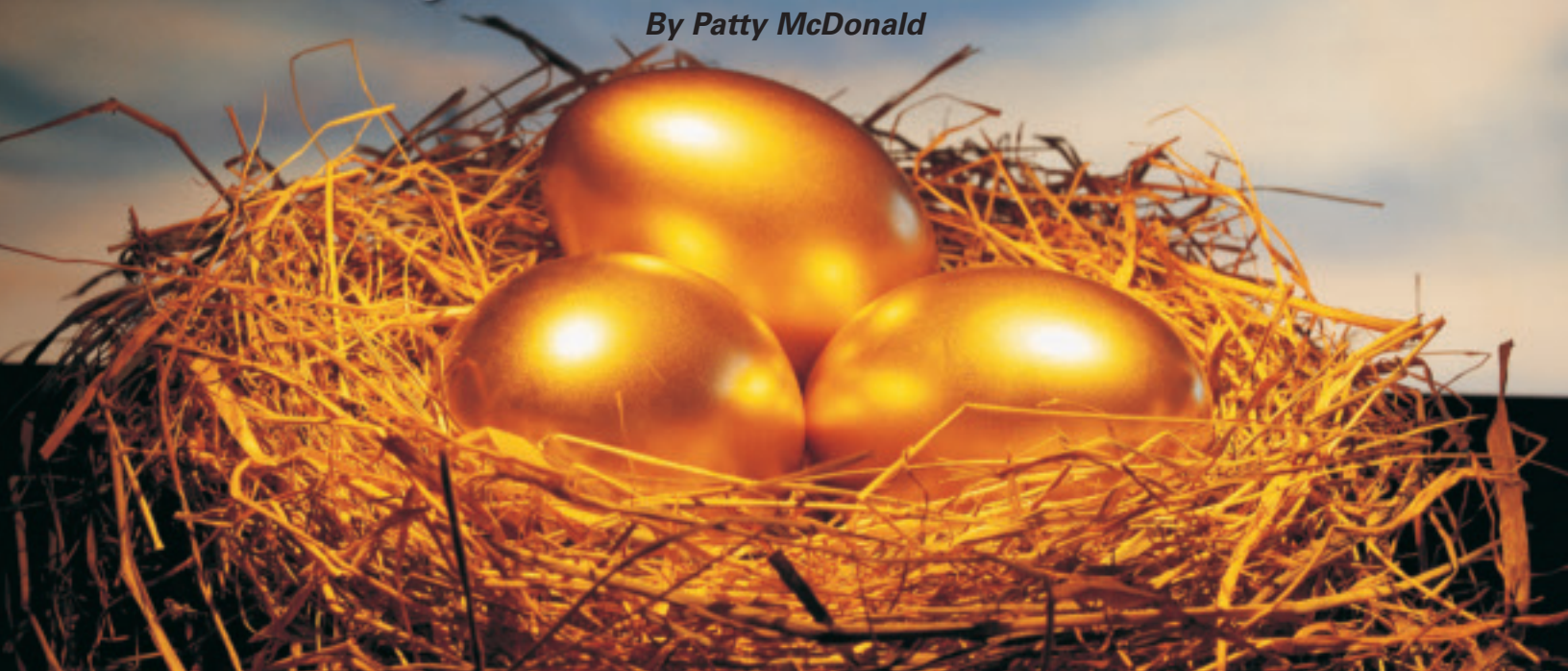
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# Preparing for Risk Protects Your Family and Preserves Assets

*By Patty McDonald*



*With the creation of a Senior Lawyers Section, an aging lawyer population and a heightened interest in healthcare and retirement planning issues in a changing economy, the following article highlights the details of the Blue Cross Blue Shield Long-Term Care program (LTC), an Alabama State Bar-approved member benefits program.*

Financial security and peace of mind go hand in hand. Most people like to feel that they are in control of the money they work hard to earn and save. Unfortunately, certain situations may preempt that control. If you or someone in your family requires long-term care, your current financial and health-care planning probably will not provide sufficient coverage. Health insurance, including Medicare and Medicare supplements, does not cover long-term care. Even with the very best financial plan, spending the current average of \$50,000-plus per year on long-term care will have an impact on a family's lifestyle.

Unfortunately, many people ignore the risk of this type of care, placing an unexpected burden on their family and risking the depletion of assets. A long-term care situation does not just affect the individual receiving care, but the entire family. A special section on retirement planning in the *Wall Street Journal* listed failing to consider long-term care needs as the number one mistake investors are making with their retirement savings. In the section's featured article, "Cracks in the Nest Egg," Joe Bowie, chief executive officer of Retirement Investment Advisors, Inc. states, "When people think about threats to their retirement savings they primarily think about market losses. What they fail to consider are the non-market-related

threats—health care, long-term care—the catastrophic events that can cause as much harm, or more, as a volatile market."

The risk of needing care is high—70 percent once one reaches ages 65. Currently 40 percent of people receiving long-term care services are adults between the ages of 18 and 64, the result of chronic health conditions, accidents and illnesses. One out of four families is currently faced with long-term care, and many are in the "sandwich generation," caring for both their dependent children and their parents. So why do so many ignore the risk? Most people do not want to envision a time in their life when they may have to be dependent on others, or they think they are immune to this risk altogether. But due to advances in medicine and technology, and therefore increased life spans, the likelihood of needing long-term care has risen over the years. A change in social demographics has increased the likelihood that people will be less dependent on family members and more dependent on paid caregivers. With couples having fewer children, more women in the workforce, higher divorce rates and fewer families living in close proximity, it has become much harder to care for a family member. Choosing to protect your family by acknowledging the risks and planning ahead for the costs of long-term care makes sense.

Long-term care is defined as extended chronic care that is needed as the result of an accident, illness, advanced age or cognitive impairment such as dementia or Alzheimer's disease. Long-term care is primarily unskilled care, and it involves assisting with activities of daily living such as bathing, eating, dressing and mobility. Long-term care is qualified when care is expected to last at least 90 days. The care is usually provided in one of the following settings: one's home, adult daycare facility, assisted living facility or nursing home.

