

MARCH 2011 • VOL. 72, NO. 2

# THE ALABAMA LAWYER

**THE 2010 CHANGES  
TO ALABAMA'S ETHICS LAW**

page 126

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## MARCH

25 Domestic Practice *McWane Center Birmingham*

## APRIL

1 Consumer Finance *Bruno Conference Center (St. Vincent's Hospital) Birmingham*

8 Back to Basics *Wynfrey Hotel Birmingham*

15 Sports Law *University of Alabama School of Law Tuscaloosa*

29 DUI/Criminal Law *Wynfrey Hotel Birmingham*

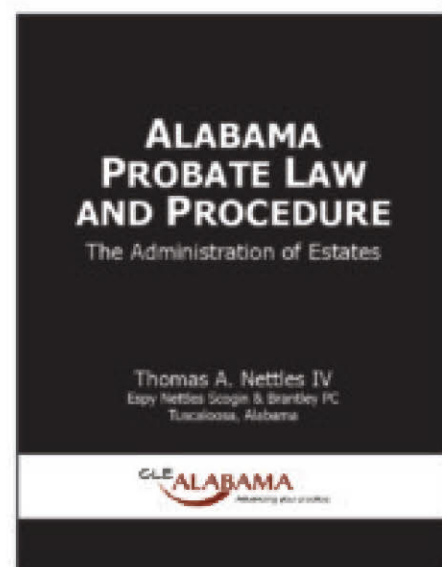
## MAY

6-7 City & County Governments *Perdido Beach Resort Orange Beach*

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The Alabama State Capitol was built in 1851 on "Goat Hill" and currently houses the Executive Branch of the state government. The Confederate States of America began here in 1861, and the Voting Rights March ended out front on Dexter Avenue in 1965. The capitol was designated a National Historic Landmark by the Secretary of the Interior in 1960.

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

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

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

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





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(334) 242-7511; 3446 Highway 69 S.,  
Guntersville 35976, (256) 582-0619,  
[weslong@mclo.org](mailto:weslong@mclo.org)  
Committees: Financial Services; Ways & Means,  
General Fund



## **Demetrius C. Newton (D)**

District 53: Jefferson  
Room 524-E, Montgomery,  
(334) 242-7546; P.O. Box 2525,  
Birmingham 35203, (205) 252-9203  
Committees: Constitutions, Campaigns  
& Elections; County and Municipal Government  
(ranking minority member); Jefferson County  
Legislation



## **Bill Poole (R)**

District 63: Tuscaloosa  
Room 537-D, Montgomery,  
(334) 242-7691; 1927 7th Street,  
Tuscaloosa, 35401, (205) 752-8338,  
[poole@g-plaw.com](mailto:poole@g-plaw.com)  
Committees: Judiciary; Technology & Research;  
Tuscaloosa County Legislation; Ways & Means,  
Education



(This information is as of March 23, 2011 and was taken from the United States House of Representatives, the United States Senate and the Alabama legislature's respective websites.)



# Making a Statement of Service to Improve Our State and Nation

## Alabama State Bar *Lawyer's Creed*

*"To my clients, I offer faithfulness, competence, diligence and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.*

*"To the opposing parties and their counsel, I offer fairness, integrity and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.*

*"To the courts, and other tribunals, and to those who assist them, I offer respect, candor and courtesy. I will strive to do honor to the search for justice.*

*"To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.*

*"To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.*

*"To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients."*

*(Approved by the Alabama Board of Bar Commissioners 4/10/92)*

This issue highlights the service of our lawyers who serve in our state and federal legislative bodies. As the daughter of a former member of our state house and senate, I know what a personal sacrifice their choice to serve can be. These men and women have taken on an obligation that takes them away from their families and their "full-time jobs" to be involved in the work of the legislative body to which they were elected, and also in committees and related work. They miss family dinners, ballet recitals and baseball games because they are attending budget hearings or public forums. They arrive late and/or leave early from school plays or honors day to make it to Montgomery or Washington on time. Add in the public meetings, civic meetings and other events where these servant



ALYCE M. SPRUELL

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"Lawyers understand that differences of opinion can be respected without personal attacks and belittlement of the opponent..."

## PRESIDENT'S PAGE

Continued from page 97

leaders meet with those they represent, and there is no time left. They work at night, on weekends and while traveling, trying to balance their work, their families and the demands of their elected office. And, as members of our profession, they do all of this with honor, with professionalism and with a commitment "to seek the common good" in the representation of their clients. For these men and women, their clients now include the citizens of our state, for what they do in their elected capacities affects us all.

I thought of our Alabama State Bar Lawyer's Creed when I was preparing this message. The creed makes a statement of belief for our bar to strive for the best in all we do and to do it with honor, with collegiality and with respect for one another, as well as those we serve. The challenge facing the lawyers in these legislative bodies is to serve in an environment where honor and integrity are not sometimes valued. These men and women, as lawyers, act as advocates, as mediators, and as facilitators, because that is what they have been trained to do. They understand that differences of opinion can be respected without personal attacks and belittlement of the opponent because they are lawyers. They understand that to treat their adversary with respect today means that the discussion tomorrow should be easy to approach, even if once again they are on opposing sides. Non-lawyers have a difficult time understanding this approach but we,

as these legislators' fellow bar members, do not. And we need more of our members in these bodies for these exact reasons.

I understand that many reading this article may disagree with the political positions taken by some of these public servants. My response is that they deserve your respect whether you agree with their political opinions or not. They honor our profession by their service, and we expect much from them because they are members of the bar. They serve as lawyers and as public officials, and as such, serve with a higher standard guiding their daily lives and actions. Our creed provides that higher standard as does our lawyer's oath. This is not an easy task in any environment but certainly more difficult in these economic and partisan times.

I hope you will consider serving in some capacity of public service within your community and in our beloved state. I believe our state benefits from lawyers in public-service positions. The history of service of our bar members' is replete with examples of how they have courageously lead our state and nation in troubled times, providing creative and steadfast leadership. These stories exist in the executive and legislative branches of our state and federal government as well as in our municipal governmental bodies. We ask these leaders now serving to continue that example and I have faith that they do and they will. And when you have the chance, please join me in thanking them for their service. ▲▼▲

**"Lawyers understand that to treat their adversary with respect today means that the discussion tomorrow should be easy to approach, even if they are once again on opposite sides."**

# Keep Those Cards and Letters Coming

Our state bar is fortunate to have a talented group of lawyers serving on the Board of Editors of *The Alabama Lawyer*.

On behalf of the editorial board, I invite you to share your ideas with any of us about things that you would like to see in your bar publication. Please send us your thoughts about interesting stories, new developments in the law, special features that you would like to see, and any other suggestion that you may have. Do not hesitate to contact any one of us. I can be reached at [ghawley@whitearnolddowd.com](mailto:ghawley@whitearnolddowd.com). Publications Director Margaret Murphy can be reached at [margaret.murphy@alabar.org](mailto:margaret.murphy@alabar.org).

Here is one idea that we have embraced. We have decided to add a new feature to *The Alabama Lawyer* to enhance the publication's service to the bar. We are adding a regular article devoted to one or more recent appellate decisions from our state and federal courts. One of our Editorial Board members, Wilson Green, has agreed to chair a committee to review such cases and highlight a handful of them in each issue of *The Alabama Lawyer*. Because of the short time between the Editorial Board's decision and the submission date for the March edition of *The Alabama Lawyer*, Wilson's committee was a committee of one for this issue. Thanks Wilson.

We welcome your ideas. Below are the general requirements for submission of articles. Thank you. ▲▼▲



GREGORY H. HAWLEY

[ghawley@whitearnolddowd.com](mailto:ghawley@whitearnolddowd.com)

## *The Alabama Lawyer*

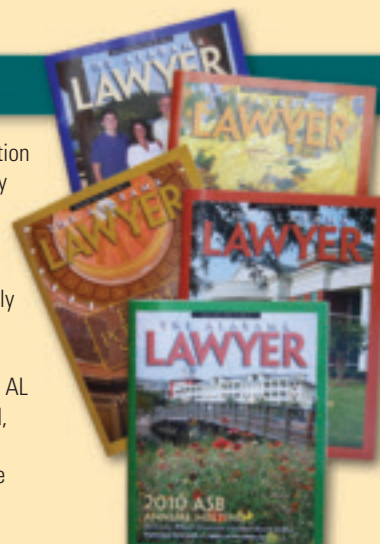
### ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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







## ALABAMA STATE BAR 2011 ANNUAL MEETING

July 13-16, The Grand Hotel Marriott Resort, Golf Club & Spa in Point Clear

An invitation for you to join hundreds of your colleagues and their families. As a special incentive for those members who register in the first seven days (once on-line registration is announced) we will be drawing one name to win an iPad2. You must be present at the meeting in order to win. We've negotiated a special rooms rate from Saturday-Saturday so that registrants can make a vacation out of it with their family!

These Sections are already confirmed to present first-class CLE programs:

- Dispute Resolution
- Real Property, Probate & Trust
- Workers Compensation
- Litigation
- Family Law

### Meeting Highlights:

\* There will also be workshops sponsored by: Casemaker\*, Alabama Criminal Defense Lawyers Association, Alabama Law Institute, Alabama Defense Lawyers Association, Alabama Appellate and a program on Business Valuations for Attorneys: Litigation, Estate Planning, Domestic Relations, Corporate Law, produced by Decosimo Advisory Services.

\*The Christian Legal Society Breakfast will have as its keynote speaker, Hon. Sonja Bivins, Magistrate Judge, Southern District of Alabama.

\*And you'll never guess who's coming! [Hint: Children will really like this.]

B   G   L   &   U   B

*Look for additional registration and housing information in the coming weeks.*



KEITH B. NORMAN

*keith.norman@alabar.org*

## The ASB and the UBE, BBE, NCBE, MBE, MEE, and MPT

The concept of a Uniform Bar Exam (**UBE**) has been discussed nationally for several years. This discussion has been principally facilitated by the National Conference of Bar Examiners (**NCBE**). The motivation behind the UBE is to have a mechanism that facilitates lawyers becoming licensed in other states in order to conduct cross-border or multi-jurisdictional practices without the need to take another bar examination. Further, it simplifies the licensure process and maximizes employability, especially for lawyers who are recent law school graduates. The main components of the UBE are the three NCBE tests that many jurisdictions already administer: the multi-state bar exam (**MBE**), the multi-state essay examination (**MEE**) and the multi-state performance test (**MPT**). Currently, the MBE is being used by 53 jurisdictions, including 48 states (excluding Louisiana, Washington and Puerto Rico). The MEE is used by 27 jurisdictions and the MPT is being used by 34 jurisdictions.

As a reminder, the MBE is a six-hour, 200-question multiple choice examination covering constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. The MEE consists of six 30-minute essay questions that can test on the topics covered by the MBE, plus business associations, federal civil procedure, family law, trusts and estates, UCC, and conflict of laws. The MPT typically consists of two 90-minute questions which require the application of fundamental lawyering



# EXECUTIVE DIRECTOR'S REPORT

Continued from page 101

skills in a realistic situation. Skills tested are factual analysis, legal analysis and reasoning, problem-solving, identification and resolution of ethical dilemmas, written communication, and organization and management of a legal task. In addition to utilizing the MBE, MEE and MPT, most states have a state-specific component that is included as a part of the bar exam. In Alabama, we utilize all three NCBE tests and a state-specific test, Alabama Civil Litigation.

Because of the prevalence of the national tests, implementation of the UBE does not require most jurisdictions to make fundamental changes in their testing. Moreover, the UBE does not require a jurisdiction to eliminate its state-specific test, to alter its pass score or to change its character and fitness requirements. Consequently, a jurisdiction that adopts the UBE and recognizes UBE scores from other jurisdictions would permit a lawyer from another UBE jurisdiction to become licensed to practice law only if the lawyer's UBE score met that jurisdiction's pass score **and** the lawyer met all character and fitness requirements. Unlike current reciprocity rules, an attorney seeking to be licensed in another UBE jurisdiction could do so without a minimum number of years of practice and by taking the state-specific test instead of the full bar exam. Thus far, Missouri and Montana have both become UBE jurisdictions.

For more than a year the Alabama State Bar Board of Bar Examiners (**BBE**) has studied the concept of

the UBE. Last winter a meeting was held at the state bar to learn more about the UBE and to discuss its possible adoption in Alabama. The meeting included past and present members of the BBE, state bar officers, members of the Board of Bar Commissioners (Commission), representatives from all five Alabama law schools, and members of the Alabama Supreme Court. We were fortunate to have Erica Moeser, president of the NCBE, and Susan Case, the NCBE's director of testing, attend and provide an in-depth explanation about the UBE and its implementation. After several subsequent meetings, the BBE concluded their review and discussions by voting unanimously to recommend to the BBC that the *Rules Governing Admission to the Alabama State Bar* be amended to incorporate the UBE and implement its operation in Alabama.

This past October, **BBE Chairman David Hymer** and board member **Barry Ragsdale**, accompanied by **Alabama Supreme Court Associate Justice Tom Woodall**, the court's liaison to the BBE, appeared before the Board of Bar Commissioners to present the BBE's recommendation of implementing the UBE in Alabama. After a thorough discussion of the BBE's proposal, the commission voted to approve the rule changes necessary to implement the UBE and to recommend them to the court for its consideration and adoption.

If approved by the court, the UBE will be a helpful change that will improve lawyer mobility. It will remove antiquated barriers to practice that are no longer practical. If we are to remain a self-regulated profession, tools to regulate the modern-day practice of law are needed. The UBE is a way to improve the practice of law, yet ensure that the public continues to be protected through regulatory rules that permit the broadest application possible for lawyers who wish to practice in Alabama.