The cost of care is high. Average care costs vary from state to state, but on a national level the average cost of care in a nursing home is \$195/day for a semi-private room (\$71,175/year) and \$220/day for a private room (\$80,300/year). The average cost of assisted living facility care ranges from \$2,050 to \$4,890/month depending on the facility and the level of care, with \$3,100/month (\$37,200/year) as the median cost. Home care averages \$21/hour for a home health aide and \$19/hour for a homemaker/companion. Adult day care averages \$66/day. Care costs continue to rise each year.

Who pays for long-term care? Unfortunately, most of the long-term care cost consists of out-of-pocket expenses paid by those needing care or by family members. Savings or retirement funds usually finance care, and in many cases families are forced to sell assets. After all resources are exhausted, Medicaid will pay for a portion; however, choices about the type of care are very limited as it mainly pays for nursing home care. The list of who *does not* pay for long-term care is the most extensive. Medicare, Medicare supplements, retiree benefit plans, private health insurance, VA plans, and disability insurance do not pay for most long-term care expenses. Home- and community-based care and nursing home care is considered to be the nation's greatest uninsured risk. A 2006 *Wall Street Journal* poll showed that two in five U.S. adults do not think they will have enough money to pay for their long-term care needs as they age and another third are not sure if they will have enough.

Because of its value in protecting a family's assets and lifting the emotional burden of care-giving off of a family, long-term care insurance is an important part of an overall financial plan. The best time to purchase a long-term care policy is when you are in good health and, therefore, insurable. Many people wait too long and are declined coverage due to health problems. The percentage of applicants declined for coverage increases with age. Most people purchase long-term care insurance in their 40s, 50s and 60s. Since premiums are based on the age when you apply for coverage and the benefit plan you select, the advantage of buying at a younger age is that your premiums will be lower. The average age that Blue Cross Blue Shield Preferred LTC customers purchase a policy is in their late 40s.

When considering a long-term care policy it helps to understand how it works. The Alabama State Bar-endorsed Blue Cross Blue Shield Preferred LTC plan is a tax-qualified long-term care insurance plan, offering both federal and state tax advantages. Features of the plan for ASB members include a group discount, limited underwriting requirements and payment options of either bank draft or direct bill. Family members can also take advantage of a group discount. The Preferred LTC plan can pay for care in one's home, adult daycare, assisted living facility, nursing home, hospital long-term care facility, and/or hospice facility. In addition, other special benefits covered may include respite care, home medical technology, med-

ical equipment, home modification, meal preparation and delivery, transportation, and informal caregiver training.

Bar members can design a plan to fit their financial situation by choosing from a variety of benefit options. The plan sets up a "pool of money" or lifetime maximum benefit that is the total amount of dollar coverage available to pay for qualified long-term care services. In general, the lifetime maximum benefit is determined by selecting a certain daily benefit amount and a benefit duration. The daily benefit is the dollar amount paid for each day of qualified long-term care services (ranges from \$50 to \$300) and it also has a corresponding monthly benefit to provide more flexibility. The benefit duration is only a multiplier used to determine the "pool of money." Benefit duration options include two, three, four and five years. A \$150/day five-year (1,825 days) plan would have a lifetime maximum benefit of \$273,750 ( $\$150 \times 1825 = \$273,750$ ). The daily, monthly and lifetime maximum benefits grow each year to keep you ahead of rising care costs with the plan's inflation protection feature (options include five percent simple or five percent compound). A lifetime waiting period is also selected (30, 60, 90, 120 days). The waiting period is the consecutive number of calendar days that must pass after qualified long-term care services begin and before benefits are available. The lifetime waiting period must be met only one time. Various optional riders are available to bar members as well.

When a long-term care need arises in a family there are a variety of issues to address. Most people do not know what to do or who can help make the best decisions. Preferred LTC's Care Coordination benefit provides an expert who can help ensure that you or your family member receives the best care in the most cost-efficient manner. The Blue Cross Preferred LTC Care Coordinator works with you, your family and your physician to design and facilitate a plan of care at no additional cost. This service does not decrease your maximum lifetime benefit.

Alabamians have trusted their healthcare insurance to Blue Cross Blue Shield of Alabama for seven decades. Now, the same trusted company offers a variety of long-term care options to Alabama State Bar members, allowing you to protect your family and your assets with a company that has a proven track record. Don't be one of those who fails to realize the value of long-term care coverage until an unexpected illness requires special care and it is too late to get insurance. Maintain your independence and provide your family with choices through Preferred LTC.

To request an information packet and quote on your Blue Cross Blue Shield Preferred LTC member benefit, contact your representatives, Patty McDonald, CLTC ([pmcdonald@bcbosal.org](mailto:pmcdonald@bcbosal.org)), or Regina Dean, CLTC ([rdean@bcbosal.org](mailto:rdean@bcbosal.org)), via e-mail or toll-free at 866-435-6669. ▲▲▲



*Patty McDonald is a Certified Long-Term Care Consultant, and serves as a Preferred LTC Marketing Representative with Blue Cross Blue Shield of Alabama.*





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# Hats Off to the Ones Who Make the LRS Possible

By Renee Avery

**Y**ou did it! Last year, the Alabama State Bar's Lawyer Referral Service assisted over 8,500 people with attorney referrals. Without the attorneys on the service, it never would have happened. Your participation allowed the LRS to assist in bridging the gap between the general public and the legal system, by finding attorneys in the county and the area of law needed.

A big "thank you" goes to all the attorneys who made the LRS a success this year with their time and effort and ongoing support. I look forward to another successful

year with the Lawyer Referral Service because of these members and I hope others join this much-needed service! ▲▼▲



*Renee Avery joined the Alabama State Bar staff as the Lawyer Referral Service secretary in February 2009.*

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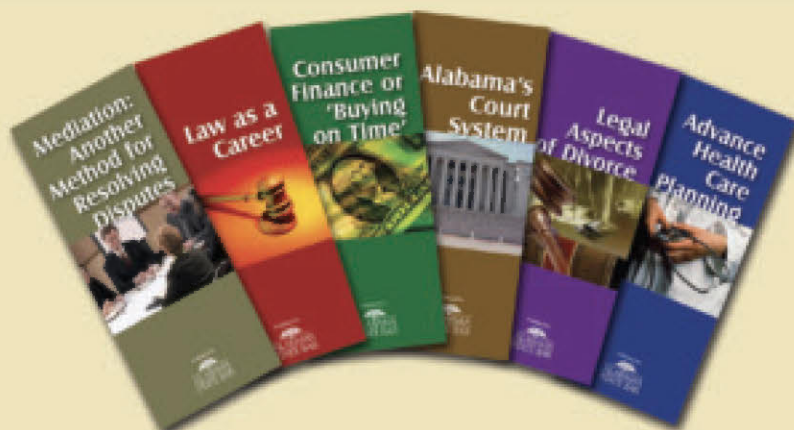
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J. ANTHONY MCLAIN



## The Unbundling of Legal Services and “Ghostwriting”

### QUESTION:

May a lawyer participate in the “unbundling” of legal services? Must a lawyer who only “ghostwrites” a pleading or complaint on behalf of a pro se litigant reveal his involvement to the court?

### ANSWER:

Rule 1.2, *Ala. R. Prof. C.*, allows a lawyer to limit the scope of his representation and, thereby, the services that he performs for his client. As such, a lawyer may participate in the “unbundling” of legal services. Ordinarily, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

- 1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.
- 2) The issue of the lawyer’s involvement in the matter is not material to the litigation.
- 3) The lawyer is not required to disclose his involvement to the court by law or court rule.

### DISCUSSION:

In recent years the practice of offering clients “unbundled” legal services has grown in popularity. “Unbundled” legal services are often referred to as “a la carte” legal services or “discrete task representation” and involve a lawyer providing a client with specific and limited services rather than the more traditional method of providing the client full representation in a legal matter. The unbundling of legal services falls into three general categories: consultation and advice, limited representation in court and docu-



## OPINIONS OF THE GENERAL COUNSEL Continued from page 401

ment preparation. For example, the client and lawyer may agree that the lawyer will be available for consultation on an hourly basis regarding a specific matter, but the lawyer will not undertake to represent the client in the matter or file a notice of appearance in the case. Sometimes, the lawyer may agree to make a limited appearance on behalf of the client at a hearing, but will not represent the client in the actual trial of the matter. Most often, however, the lawyer agrees to prepare an initial complaint for a client that the client will then file pro se. In that instance, the lawyer's drafting of the complaint is most often referred to as "ghostwriting."

The rationale behind offering clients the option of unbundled legal services is two-fold. First, the unbundling of legal services is viewed as a means of helping clients control the cost of litigation by allowing the client to pick and choose which services the lawyer will actually provide. Advocates of the unbundling of legal services contend that such limited representation provides lower- and middle-income individuals greater access to legal assistance than they would normally be able to afford. Advocates argue that many such individuals do not have the financial means to employ a lawyer under the more traditional full representation approach. Another proposed benefit is that the unbundling of legal services allows a lawyer to provide limited assistance to individuals when the lawyer may not have the time or resources to undertake full representation.

The offering of unbundled legal services is implicitly authorized under Rule 1.2(c), *Ala. R. Prof. C.*, which provides as follows:

### RULE 1.2 SCOPE OF REPRESENTATION

\* \* \*

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Moreover, the Comment to Rule 1.2, *Ala. R. Prof. C.*, provides in pertinent part as follows:

#### Comment

\* \* \*

#### Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the

client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the *Rules of Professional Conduct* and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

As such, the Disciplinary Commission holds that a lawyer may limit the scope of his representation and, thereby, the services that he performs for his client in a specific matter. In doing so, the lawyer must be careful not to agree to or allow his representation to be limited to such an extent that the lawyer cannot provide competent representation as mandated by Rule 1.1, *Ala. R. Prof. C.* Additionally, any agreement by a lawyer and his client to limit the scope of representation or the services to be performed by the lawyer should be reduced to a written document signed by both the client and the lawyer.

As discussed earlier, there are three general categories of unbundled legal services: consultation and advice, limited representation in court and document preparation. Under the first two categories, disclosure to the court of the lawyer's involvement is not required or will otherwise be readily apparent to the court. Generally, whether an individual has sought the advice of an attorney is protected by the attorney-client privilege and Rule 1.6 of the *Alabama Rules of Professional Conduct*. As such, a lawyer who merely provides advice

to a client appearing pro se is not required to disclose to the court or the opposing party his consultation with the client. Where a lawyer makes a limited notice of appearance on behalf of a client, the lawyer should simply advise the court and opposing party of the nature of his limited appearance.

The more difficult question is whether a lawyer must disclose his assistance to the court when the lawyer prepares or drafts pleadings on behalf of a pro se litigant. In reviewing the opinions of other state bars, there appear to be varied opinions regarding whether the lawyer must disclose his assistance. Some states require lawyers to identify any documents that they prepare on behalf of a pro se litigant by including a statement on the document that the document was prepared by the lawyer.<sup>1</sup> Other states require a lawyer to include a statement on the document that indicates that the document was prepared with the assistance of counsel. However, the lawyer is not required to personally identify himself.<sup>2</sup>

These states have held that such disclosure is mandated by a duty of candor to the court. In addition, some courts have also held that a lawyer has a duty to disclose to the court the fact that the lawyer has drafted pleadings on behalf of the client. In *Duran v. Carris*, the Tenth Circuit held as follows:

Ethics require that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers. See *Haines*, 404 U.S. at 520-21.