## MEDIATION SERVICES

**Appellate – General Civil  
Domestic Relations  
Domestic & Family Violence**

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





WILSON F. GREEN

wgreen@fleenorgreen.com

## THE APPELLATE CORNER— A New Regular Feature

The following are some of the more significant civil decisions from our appellate courts in the last two months:

### **Discovery; Attorney-Client Privilege; Status of Financial Transactions between Attorney and Client**

*Ex parte Tucker*, No. 1090445 (Ala. Dec. 30, 2010)

*This case is significant in holding that financial transactions and payments between attorney and client are not privileged. The case also reminds litigants of the broad scope of discovery generally applicable to civil cases.*

Judgment creditors against Richard Scrushy subpoenaed Scrushy's outside law firm for records of monies paid by Scrushy and of Scrushy's monies placed into the firm's trust account. The law firm resisted the subpoena, arguing that the records were privileged, irrelevant for discovery purposes and unduly burdensome. The trial judge quashed the subpoena, and creditors filed a mandamus petition.

The supreme court granted the writ, holding that (1) no privilege was attached to financial records relating to transactions between attorney and client as well as client trust monies (citing and discussing authority from Alabama and from the Tenth Circuit); (2) the records were reasonably calculated to lead to admissible evidence—and, in that regard, the court specifically noted that, "A trial judge, who has broad discretion in this area, should nevertheless incline toward permitting the broadest discovery ...." *Ex parte AMI West Alabama Gen. Hosp.*, 582 So. 2d 484, 486 (Ala. 1991); and (3) the law firm made no evidentiary showing as to undue burden, which was its burden in resisting discovery on that ground.

## Statute of Frauds; Fraud in the Inducement Exception; Oral Contracts Regarding Real Property

*Nix v. Wick*, No. 1090687 (Ala. Dec. 30, 2010)

*This case specifically abrogates an older line of Alabama cases concerning the viability of fraud claims in transactions which are subject to the statute of frauds, but where the transaction fails to meet the statute of frauds' requirements.*

Wick contracted with Nix in two separate contracts to sell a house and an adjacent five acres. Wick did not disclose in connection with the five-acre contract that a co-owner, Oldfield, would have to consent to the sale. Additionally, the contract on the five-acre parcel did not identify the parcel other than to say that it was adjacent to the house. The sale of the house closed, but then the five-acre parcel could not close due to the lack of consent of Oldfield.

Nix sued for fraud and breach of contract, seeking either to compel specific performance of the five-acre transaction or to rescind the house sale, based on the theory that Nix would not have bought one without being able to buy the other. The trial court granted summary judgment for defendants based on the statute of frauds, holding that under the line of authority discussed in *DeFriece v. McCorquodale*, 998 So. 2d 465 (Ala. 2008), fraud cannot be employed as a claim when the finding of fraud is based on a promise or representation which would be rendered unenforceable by the statute of frauds. In this case, the fact that the land was not sufficiently described rendered the promise to convey unenforceable.

The supreme court affirmed. The court reasoned, first, that the description of the five acres was too nonspecific to be rendered enforceable, because concurrent parol evidence could not be used (concurrent to the time of the promise to convey) to identify the parcel, in that no survey had been done at the time. The court then reaffirmed the *DeFriece* line of authority and noted that cases such as *Darby v. Johnson*, 477 So. 2d 322, 325 (Ala. 1985) and others have been abrogated or overruled, and under the

current state of the law, a claim of promissory fraud cannot be predicated on a promise which would be unenforceable under the statute of frauds.

## Section 14 Immunity

*Health Care Auth. for Baptist Health v. Davis*, No. 1090084 (Ala. Jan. 14, 2011)

*This case garnered significant press attention on release. Taken to its logical conclusion, it might support the conclusion that private actors under contract with the state enjoy Section 14 immunity. Petitions for rehearing are pending in the case as of press time.*

In a significant 5-3 decision (Justice Smith did not participate), with now-retired Justice Lyons in the majority, the court held that Baptist Health of Montgomery was entitled to Section 14 state immunity in a wrongful-death action, because Baptist had formed a healthcare authority in connection with a management arrangement with UAB Health Care System. The trial court had entered a judgment on a jury verdict for \$3.2 million, denying post-trial motions on a variety of grounds. The court vacated the trial court's judgment and dismissed the appeal based on a lack of subject-matter jurisdiction, because the defendant was immune from suit. Justices Murdock and Parker, along with Chief Justice Cobb, dissented. Petitions for rehearing have been filed, and it will be interesting to see how the 5-3 division is altered with the departure of Justice Lyons and the arrival of Justice Wise and Justice Main.

## Forum Selection Clauses; Waiver and Non-Exclusivity

*Ex parte Textron Corp.*, No. 1100032 (Ala. Jan. 14, 2011)

*This is the last opinion of Justice Lyons, who resigned from the court on January 14, 2011. His thoughtful analysis and mellow prose will be missed by the bar. The case also presents an interesting issue regarding the exclusivity of venue in detinue as against a forum selection clause.*

The debtors obtained inventory financing on boats from Textron Financial. The debtors' obligations were personally guaranteed by certain guarantors. The notes

with the debtors contained an exclusive forum-selection clause designating Rhode Island courts; the guaranty agreements contained a non-exclusive clause designating Rhode Island. The notes also contained rights on the part of Textron Financial to repossess the collateral in the event of nonpayment. After default, Textron Financial brought a detinue action against debtors in the U.S. District Court for the Northern District of Alabama under FRCP 64 and Alabama statutory law, seeking repossession of the collateral. Debtors and guarantors then sued Textron Financial, Textron (parent corp.) and a Textron employee in St. Clair County Circuit Court for fraud and other claims. The detinue action was dismissed on stipulation, and Textron Financial then brought another federal case in the District of Rhode Island. Back in St. Clair County, defendants moved to dismiss based on the forum-selection clauses. Debtors and guarantors opposed on the basis of waiver—their argument was that defendants had waived rights to exclusivity of the venue provided for by the forum selection clause by filing original detinue action in the Alabama federal court. The trial court found waiver and denied dismissal; the defendants petitioned for mandamus.

The supreme court granted the writ in part, as to the claims of the debtors. The court reasoned that detinue was subject to the exclusive jurisdiction of the court where the property being repossessed was situated, being in Alabama. Thus, the filing of the Alabama action was not a waiver of the right to enforce exclusivity of the venue mandated in the forum selection clause as to other claims. (The court noted that no argument was raised as to whether the enforcement of the clause would be commercially unreasonable.) The court also held that the claims against the employee and parent corporation also fell within the scope of the exclusive forum selection clause. However, claims brought by the guarantors were not subject to the exclusive forum-selection clause, but rather fell within the scope of a non-exclusive forum selection clause found in the guaranty agreements; therefore, the petitioners did not show a clear legal right to seek dismissal of those claims.

## Corporate Governance (Delaware Law); Law of the Case

*Scrushy v. Tucker*, No. 1081424 (Ala. Jan. 28, 2011)

*This is yet another chapter in the Richard Scrushy litigation. It is the most significant opinion in the litigation to date, as it addresses the bulk of the substantive claims in the derivative actions, which have taken nearly a decade to litigate.*

This is a derivative action brought by shareholders of HealthSouth Corp. against former CEO Richard Scrushy, asserting claims arising from HealthSouth accounting fraud and seeking disgorgement of bonuses and damages for loss of value. The trial court entered judgment for plaintiffs in the amount of \$2.8 billion. The supreme court affirmed. Scrushy assigned seven grounds for appeal, all of which were rejected. The more significant issues (numbered as in the opinion) and their resolutions are as follows:

### ***Issue 1: Subject-matter jurisdiction over derivative action, given initial failure to plead a demand or excuse***

The supreme court held that the trial court had subject-matter jurisdiction under Delaware law (which governed the substantive claims, since the conduct and allegations concerned the workings of a Delaware corporation). Under Delaware law, faulty or inadequate pleading of the excuse for failure to make a demand on the board of directors can be cured by amendment, even though the general failure to plead demand or excuse generally deprives the court of subject-matter jurisdiction.