We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney. See *Johnson*, 868 F.Supp. at 1231-32 (strongly condemning the practice of ghost writing as in violation of *Fed. R. Civ. P.* 11 and *ABA Model Code of Professional Responsibility* DR 1-102(A)(4)). Other jurisdictions have similarly condemned the practice of ghost writing pleadings. See, e.g., *Ellis v. Maine*, 448 F.2d 1325, 1328 (1<sup>st</sup> Cir. 1971) (finding that a brief, "prepared in any substantial part by a member of the bar," must be signed by

him); *Ellingson v. Monroe (In re Ellingson)*, 230 B.R. 426, 435 (Bankr. D. Mont. 1999) (finding "[g]host writing" in violation of court rules and ABA ethics); *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 885-86 (D. Kan. 1997) (expressing legal and ethical concerns regarding the ghost writing of pleadings by attorneys); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1077 (E.D. Va. 1997) (finding it "improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se"); *United States v. Eleven Vehicles*, 966 F.Supp. 361, 367 (E.D. Pa. 1997) (finding that ghost writing by attorney for pro se litigant implicates attorney's duty of candor to the court, interferes with the court's ability to supervise the litigation, and misrepresents the litigant's right to more liberal construction as a pro se litigant).

We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to "substantial" assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature.<sup>[footnote omitted]</sup> In fact, we agree with the New York City Bar's ethics opinion that "an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing." *Rothermich*, supra at 2712 (citing Committee on Prof'l and Judicial Ethics, Ass'n of the Bar of the City of New York, Formal Op. 1987-2 (1987)). We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. See *id.* at 2711-12. We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved.

238 F.3d 1268, 1271-72 (10<sup>th</sup> Cir. 2001) While the court in *Duran v. Carris* requires lawyers to disclose their involvement in the drafting of legal briefs for pro se litigants, Alabama courts have yet to issue such a rule or opine on the issue of disclosure.



# OPINIONS OF THE GENERAL COUNSEL

Continued from page 403

Further, a number of bar associations, including the American Bar Association, have concluded that no such duty of disclosure exists.<sup>3</sup> In ABA Formal Opinion 07-446, the American Bar Association framed the issues as follows:

Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

The American Bar Association then concluded that, absent a law or local court rule requiring disclosure, the fact that a lawyer drafted the legal documents for a pro se litigant is “not material to the merits of the litigation” and does not need to be disclosed to the court. In essence, the American Bar Association held that the duty of candor to the court does not impose an affirmative duty on a lawyer to disclose to the court that he drafted a particular legal document for a client. Moreover, the ABA commented that, more often than not, the fact that a document filed by a pro se litigant was drafted by a lawyer will be readily apparent to the court and opposing party. If either the court or the opposing party believes that whether a document was ghostwritten is a material issue to the litigation, then they may raise the issue with the pro se party.

In Alabama, the duty of candor to the court is encompassed within Rule 3.3, *Ala. R. Prof. C.*, which provides as follows:

## RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Upon review of Rule 3.3, the Disciplinary Commission finds that, ordinarily, the drafting of a legal document by a lawyer for filing by a pro se litigant does not constitute a false statement of material fact. As such, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

- 1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.
- 2) The issue of the lawyer’s involvement in the matter is not material to the litigation.
- 3) The lawyer is not required to disclose his involvement to the court by law or court rule.

[RO-2010-01]



## Endnotes

1. See Kentucky Bar Assoc., Ethics Op. E-343; Connecticut Bar Assoc., Ethics Op. 98-5; Colorado Bar Assoc. Ethics Op. 101; New York State Bar Assoc. Ethics Op. 613; and Delaware Bar Assoc. Ethics Op. 1994-2.
2. Florida Bar Assoc. Ethics Op. 79-7; Iowa Op. 98-1; Kansas Bar Assoc. Ethics Op. 09-01; and Massachusetts Bar Assoc. Ethics Op. 98-1.
3. See Arizona State Bar Assoc. Ethics Op. 06-03 and Maine Ethics Op. 89.

*The Alabama Law Institute held its annual meeting July 16 during the Alabama State Bar's Annual Meeting. President Demetrius Newton announced that the Law Institute and Legislative Council again will be conducting an orientation for all legislators December 6-8 in the Moot Courtroom of the University of Alabama School of Law.*

*Institute committees have the following studies under review: Uniform Durable Power of Attorney Act, Model Nonprofit Corporation Act, Limited Liability Company Act, Rule Against Perpetuities, Amendments to the Uniform Interstate Family Support Act, and amendments to Alabama's Condominium Act. Also being revised are the Warrant and Indictment Forms and the Alabama Government Manual.*

*One item the new legislature will have to consider is the impact of federal health care reform on Alabama. Birmingham attorney LaVeeda Morgan Battle, who has served for the past several years as Law Institute counsel for committees in both the Alabama House of Representatives and Senate, presented an overview of the federal law to the bar during the annual meeting.*



**ROBERT L. MCCURLEY, JR.**

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

## Impact of Federal Health Care Reform on Alabama

**By LaVeeda Morgan Battle**

### Patient Protection and Affordable Care Act (PPACA) of 2010

The PPACA was signed into law March 23, 2010 along with the Health Care and Education Reconciliation Act of 2010. These acts transform America's healthcare system with new federal programs, grants and discretionary funding. Some funding will be "direct spending" to states. However, it will however require state-initiated action to secure funding. The state has the choice to run the healthcare program in Alabama or, if they do not do so, the federal government will run the program.



*Battle*

### Transformation in State Oversight of Healthcare

New state oversight is required for insurance reform and includes minimum health coverage standards, premium rate increases, healthcare costs, insurance exchanges, and consumer protection. There is a shift in priority toward preventative health care and major delivery system reforms. A state will monitor compliance with the minimum standards for coverage of preventative health services by insurance companies. There is increased Medicaid coverage for lowest-income individuals under age 65 up to 133 percent of the federal poverty level and expands Medicaid responsibility.



# LEGISLATIVE WRAP-UP

Continued from page 405

## Cooperation and Action Are Imperative

The governor must have an implementation plan to coordinate actions by the various state agencies affected by health care reform and to address budget impact. *State legislators will be required to pass legislation no later than 2012 to implement healthcare reform.* One example would be minimum healthcare coverage and premium rate review.