### ***Issue 2: Law of the case barred consideration of defenses of statute of limitations and res judicata***

The supreme court refused to consider the merits of Scrushy's statute of limitations and res judicata arguments. The court reasoned that the doctrine of the law of the case (a procedural doctrine, thus governed by Alabama law) barred assertion of statute of limitations and res judicata defenses in a second appeal. Even



## THE APPELLATE CORNER

Continued from page 105

though those defenses supposedly applied to a number of claims, they could have been raised in a prior appeal in the case concerning the issue of payment of improper bonuses, which was one of the claims against which these defenses were interposed. The court held that the law of the case doctrine bars assertion of grounds applicable to any claims which could have been asserted as to claims in issue in a prior appeal.

***Issue 4: Does Brophy v. Cities Service Co., 70 A.2d 5 (Del. Ch. 1949), continue to provide a valid basis for an insider-trading claim?***

The supreme court rejected Scrushy's argument that *Brophy* was no longer viable as being either duplicative of or in conflict with the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5.

***Issue 6: Was Scrushy's involvement in the First Cambridge and Digital Hospital projects shielded by the business judgment rule?***

The court held that under Delaware law, the business judgment rule did not apply because the essential element of "good faith" was lacking based on unchallenged findings of self-dealing transactions in violation of the duty of loyalty. ▲▼▲

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*Wilson F. Green is a partner in Fleenor Green & McKinney in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation. Contact him at [wgreen@fleenorgreen.com](mailto:wgreen@fleenorgreen.com).*



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## Meetings and Mock Trials Keep Section on the Road

In February, the Alabama State Bar Young Lawyers' Section (YLS) sent five delegates to the **American Bar Association Young Lawyers' Division** (ABAYLD) Mid-Year Meeting in Atlanta. Later that month, the YLS officers and executive committee members held their annual winter meeting at the Grand Hotel in Point Clear.

Upcoming YLS events include the **Minority Pre-Law Conference** (MPLC) to be held in Birmingham March 30 at Birmingham Southern College and in Montgomery April 20 at the Frank M. Johnson Federal Courthouse and the Alabama State University Acadome. The MPLC is an award-winning program that allows local high school students an opportunity to observe a mock trial in which students may participate as jurors. Following the mock trial, students go into break-out sessions with local attorney volunteers and law students, where they discuss law school, the practice of law and how to achieve their educational and professional goals. High school students also receive the benefit of a college prep speaker as well as a folder of college admission material from various institutions of higher learning across the state. There is no charge to students taking part in the MPLC, due to the generous support of our sponsors. For more information on how to become a sponsor of one (or both) of the MPLC events, please contact **J. R. Gaines at (334) 244-6630** or **Sancha Howard at (334) 215-3803**.

## YOUNG LAWYERS' SECTION

Continued from page 107

As spring approaches, many firms begin traveling to law schools to interview students for summer clerkships. If you have not committed to conducting on-campus interviews or hiring any summer clerks, I encourage you to do so. Hiring a summer clerk is not only beneficial to your firm and the law school which the student attends, but a great way for students to begin learning the practice of law. In addition, having a summer clerkship on their resume will prove helpful to graduating law school students in their search for a full-time associate position.

The largest YLS event of 2011 will be May 12–15 at the Sandestin Resort in Destin. The **Sandestin CLE** is the only CLE that is targeted specifically at young lawyers. This seminar is crafted each year to offer a broad range of topics that all young lawyers should have a working knowledge of, regardless of their specialized area of

practice, and to provide practical instruction that will assist new lawyers in developing their legal skills. It is also a great way for young lawyers to reconnect with law school classmates and to make new connections with judges and other young lawyers from around the state. The YLS Sandestin CLE is held in May of each year just prior to the higher summer rental rates kicking in and provides an economical way for young lawyers to obtain half their CLE requirements for the year and enjoy a weekend of relaxation at one of the most beautiful resorts in the southeast. Mark your calendars now and plan to attend the **Sandestin CLE May 12–15!** The registration brochure and more detailed information on speakers and events will be coming soon.

For more information about your YLS, visit [www.alabamayls.org](http://www.alabamayls.org).





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# Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners*.

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

8 <sup>th</sup> Judicial Circuit	22 <sup>nd</sup> Judicial Circuit
10 <sup>th</sup> Judicial Circuit, Place 4	23 <sup>rd</sup> Judicial Circuit, Place 1
10 <sup>th</sup> Judicial Circuit, Place 7	28 <sup>th</sup> Judicial Circuit, Place 2
10 <sup>th</sup> Judicial Circuit, Bessemer Cutoff	30 <sup>th</sup> Judicial Circuit
11 <sup>th</sup> Judicial Circuit	31 <sup>st</sup> Judicial Circuit
13 <sup>th</sup> Judicial Circuit, Place 1	33 <sup>rd</sup> Judicial Circuit
13 <sup>th</sup> Judicial Circuit, Place 5	34 <sup>th</sup> Judicial Circuit
15 <sup>th</sup> Judicial Circuit, Place 5	35 <sup>th</sup> Judicial Circuit
17 <sup>th</sup> Judicial Circuit	36 <sup>th</sup> Judicial Circuit
18 <sup>th</sup> Judicial Circuit, Place 1	40 <sup>th</sup> Judicial Circuit
19 <sup>th</sup> Judicial Circuit	41 <sup>st</sup> Judicial Circuit
21 <sup>st</sup> Judicial Circuit	

Additional commissioners will be elected in circuits for each 300 members of the state bar with principal offices therein as determined by a census on March 1, 2011 and certified by the secretary no later than March 15, 2011. All terms are for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. PDF or fax versions are acceptable and may be sent to the secretary as follows:

**Keith B. Norman, Secretary, Alabama State Bar**  
P. O. Box 671 • Montgomery, AL 36101  
*keith.norman@alabar.org* • Fax: (334) 517-2171

Paper or electronic nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 29, 2011).

As soon as practical after May 1, 2011, members will be notified by e-mail with a link to the Alabama State Bar website that includes an electronic ballot. **Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot.** A single written request will be sufficient for all elections, including run-offs and contested president-elect races. Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 20, 2011). Election rules and petitions are available at [www.alabar.org](http://www.alabar.org).

## At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2011. A petition form to qualify for these positions is available at [www.alabar.org](http://www.alabar.org).

# IMPORTANT NOTICES

Continued from page 109

## Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented Saturday, July 16, during the Alabama State Bar's 2011 Annual Meeting at the Grand Hotel in Point Clear.

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

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

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

To be considered for this award, local bars must complete and submit an award application by June 1, 2011. Applications may be downloaded from [www.alabar.org](http://www.alabar.org). For more information, contact Rita Gray at (334) 517-2162 or [rita.gray@alabar.org](mailto:rita.gray@alabar.org).

## Members' Records Reminder

As a member of the Alabama State Bar, you are required to keep the Membership Department informed of your current address, telephone number, fax number, e-mail address, etc. All requests for address changes and other information *must be made in writing and will be accepted by mail, fax or e-mail (P.O. Box 671, Montgomery, AL 36101; 334-261-6310; [ms@alabar.org](mailto:ms@alabar.org))*.

There is also a form available on the bar's website ([www.alabar.org](http://www.alabar.org)) for your use when notifying our office of any address information change. Our policy does not permit us to make changes via phone. **The Administrative Office of Courts is not authorized to make changes to your contact information.**

## BP Filing Deadline

The vast majority of lawsuits filed against BP, and the other entities involved in the Deepwater Horizon incident and resulting oil spill, have been consolidated in a proceeding in federal court in Louisiana. If persons and entities having claims against these parties have not asserted their claims by April 20, 2011, some or all of their claims may be forever barred. Filing a claim with the Gulf Coast Claims Facility (Feinberg's process) does not constitute filing a claim in this court action.

The *U.S. District Court, Eastern District of Louisiana*, has allowed the joinder in the action (the filing of a claim) via a short form.

**The deadline to file claims in the BP lawsuit pending as an MDL is April 20, 2011.**



**Allen, Bob E.**

Marbury

Admitted: 1975

Died: December 22, 2010

**Alley, L. Murray Jr.**

Birmingham

Admitted: 1959

Died: November 29, 2010

**Bedsole, T. Massey**

Mobile

Admitted: 1941

Died: January 1, 2011

**Blanton, John H.**

Selma

Admitted: 1942

Died: December 27, 2010

**Lathem, Donald Nickerson**

Alabaster

Admitted: 1951

Died: May 22, 2010

**Lyles, Harry Arthur**

Montgomery

Admitted: 1979

Died: February 9, 2010

**Neumann, Franklin William III**

Vestavia Hills

Admitted: 1974

Died: January 1, 2011

**Pelham, Pierre**

Chatom

Admitted: 1956

Died: December 3, 2009

**Perry, Ralph**

Mobile

Admitted: 1987

Died: March 20, 2010

**Salmon, Joseph Thaddeus**

Montgomery

Admitted: 1951

Died: November 5, 2010

**Selfe, Edward M.**

Birmingham

Admitted: 1953

Died: November 30, 2010

**Slade, Charles Kenneth Jr.**

Fairhope

Admitted: 1982

Died: March 23, 2010

**Suits, Sherman L.**

Birmingham

Admitted: 1977

Died: October 23, 2010



# Volunteer Lawyers Program

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Their generous assistance,  
cooperation and dedica-  
tion have enabled these  
programs to provide legal  
representation to hundreds  
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# Alabama Attorneys Complete Work at Uniform Law Conference

*By Representative Cam Ward*

For the 119<sup>th</sup> time, uniform law commissioners recently gathered for a full week to discuss—and debate line by line and word by word—legislative proposals drafted by their colleagues during the year.

At its meeting in Chicago, the Uniform Law Commission (ULC) approved ten new acts dealing with issues ranging from a new law that assists military and overseas voters to a new act addressing the complex issues of tenancy-in-common land ownership.

The ULC has worked for the uniformity of state laws since 1892. Originally called the National Conference of Commissioners on Uniform State Laws, the ULC was formed by representatives of seven states to promote uniformity among state laws. It was created to consider state law, determine in which areas of the law uniformity is important and then draft uniform and model acts for consideration by the states. For well over a century, the ULC's work has brought consistency, clarity and stability to state statutory law.

Alabama joined the ULC in 1906, and since that time has enacted more than 75 uniform or model acts promulgated by the ULC, including important state statutes such as the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Interstate Family Support Act, the Uniform Anatomical Gift Act, and the Uniform Child Custody Jurisdiction and Enforcement Act. Just in 2010, Alabama enacted two new uniform acts: the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and the Uniform Child Abduction Prevention Act. The Child Abduction Prevention Act was a multi-year project developed by former **Alabama Justice Gorman Houston**, many others in the legal community and this author.

Uniform law commissioners are appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The commissioners draft proposals for uniform laws on issues where disparity between the states is a problem. Commissioners donate their time and expertise, receiving no salary or fee for their work with the ULC. Alabama's commissioners are some of the most active members in the conference, serving on dozens of drafting committees over the years.

Alabama currently has nine uniform law commissioners appointed to the ULC: **Jerry Bassett, Montgomery; Joseph Colquitt, Tuscaloosa; William H. Henning, Tuscaloosa; Gorman Houston, Jr., Birmingham; Thomas L. Jones, Tuscaloosa; Ted Little, Auburn; Robert L. McCurley, Jr., Tuscaloosa; Bruce J. McKee, Birmingham;** and this author.

Highlights of acts recently approved by the ULC and now available for state enactment include:



*Uniform Law Commission President Bob Stein (right) speaks to attendees of the recent ULC meeting in Chicago as Illinois Governor Pat Quinn prepares to sign an act into law.*

The **Uniform Military and Overseas Voters Act** will simplify the process of absentee voting for United States military and overseas civilians by making the process more uniform, convenient, secure and efficient. The Act covers all military personnel and their dependents, as well as U.S. citizens residing outside the United States who are unable to vote in person. The Act applies to all statewide and local elections, as well as to all federal elections, both primary and general.

The **Uniform Commercial Code (UCC) Article 9** governs secured transactions in personal property. UCC9 was substantially revised in 1999 and adopted in all states. The 2010 Amendments to UCC9 modify the existing statute to respond to filing issues and address other matters that have arisen in practice following a decade of experience with the 1999 version of UCC9. Of most importance is that the 2010 amendments provide greater guidance as to the name of an individual debtor to be provided on a financing statement.

The **Uniform Partition of Heirs Property Act** addresses the issue of tenancy-in-common land ownership. Tenancy-in-common is a type of joint ownership without right of survivorship. When there is no right of survivorship, the death of a tenant-in-common can trigger an action to partition the land to satisfy the deceased tenant's heirs. In a partition, the land is sold to satisfy tenant-in-common interests, often in a sale that does not meet market value. This Act protects vulnerable landowners by providing a buy-out option, balancing factors for judges on partition of real property, sale price minimums if dispossession occurs and a waiting period of up to three years for strangers to title.

The **Uniform Electronic Recordation of Custodial Interrogations Act** addresses the use of audio and/or videotaping to record law enforcement officers' interviews of criminal suspects who are in custody. The Act mandates audio-recordings of interrogations only, leaving to the discretion of the various states and law enforcement agencies to require both audio- and video-recording of custodial interrogations.

The **Uniform Faithful Presidential Electors Act** provides a statutory remedy in the event a state presidential elector fails to vote in accordance with the voters of his or her state. The Act has a state-administered pledge of faithfulness, with any attempt by an elector to submit a vote in violation of that

pledge, effectively constituting resignation from the office of elector. The Act provides a mechanism for filling a vacancy created for that reason or any other.