## If States Take No Action

There are provisions in the bill for the federal government to step in and implement healthcare reform in states taking no action. If a state decides to opt out of these healthcare reforms, there are *penalties* assessed that will reduce funding in already existing programs. The state will likely *lose some authority* over its healthcare through federal preemption.

The State of Alabama has already decided not to set up a high-risk pool for Alabamians who, because of pre-existing conditions, are unable to obtain insurance. The federal government will administer a high-risk pool for Alabama.

## Minimum Coverage of Healthcare

Health and Human Services (HHS) will develop minimum standard benefits and coverage with uniform definitions of medical and insurance terms. Alabama is required to monitor compliance with the minimum standards through a new consumer assistance office and state insurance regulations consistent with federal standards.

## State Oversight of Premium Rate Increases

Beginning in 2010, HHS will conduct an annual review of premiums to determine if consumers are subject to unreasonably high premiums. Alabama is charged with conducting a review and requiring that issuers post on their website premium rate increases and the reasons for “unreasonably high” premiums. (The grant application for \$1 million to set up office was due July 7, 2010). Each state is required to maintain a website for transparency and to post premiums, policies and coverage.

## Containing Healthcare Costs to the Consumer

Alabama is also required to report to the federal government excessive premiums and make recommendations

regarding whether an insurance issuer should be excluded from participation in the exchange based upon a pattern of unjustified premium rate hikes. Some states already regulate premium rate hikes. Alabama does not. *This requires new law in Alabama.*

## Consumer Protections

Alabama will have immediate responsibility for oversight of compliance with healthcare plans to insure:

- *No lifetime limit* on the dollar value of benefits for any participant.
- No “*unreasonable*” *annual limits* on coverage.
- No annual or lifetime *specific coverage benefit limits*.
- No *rescission of coverage* unless there is fraud or misrepresentation.
- No discrimination in favor of higher salaried employees in a plan.
- No contribution requirements that favor higher salaried employees in a plan.
- No *pre-existing condition exclusions* for enrollees under age 19.

*No cost-sharing on required preventive services*—Requires coverage and prohibits the imposition of cost-sharing for specified preventative services.

*Extends dependent coverage for children until age 26*—If a policy offers dependent coverage, it must include dependent coverage until age 26.

*No prior authorization for emergency services*—regardless of the participating status of the provider, and at the in-network cost-sharing level

*Access to pediatricians*—Mandates that if designation of a Primary Care Provider (PCP) for a child is required, the person be permitted to designate a physician who specializes in pediatrics as the child’s PCP if the provider is in-network

*No referral or authorization requirements for access to OB/GYNs*—Prohibits authorization or referral requirements for obstetrical or gynecological care provided by in-network providers who specialize in obstetrics or gynecology

*Early Retiree Reinsurance Program*—Provides for retirees who are not active employees and not qualified for Medicare to participate in employer plans at

reduced premium contributions. An estimated 108,000 people in Alabama retired before they were eligible for Medicare and have health coverage through their former employers. The State Insurance Commissioner has issued a letter to licensed Alabama health insurers regarding the federal program.

## Consumer Protection—Appeals

**New Appeals Process**—A group health plan and a health insurance issuer offering group or individual health insurance coverage are required to implement an effective appeals process. The appeals process must, at a minimum, provide an external review of healthcare plans which include consumer protections provided in the Uniform External Review Model Act. *This act must pass the legislature to create external review or the feds will oversee this function.*

## Cost Containment—The Exchange

**Exchanges** are the central mechanisms created by the health reform law to help individuals and small businesses purchase health insurance coverage.

Alabama is required to establish an exchange to help consumers make valid comparisons between plans that are certified to have met benchmarks for quality and affordability and to help consumers make valid comparisons between plans that are certified to have met benchmarks for quality and affordability.

**Two National Insurance Companies**—There will be at least two healthcare plans available in Alabama through the exchange with oversight by the federal government (Office of Personal Management).

**Premium Rebate**—Insurance companies must spend at least 80–85 percent of premium dollars on direct medical care and rebate the insured the difference if the company spends less on medical care. Premium rebates to consumers are based on percentages set by the HHS or the state.

**State may set rebate**—Lower percentages may be set by a state. The state must seek to ensure adequate participation by health insurance issuers, competition in the health insurance market in the state and value for consumers so that premiums are used for clinical services and quality improvements.

## Federal Priority Shift to Preventive Healthcare

The Act creates an interagency council to promote healthy living and establishes a Prevention and Public Health fund to expand and sustain a national investment in prevention and public health programs. The prevention program includes an investment in new therapies to prevent, diagnose and treat acute and chronic diseases and includes funding opportunities for state agencies to prevent chronic disease, improve immunization rates and promote the public health workforce.

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# LEGISLATIVE WRAP-UP

Continued from page 407

## Preventive Healthcare

Financial incentives are created for state Medicaid programs to cover evidence-based preventive services with no cost-sharing by 2013. The Act increases Medicaid payments for Primary Care Physicians (PCP) through federal funding. Medicaid coverage will include wellness benefits and public health education.

The Act provides direct funding for prevention and a public health fund to help restrain the rate of growth in private and public sector healthcare costs (2010–\$500 million).

School-based health centers are included.

The Centers for Disease Control (CDC) awards demonstration project grants for living well, childhood obesity, immunizations and healthcare workforce development. Medicaid planning grants are available up to \$25 million per state for developing coordinated care for chronic conditions.

Medicaid grants to test approaches that may encourage behavior modification for healthy lifestyles—Provides Federal Medical Assistance Program incentive payment to states that eliminate cost-sharing requirements for preventive services (1 percent increase in FMAP)

## Medicaid's New Responsibilities

Medicaid is the “financial glue” holding together local healthcare safety nets. It finances over half of community health centers and mental healthcare, and provides significant hospital revenues. The Act requires oversight of new standards and preventative care, and uses community health workers to promote positive health behaviors and outcomes in medically underserved communities.