The **Revised Model State Administrative Procedure Act** is an update of the 1980 Act of the same name. The 1980 Act provided procedures for promulgating administrative regulations and for adjudicating disputes before administrative bodies. The revision updates the Act to recognize electronic communications and other state procedural innovations since the Act was originally promulgated.

The **Uniform Collateral Consequences of Conviction Act** addresses the various penalties and disqualifications that individuals face incidental to criminal sentencing, including disqualification from voting, prohibitions from running for office, exclusion from certain types of employment, etc. The provisions in the Act are largely procedural, and designed to rationalize and clarify policies and provisions which are already widely accepted by the states. The Act includes provisions to ensure that defendants are aware of the existence of collateral sanctions before sentencing. Amendments to the Act address the recent U.S. Supreme Court decision in *Padilla vs. Kentucky*.

Information on all of these acts, including the approved text of each act, can be found at the ULC website, [www.nccusl.org](http://www.nccusl.org).

Once an act is approved by the ULC, it is officially promulgated for consideration by the states, and the legislatures are urged to adopt it. Since its inception, the ULC has been responsible for

more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act and the Uniform Interstate Family Support Act.

The procedures of the ULC ensure meticulous consideration of each uniform or model act. The ULC usually spends a minimum of two years on each draft. Sometimes, the drafting work extends much longer. No single state has the resources necessary to duplicate this meticulous, careful, non-partisan effort.

The ULC works efficiently for all the states because individual lawyers are willing to donate their time to the uniform law movement, and because it is a genuinely cooperative effort of all the states. The ULC continues to be a good idea, well over a century since its founding, and strengthens the role of state law in our federal system. The Uniform Law Commission continues its commitment to help sustain the independence of the states, while achieving a uniform legal system for the nation. ▲▼▲



**Representative Cam Ward** serves in the Alabama House of Representatives for District 14, which includes Bibb, Chilton, Jefferson and Shelby counties, and is the executive director of the Alabaster Industrial Development Board. He is a graduate of Troy University and the Cumberland School of Law. Representative Ward is president of the Alabama Law Institute and one of Alabama's five commissioners on the National Conference of Commissioners on Uniform State Laws. He also volunteers time as chair of the Alabama Autism Task Force.

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The stated purpose of the session  
and the legislation introduced  
during that session was to  
increase **accountability**  
and **transparency** in  
government at the state,  
county and local levels.





# The 2010 Changes to Alabama's ETHICS LAW

By Edward A. Hosp

In early December 2010, the Alabama Legislature was called into special session by outgoing Governor Bob Riley. The stated purpose of the session and the legislation introduced during that session was to increase accountability and transparency in government at the state, county and local levels. More specifically, one of the primary focuses of the session was to limit the perceived influence that “lobbyists” and those who hire “lobbyists” have on the political process. Thus, two of these bills, Senate Bill 14 (“SB14”), by Senator Bryan Taylor, and House Bill 11 (“HB11”), by Representative Paul DeMarco, made extensive changes to the definitions of “lobbying,” “lobbyists” and the items and hospitality that “lobbyists” and “principals”—those who hire “lobbyists”—can provide to “public officials” and “public employees.”<sup>1</sup> In fact, these bills so transformed the law that at the first mandated ethics training session in Montgomery on January 24, 2011, Ethics Commission Executive Director Jim Sumner declared that “life, as we have known it in the past, no longer exists.”

To say that there is significant confusion and disagreement over what the new laws actually did would be an understatement. *See* Montgomery Advertiser, 2/3/2011. The changes are still being analyzed, and many of the new provisions will require interpretation through advisory opinions issued by the Ethics Commission before their full impact is understood.<sup>2</sup> Additionally, the legislature may have addressed some of the issues that have arisen through technical amendments when the 2011 Regular Session began March 1, although early indications are that they are reluctant to do so.

This article analyzes SB14 and HB11 in an attempt to provide as clear a picture as possible of the new restrictions on “public officials,” “lobbyists” and those who employ “lobbyists”—as well as to whom those restrictions apply.

## What Is Lobbying?

Under prior law, and pursuant to language re-passed in SB14, the definition of “lobbying” includes any attempt to influence legislation, including the veto or amendment of legislation.<sup>3</sup> The definition of “lobbying” also includes any attempt to influence the adoption and modification of regulations instituted by any regulatory body. Therefore, if the purpose of contact with the government is to influence the content of legislation or regulation, an attorney would likely fall under the definition of a “lobbyist.”

Consistent with prior interpretation of the law, and based on the language in the definition of “lobbying” as well as the “attorney exception” to the definition of “lobbyist” (*see* Ala. Code 36-25-1(20)(b)(2)), it does not appear that “lobbying” includes attempting to influence the application of regulations to a particular situation—for example, an attempt to obtain a license or to convince a government entity that a party is not in violation of an existing rule or regulation. Additionally, “professional services” involving drafting legislation or regulations, or assisting clients in interpreting the impact of particular measures does not render a person a “lobbyist.” Ala. Code § 36-25-1(20)(b)(2).

The purpose of HB11, however, was to add a new code section that expanded the definition of “lobbying” to include any attempt to influence the award of any contract or grant by any department of the executive, legislative or judicial branch of state government. Ala. Code § 36-25-1.5. While this is a significant change to the law, note that HB11 applies only to those seeking contracts and grants with the state. Therefore, those seeking contracts and grants with county or city governments, or their departments and agencies, would not fall under the definition of “lobbying” and should not be considered “lobbyists.”

As discussed more fully below, there appears to be a conflict between the new definition of “lobbying” contained in HB11, and one of the exceptions to the definition of “lobbyist” contained in the existing *Code* and re-enacted as part of SB14. Thus, there exists some confusion as to the circumstances under which a person seeking to obtain a contract for goods and services with the executive or legislative branches of state government will be considered a “lobbyist.”<sup>4</sup>

## Who Is a Lobbyist?

### Generally

Under SB14, “the term lobbyist includes any of the following:”

1. A person who receives compensation to lobby. That is, anyone paid to influence legislation, regulations or the award of contracts of grants by the state;
2. A person who lobbies as a “regular or usual part of employment;”
3. A consultant to any government entity who is employed to influence legislation or regulations regardless of the funds from which that person is paid;
4. Any employee or consultant of a lobbyist who regularly communicates with members of a legislative body.

*Ala. Code* § 36-25-1(20)(a).

As noted above, the definition of “lobbyist” in *Ala. Code* § 36-25-1(20) as adopted by SB14 begins with the phrase “the term lobbyist includes any of the following” (emphasis added). Therefore, the examples given and listed above may not be exclusive. This creates the possibility that the Ethics Commission could interpret other activities by an individual as rendering that person a “lobbyist.”

What is perhaps more instructive than the definition of who is a “lobbyist” is that the *Code* also specifies who is not a “lobbyist.” A “lobbyist” does not include:

1. Elected officials acting on matters which involve that person’s official duties;

*In contrast, those hired purely for the purpose of influencing a decision of the state government with respect to a contract or grant, or those hired to “open doors” for a business are considered “lobbyists,” however, and must register.*

2. A person or attorney drafting bills or advising clients or rendering opinions regarding the construction or effect of pending legislation, executive action or rules or regulations;
3. Reporters and members of the press;
4. Citizens who do not expend funds to lobby or who merely give public testimony on a particular issue;
5. A person who appears before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services;
6. A person whose primary duties or responsibilities do not include lobbying, but who may organize social events for members of a legislative body so long as that person has only irregular contact with members of the legislative body;
7. Persons who are members of associations who retain lobbyists but who do not personally lobby;
8. State government agency heads or their designees who provide information or communicate with other entities regarding policy and the positions affecting that agency.

*Ala. Code* § 36-25-1(20)(b).

## Are Sales People Now “Lobbyists”?

Although the exception to the definition of “lobbyist” set forth in § 36-25-1(20)(b)(5) for those appearing before a legislative or executive body to sell or purchase goods or services appears to be broad, as noted previously, it is also in conflict with the legislature’s attempt in HB11 to include as “lobbyists” individuals “seeking to influence the award” of contracts and grants with the state. A question therefore arose as to whether or not a salesperson who attempts to make sales to a state government entity fell under the new definition of a “lobbyist.” This issue was a contentious one during the session, and there were numerous attempts to include language in the final bill that would clarify that salespeople were not intended to be included in the definition of “lobbyist.” Those efforts were ultimately unsuccessful; however, on February 2, 2011, the Ethics Commission issued Advisory Opinion 2011-02, clarifying this issue. According to that opinion, individuals and entities who engage in sales activities with the state government as part of their normal job activities are not considered by the Commission to be “lobbying.” Similarly, the opinion states that individuals and entities who respond to requests for proposals are not “lobbyists.” In contrast, those hired purely for the purpose of influencing a decision of the state government with respect to a contract or grant, or those hired to “open doors” for a business are considered “lobbyists,” however, and must register. Ethics AO 2011-02.

## Who Is a Principal?

A “principal” is any person—including any business—who employs a “lobbyist.” The revised definition of “principal” removes the statement previously contained in the *Code* that a “principal” could simultaneously serve as his or her own “lobbyist,” and added the statement that “a principal is not a lobbyist, but is not allowed to give a thing of value.” Clearly, in some instances, particularly with regard to associations, a “principal” may also be a “lobbyist.” The current thinking of the

Ethics Commission staff appears to be that the language stating that a “principal” was not a “lobbyist” was added to the *Code* only to indicate that a “principal” was not automatically also a “lobbyist.”

## *What Can a Lobbyist or Principal Do (or Not Do)?*

As discussed in detail below, when the new law was first passed, there existed some confusion regarding the impact of changes to *Code* § 36-25-7. The language in new section 7 provides that no one—not a “lobbyist,” a “principal” or a citizen—is permitted to provide anything to a “public official” if the giving of that thing is to influence official action. If not given to influence official action, there appears to be no limitation on what an individual or entity who is not a “lobbyist” or “principal” may provide to a “public official.” This is not the case for “lobbyists” and “principals,” as new *Code* section 36-25-5.5 places specific restrictions on those individuals and entities. New *Code* § 36-25-5.5(a) states in relevant part that:

no lobbyist, or subordinate of a lobbyist or principal shall offer or provide a thing of value to a public employee or public official or family member of [those individuals]...

*Ala. Code* § 36-25-5.5(a). This new section similarly prohibits “public employees” or “public officials” and their “family members” from soliciting or receiving a thing of value from a “lobbyist” or a subordinate of a “lobbyist” or “principal.” In what appears to be a minor drafting error, the plain language of this provision does not include a prohibition that relates to “principals”—only to subordinates of “principals.” However, it is clear that the legislature intended this prohibition to apply to “principals” as well as “lobbyists.” As noted above, contained in the definition of “principal” is the statement that “a principal . . . is not allowed to give a thing of value.” As a result, it should be assumed that “principals,” like “lobbyists,” are prohibited from providing to “public officials” and “public employees” any “thing of value.”

Under § 36-25-5.5, neither a “lobbyist” nor a “principal” can provide to a “public official” or the official’s “family members” a “thing of value.” As noted previously, it appears that anyone not considered a “lobbyist” or a “principal” may be permitted to give to a “public official” anything—including a thing of value, so long as the thing provided is not for the purpose of influencing official action, as prohibited by § 36-25-7. Again, the intersection between section 5.5 and the language of § 36-25-7, and how the Ethics

Commission has dealt with this issue thus far, is dealt with below.

## *What Is (and Is Not) a Thing of Value?*

If it is assumed that no conflict exists between section 5.5 and section 7, and that “lobbyists” and “principals” are permitted

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to give to “public officials” things that are not “thing[s] of value,” then it is important to have a clear understanding of exactly what that term does and does not mean. “Thing of value” is defined very broadly, and includes essentially anything and everything that has any value. Thus, as in the past, the numerous exceptions to the definition are more relevant and helpful.

## General Exclusions from “Thing of Value”

The following items are specifically excluded from the definition of a “thing of value,” and therefore appear to have been intended by the legislature to be allowed to be provided to “public officials” and “public employees” so long as they are not given for the purpose of influencing official action:

1. Campaign contributions or contributions to an inaugural or transition committee;
2. Anything given by a family member “[u]nder circumstances which make it clear that the gift is [the thing given] is motivated by a family relationship;”
3. Anything given by a friend under circumstances which make it clear that the gift is given due to the friendship;
4. Items of little intrinsic value such as plaques or certificates, or items and services of de minimis value;
5. Anything that is available to the general public such as loans, discounts and “opportunities and benefits,” and “rewards and prizes given in contests or events including random drawings...;”
6. Benefits earned by a public official or employee through a non-government employer where it is clear that those benefits are provided for reasons unrelated to the person’s public service.

*Ala. Code* § 36-25-1(33)(b)(1-7, 10).

## Group Meetings, Receptions and Conferences

There are several exceptions to the definition of “thing of value” that deal with group meetings, receptions and conferences. Under those exceptions, a “thing of value” does not include:

1. Reimbursement for transportation and lodging for public officials or public employees attending an educational function or a widely attended event when the person providing the reimbursement is a primary sponsor. This exclusion only applies if the public official is a meaningful participant in the event, or if the public official’s attendance is “appropriate to the performance of his or her official duties for representative function;”
2. Reimbursement for travel and expenses in connection with participation in an economic development function;
3. Hospitality, meals and other food or beverages provided as an integral part of an educational function, economic development function, a work session,<sup>5</sup> or a widely attended event.

*Ala. Code* § 36-25-1(33)(12-14).

## Educational Function

An “educational function” must be organized around a formal program or agenda concerning matters within the scope of the participant’s official duties for other matters of public policy, economic trade or development, ethics, government services or programs, or government operations.

The definition states that “[t]aking into account the totality of the program or agenda [it] could not reasonably be perceived as a subterfuge for a purely social, recreational, or entertainment function.” *Ala. Code* §36-25-1(12). If the function is primarily attended by individuals from Alabama, it must take place in Alabama. If it is predominately attended by individuals from other states, it still must take place in the continental United States. *Ala. Code* § 36-25-1(12).