*Medical records*—Health information technology requires implementation of electronic health records

## Challenges in Alabama

*State Budget Crisis*—More demands on limited resources and uncertain funding for administration of new programs

*Legislative Action*—Reform calls for unprecedented changes in state law regulating private insurers and Medicaid. *Many laws must be enacted by 2011 and 2012 to receive federal funds.*

Population health needs are high—childhood and adult obesity



Following Battle's presentation, these legislators were recognized for sponsoring Institute bills during the 2010 legislative session which will become effective January 1, 2011:

### Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Representative Tammy Irons

Senator Arthur Orr

### Uniform Child Abduction Prevention Act

Representative Cam Ward

Senator Wendell Mitchell

### Amendments to Trademark Act

Representative Greg Canfield

Senator Ben Brooks

### Amendments to Revised Limited Partnership Act

Representative Cam Ward

Senator Roger Bedford

Law Institute officers elected for the 2010-2011 year are:

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NOTICES

REINSTATEMENTS

TRANSFERS TO DISABILITY  
INACTIVE STATUS

DISBARMENTS

SUSPENSION

PUBLIC REPRIMANDS

## Notices

- **Mary Isabelle Eaton**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2010 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 08-1391(A), 09-1801(A), 09-1802(A) and 09-1947(A), by the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **Pamela Bryant Fetterholf**, who practiced law in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 3, 2010, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2009. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 10-689]
- Notice is hereby given to **James Carroll Morris**, whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 3, 2010, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2009. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 10-701]
- Notice is hereby given to **Tommy Wayne Patterson**, who practiced law in Mobile and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 3, 2010, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2009. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 10-702]

## Reinstatements

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating **Major E. Madison, Jr.** to the practice of law in Alabama, effective May 12, 2010. [Pet. No. 08-02]
- On May 10, 2010, the Supreme Court of Alabama entered an order reinstating Mobile attorney **Stephen Keith Orso** to the practice of law. The order was based upon an order entered by the Disciplinary Board of the Alabama State Bar, Panel II, reinstating Orso with conditions, and Orso was placed on probation for three years, effective April 2, 2010.

In March 2005, Orso entered a conditional guilty plea to violations of rules 1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.8(a), 1.8(b), 1.15(a), 1.15(d), 1.15(e), 1.15(f), 1.15(g), 1.16(d), 5.1(c), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* Based upon acceptance of his conditional guilty plea, Orso received a five-year suspension, effective July 17, 2002, the date of his interim suspension. [Pet. No. 09-2663]

# DISCIPLINARY NOTICES

Continued from page 409

- The Supreme Court of Alabama entered an order reinstating **James Dee Terry** to the practice of law in Alabama, effective May 10, 2010. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Terry November 19, 2009. Terry surrendered his license to practice law January 24, 1997 as a result of his guilty plea in the Circuit Court of Tuscaloosa County to a charge of felony possession of a controlled substance in the first degree. [Rule 28, Pet. No. 09-2676]

## Transfers to Disability Inactive Status

- On June 11, 2010, the Supreme Court of Alabama accepted the order entered May 7, 2010 by the Disciplinary Board, Panel I, of the Alabama State Bar and ordered that Selma attorney **William Thomas Faile** be transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Professional Conduct*, effective May 7, 2010. [Rule 27(b), Pet. No. 2010-749]
- Alabaster attorney **Carl Austin Hassler** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective April 7, 2010. [Rule 27(c), Pet. No. 10-572]

## Disbarments

- Montgomery attorney **Rodney Newman Caffey** was disbarred from the practice of law in Alabama, effective October 23, 2009, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 23, 2009 order of Panel II of the Disciplinary Board of the Alabama State Bar. In ASB nos. 08-74(A), 08-233(A) and 08-234(A), Caffey failed to perform tasks in a timely manner, failed to keep his clients updated on the progress of their

cases and failed to provide copies of pleadings and motions to the clients in a timely manner. The Disciplinary Board also took into account significant prior disciplinary history that included multiple reprimands and a suspension for similar conduct. [ASB nos. 08-74(A), 08-233(A) and 08-224(A)]

- Athens attorney **John Hamilton McLain, V** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective May 27, 2010. The supreme court adopted the order of the Disciplinary Commission of the Alabama State Bar disbarring McLain pursuant to Rule 22(a), *Ala. R. Disc. P.* McLain was convicted February 12, 2009 and later sentenced in the Circuit Court of Madison County on two counts of enticing a child, two counts of sexual abuse 2<sup>nd</sup> degree and two counts of unlawful imprisonment 2<sup>nd</sup> degree. [Rule 22(a), Pet. No. 10-421; ASB No. 08-154(A)]

## Suspension

- Alabama attorney **Thomas Verner Smith**, who is also licensed in Tennessee, was suspended from the practice of law in Alabama by order of the Disciplinary Board of the Alabama State Bar for one year. The Disciplinary Board ordered that the suspension be held in abeyance and Smith be placed on probation for one year pursuant to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Board entered its order, as reciprocal discipline, pursuant to Rule 25, *Ala. R. Disc. P.*, based upon the March 29, 2010 order of enforcement of the Supreme Court of Tennessee, which imposed upon Smith a one-year suspension for violations of Rule 8 and rules 1.7 and 1.8, *Tennessee Rules of Professional Conduct*. Smith engaged in a business transaction with his client without properly informing his client of a conflict of interest. [Rule 25(a), Pet. No. 10-645]

## Public Reprimands

- Birmingham attorney **John Edward Cabral** was ordered to receive a public reprimand without general publication for a violation of Rule 1.1, *Alabama Rules of Professional Conduct*. Cabral was retained to represent a couple to pursue their claims against a contractor and other defendants for incomplete and defective work on a \$42,000 sunroom addition to their home. During the first three months of representation Cabral charged the couple over \$14,000 in fees at the rate of \$275 per hour. In September 2007, Cabral informed the clients that he had taken no depositions and that he needed to associate additional counsel to work on the case. As a result, the clients terminated Cabral's representation and engaged new counsel. The new counsel confirmed that the case had not been adequately prepared for trial. Cabral failed to competently provide the legal knowledge, skill and thoroughness reasonably necessary for the representation of his clients. [ASB No. 08-53(A)]

- On April 9, 2010, Montgomery attorney **Robert Bozeman Crumpton** received a public reprimand without general publication for violations of rules 8.4(a), (c) and (g), *Alabama Rules of Professional Conduct*. On or about April 11, 2005, Crumpton signed a contract with the complainant to purchase a condominium in Miramar Beach, Florida. Crumpton deposited \$5,000 in earnest money with State Abstract and Title Company. Crumpton did not inform the complainant that he had an ownership interest in this title company.

Crumpton later learned he could not obtain financing to complete his portion of the contract. Crumpton failed or refused to exercise due diligence in obtaining financing and completing the contract. Crumpton also failed or refused to release the earnest money to the complainant, or, at least, equally divide the earnest money with him. Crumpton also failed or refused to notify the complainant that he had an interest in the title company. [ASB No. 07-26(A)]

- Birmingham attorney **John Martin Eades, Jr.** received a public reprimand without general publication on April 9, 2010 for violations of rules 5.4(a) and 8.4(a), *Alabama Rules of Professional Conduct*. Eades entered into an independent contractor agreement with the complainant in which he agreed to pay her 50 percent of all fees received in exchange for her assistance as a paralegal in immigration cases. Thereafter, Eades requested the complainant's assistance in preparing immigration documents and paid her \$250 on two separate occasions. Apparently, because of problems associated with her work, Eades terminated her services. Thereafter, the complainant sought payment for 50 percent of a \$10,000 fee Eades received from a client on whose behalf the complainant had attempted to prepare documents. Although Eades did not share legal fees with the complainant in the matter that made the basis of this grievance, he did draft and enter into a written agreement to share legal fees with a non-lawyer. [ASB No. 08-216(A)]
- On May 7, 2010, Mobile attorney **Carl Everett Freman** received a public reprimand without general publication for a violation of Rule 1.8(a), *Ala. R. Prof. C*. Freman was long-time friends with the complainant and her husband prior to the husband's death in 2006. After the husband died, Freman continued to represent the complainant in various matters. Freman entered into an agreement with the complainant to purchase her husband's vehicle, one of her real estate properties and various articles of furniture. Freman also signed a promissory note in the amount of \$100,000 to secure the purchase of the property from the complainant. At the time of the transaction, Freman acquired an ownership interest that was adverse to the complainant and he failed to inform the complainant that she had the opportunity to seek the advice of independent counsel. Freman also failed to disclose this conflict to the complainant in writing and have her execute a written waiver. In April 2008, the complainant had to retain counsel to pursue payment of the \$100,000 promissory note, \$7,000 for the vehicle and \$8,200 for the remaining furniture. [ASB No. 08-170(A)]



# DISCIPLINARY NOTICES

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- Birmingham attorney **Daryl Patrick Harris** received a public reprimand without general publication on April 9, 2010 for violations of rules 1.3, 8.1(b) and 8.4(d), *Alabama Rules of Professional Conduct*. In 2007 and 2008, Harris represented clients in the Circuit Court of Escambia County. Neither Harris nor his clients appeared before the court for scheduled hearings. A subsequent order was entered requiring Harris to appear before the court to show cause why he should not be held in contempt. Harris failed to return telephone calls from the court and failed to appear for the contempt hearing. Harris was found in contempt and forbidden from further representation of clients before the Circuit Court of Escambia County. Harris was also ordered to appear before the court to show cause why he should not be incarcerated.

During the course of the bar's investigation, Harris failed to promptly respond to requests for information. When Harris finally responded, he claimed that he had contacted the court to clear up the matter. However, he never personally appeared as ordered. Because of Harris's failure to appear to show cause why he should not be incarcerated, a warrant was issued for his arrest.

Harris was subsequently summarily suspended March 17, 2009 because he knowingly failed to respond to requests for information from a disciplinary authority. Thereafter, Harris appeared before the Circuit Court of Escambia County and resolved all pending issues. His summary suspension was dissolved by agreement on April 9, 2009. [ASB No. 08-153(A)]

- On April 9, 2010, Huntsville attorney **Barbara Currie Miller** received a public reprimand with general publication for violations of rules 4.1(a), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* Miller made false statements of material fact to the Better Business Bureau and her neighbors and did not provide a corrected or retracted statement to the Better Business Bureau.

A neighbor of Miller's sent a flier to several people in their neighborhood regarding roof damage caused by hail. The fliers informed the neighborhood that other homes may have also suffered hail-caused roof damage. The fliers identified the complainant and stated that his company had inspected the neighbor's roof and determined there was hail damage. Using her law firm letterhead, Miller filed a complaint against the complainant and his company with the Better Business Bureau and copied it to her neighbors. In her complaint, Miller made several false accusations about the complainant. When asked by the complainant's attorney to contact the Better Business Bureau and request that they expunge the letter from their records, Miller responded that she would only address the issue if she was provided with the complainant's personal information so she could conduct a background check on him. Miller failed to take any other action to correct the misinformation that she had disseminated. [ASB No. 06-142(A)]

- On April 9, 2010, Dadeville attorney **Michael Allan Mosley** received a public reprimand without general publication for violations of rules 1.3, 1.4(a), 1.4(b) and 1.16(d), *Ala. R. Prof. C.* In or about March 2006, Mosley's client retained him and paid him a fee of \$2,000 to represent her in a bankruptcy matter. In February 2007, the client received a telephone call from her mortgage company informing her that she had been dismissed from the bankruptcy and that the mortgage company would be foreclosing on her house unless she brought the mortgage current. Mosley's client made payments to the mortgage company although she was still paying through the bankruptcy trustee. The client made several calls to Mosley but he failed or refused to communicate with her. Eventually, she had one of her friends contact Mosley from their telephone. Mosley accepted the call and upon speaking with the client, he assured her that he

would correct the matter. Mosley incorrectly listed automobile loans on the bankruptcy petition. Although he filed an amended bankruptcy petition, the bankruptcy court filed a Second Amended Motion for Sanctions against him. This motion named Mosley's client and, at that time, Mosley had been discharged from the case and new counsel had appeared. Mosley's conduct in this matter violated rules 1.3, 1.4(a), 1.4(b) and 1.16(d), *Ala. R. Prof. C.*, in that he failed to diligently pursue the client's bankruptcy matter, did not communicate with the client in a reasonable manner and, when his representation was terminated, he failed to take steps to the extent reasonably practicable to protect his client's interests. [ASB No. 07-1361(A)]

- On April 9, 2010, Montgomery attorney **Amardo Wesley Pitters** received a public reprimand without general publication. On January 14, 2005, an order of contempt was entered against Pitters by Judge Frank L. McGuire, III in the District Court of Covington County. The contempt order was issued because Pitters was 37 minutes late for a court appearance. When questioned by Judge McGuire, Pitters stated that he had a conflict and had to appear in court in Montgomery County earlier in the morning. Pitters then changed his story and told Judge McGuire that he did not have to appear in court but rather that he had an appointment to meet with the prosecutor in another matter. Pitters stated that he attempted to telephone the judge but, due to cell phone roaming problems, he

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# DISCIPLINARY NOTICES

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was unable to place the call. Pitters also stated that he called his office and told his staff to contact the judge's office to explain that he was en route and running late. However, the judge's assistant testified that she had telephoned Pitters's office and spoken with his office staff, but she was not informed that he was running late. The court's order stated that Pitters would be incarcerated until 5:30 p.m., but the judge released him after approximately two hours and 30 minutes. Upon his

release, Pitters was interviewed by the media, at which time he stated that the contempt order stemmed from a discrimination suit that he filed against a local municipality, the town of River Falls. Pitters's comments attacked the qualifications and integrity of Judge McGuire. The contempt of court order involving his false statements to the court and his subsequent statements to the media violated Rule 8.4(d), *Alabama Rules of Professional Conduct*, in that they undermined the judicial

system and therefore were prejudicial to the administration of justice. [ASB No. 05-013(A)]

- On April 9, 2010, Decatur attorney **Beverly B. Scruggs** received a public reprimand without general publication for violation of Rule 1.3, *Ala. R. Prof. C.* In or about January 2008, Scruggs was retained to represent a client in an on-going custody case. The client provided Scruggs with the discovery requests and all other related documents. Scruggs did not file a notice of appearance, did not file the discovery responses and did not respond to opposing counsel. By Scruggs's having not filed a notice of appearance, all court notices were sent to prior counsel, who was disbarred. Scruggs did appear at several court appearances but failed to subpoena the necessary witnesses. After being provided answers by the client in response to discovery requests, Scruggs failed to confirm that the responses were properly provided to opposing counsel and filed with the court. Ultimately, the court dismissed the case due to Scruggs's failure to respond to discovery requests. Due to Scruggs's lack of diligence, her client lost custody of her child. [ASB No. 08-160(A)]

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

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10	\$110	\$110	\$132	\$220	\$282	\$475	\$748
15	\$125	\$125	\$152	\$270	\$398	\$600	\$960
20	\$152	\$152	\$202	\$340	\$515	\$775	\$1,325
30	\$230	\$241	\$339	\$525	\$797	\$1,545	

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10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
15	\$195	\$200	\$255	\$485	\$725	\$1,150	\$1,830
20	\$255	\$255	\$355	\$620	\$950	\$1,480	\$2,520
30	\$385	\$414	\$609	\$985	\$1,524	\$2,960	

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## Among Firms

**Adams & Reese** announces that **Willis Meriwether, IV** has joined as a member.

**David B. Anderson & Associates LLC** announces that **Deanna L. Weidner** has become a partner and the firm's name is now **Anderson & Weidner LLC**.

**Bond, Botes, Reese & Shinn PC** announces **L. Kenneth Elmer** has joined as an associate.

**Cabaniss, Johnston, Gardner, Dumas & O'Neal** announces that **Leonard Wertheimer, III** has joined the firm.

**Richard C. Duell, III** announces that **Marcus L. Hunt** has joined as a partner and the firm name is now **Duell Hunt LLC**.

**Gunter & Danzey PC** announces that **M. Russ Goodman** has joined the firm.

**Hill & Turner LLC** announces that **Michael C. Quillen** has joined *of counsel*.

**Johnston Barton Proctor & Rose LLP** announces that **Don B. Long, III** has joined as an associate.

The **Law Office of Bill Lewis LLC** announces that **Patrick J. Garrett** has joined the firm.

**Maynard, Cooper & Gale PC** announces that **Barry Johnson Parker** has joined as a shareholder and **C. Bradley Cherry, Todd H. Cox** and **Kathryn L. Dietrich** have joined as associates.

**McMath Law Firm PC** announces that **Ashaunti Pritchett Parker** and **Ontkeno K. Boman** have joined as associates.

**Phelps Dunbar LLP** of Louisiana announces that it has merged with the Mobile firm of **Lyons, Pipes & Cook PC**.

**Prince Glover Law** announces that **Joshua P. Hayes** has been named a partner and the firm name is now **Prince Glover & Hayes**.

**E. S. Robbins Corporation** has appointed **John L. Tate** vice president and general counsel.

**Starnes & Atchison LLP** announces a name change to **Starnes Davis Florie LLP**.

**Wilmer & Lee PA** announces that **Benjamin R. Rice** and **Earl T. Forbes** have joined as shareholders and **Andrew D. Dill, Ellen M. Melson** and **Thomas A. Wheat** have joined as associates. ▲▼▲



PLEASE E-MAIL  
ANNOUNCEMENTS TO  
MARCIA DANIEL  
[marcia.daniel@alabar.org](mailto:marcia.daniel@alabar.org)

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



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