Transportation and lodging may be provided for an “educational function,”

but only by a primary sponsor of the event, and only if the “public official” is a “meaningful participant” in the event. *Ala. Code* § 36-25-1(33)(12). There is no definition of a “primary sponsor;” however, the legislation’s use of the more broad term “a principal sponsor” rather than the restrictive term “the primary sponsor” indicates that an event may have more than one primary sponsor.

Additionally, according to the exceptions to the definition of a “thing of value,” hospitality may be provided at an “educational function,” but the language states that the hospitality must be “an integral part” of the event. *Ala. Code* § 36-25-1(33)(14).

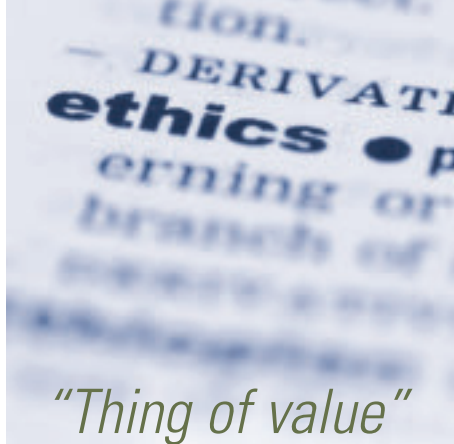
## Economic Development Function

An “economic development function” is one reasonably “[a]nd directly related to the advancement of a specific, good faith economic development or trade promotion project or objective.” *Ala. Code* § 36-25-1(11) (emphasis added). In order to qualify as an “economic development function,” therefore, the event must concern an actual project or proposal, and cannot be a function relating to economic development in general.

Travel and lodging of a “public official” or employee may be paid to “facilitate a public official’s or public employee’s participation in an economic development function.” *Ala. Code* § 36-25-1(33)(13). As in the case of an “educational function,” hospitality may be provided as part of an “economic development function” if the hospitality is an integral part of the function. *Ala. Code* § 36-25-1(33)(14).

## Widely-Attended Event

A “widely-attended event” is any “[g]athering, dinner or reception at which it is reasonably expected that more than 12 individuals will attend....” According to this definition, the participants must have “mutual interests,” but the attendees must include “individuals with a diversity of views or interests.” *Ala. Code* § 36-25-1(35). If the event is one organized around a formal agenda, and the “public official” or employee is a meaningful participant, transportation and lodging may be provided by a primary sponsor of the event. *Ala. Code* § 36-25-1(33)(12). Hospitality may be provided if it is an integral part of the event. *Ala. Code* § 36-25-1(33)(14).



*“Thing of value”  
is defined very  
broadly, and  
includes essentially  
anything and  
everything that  
has any value.*

In general, the exception for “widely attended events” appears to be broader than the exceptions for “educational functions” and “economic development functions.” As a result, it appears that so long as more than 12 people are expected to attend, most events that would qualify as “educational functions” or “economic development functions” would also qualify as a “widely-attended event.”

## General Rules for Group Events and Functions

There is no limitation on the amount that can be spent on travel, hospitality or entertainment for a “public official” or “public employee” if the event qualifies

under one of the group event exceptions. However, travel and lodging can only be provided by a primary sponsor of the event. It also can only be provided if the event is one organized around a formal agenda or program, and if the official is a meaningful participant, meaning that he or she performs a role such as speaker or panel participant—or if the event concerns his or her role as a “public official.”

Hospitality, including food and beverages, can only be provided at a group event if it is an “integral part” of the function. Unfortunately, there is no definition of “integral part” of a function, although the dictionary definition of the word is “essential to completeness.” At this time, it is not clear when the provision of hospitality will be considered “an integral part” of an event, or how that term will be interpreted.

Unlike a previous code section that restricted the provision of hospitality in certain circumstances to three consecutive days, there is no time limitation in the newly passed law.

## Meals and Beverages Provided by Lobbyists and Principals

Also excepted from the definition from a thing of value are meals or beverages provided by a “lobbyist” to a “public official” not exceeding \$25 per meal, with an aggregate limit of \$150 per year. “Principals” are permitted to spend \$50 per meal on a “public official,” with a limit of \$250 per year. It is important to remember, though, that if the provision of hospitality falls within a group event

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exception such as an “educational function” or a “widely-attended event,” it is not a “thing of value,” and therefore does not fall within the \$25 or \$50 limitation, nor does it count toward the \$150 or \$250 aggregated amount permitted for the calendar year.


## Reporting Hospitality Provided to Public Officials

Under prior law, the definition of “thing of value” indicated that when more than \$250 in hospitality was spent on a “public official” or “public employee” during a single calendar day, the entire amount spent was required to be reported by the provider to the Ethics Commission.

Although SB14 eliminated this reporting requirement within the definition section, “lobbyists” and “principals” still must file quarterly reports pursuant to *Ala. Code* § 36-25-19(a). Those reports require an itemization of the items outside the definition of “thing of value” provided to a “public official” in excess of \$250 in a 24-hour period.

## Giving Something to Influence Official Action

Without question, the most confusion and disagreement regarding the new provisions of the Ethics Act have centered on the changes made to § 36-25-7. Previously, this code section prohibited the giving and receiving of a “thing of value” for the purpose of influencing official action. Although the language used in this section did not on its face appear to require an explicit *quid pro quo* agreement (i.e., it used the phrase “influencing official action” as opposed to “in exchange for an official act”), it was generally viewed as an anti-bribery statute that required some sort of *quid pro quo*. In any event, though, because section 7 only prohibited the giving of a “thing of value,” individuals and businesses knew that they were safe so long as the thing



*Under the new ethics laws, anyone considering providing a meal, a gift, sponsorship of an event—anything—at which “public officials” or “public employees” will be present, must given serious thought beforehand to how and whether to proceed.*

given—hospitality or whatever—fell within one of the many exceptions to the definition of a “thing of value.”

Although there are still numerous exceptions to the definition of “thing of value,” SB14 modified § 36-25-7 to remove the requirement that the thing given to influence official action be a “thing of value.” Thus, under the new section 7, if anyone offers to a “public official” anything, “[w]hether or not the thing...is a thing of value,” in order to influence official action, that person has violated the law. *Ala. Code* § 36-25-7(a-c). On February 2, 2011, the Ethics Commission issued Advisory Opinion 2011-01 to the Association of County Commissioners of Alabama, and examined several of the exceptions to the definition of “thing of value.” The opinion is helpful in understanding what is permitted with regard to group functions and meals provided by “lobbyists” or “principals.” It is particularly useful, however, in that it clearly interpreted what was allowed to be given through the lens of § 36-25-7.

According to AO 2011-01, businesses and individuals including “lobbyists” and “principals” may sponsor group events and meals pursuant to the exceptions set forth in the *Code*, and “public officials”

may attend such events and activities. However, implicitly acknowledging the language of section 7, the Commission pointed out that the individuals and businesses providing the meals at these events may not use the event “[a]n opportunity to lobby the public official/employee, or use it for a sales opportunity.” Ethics AO 2011-01 at 9.<sup>6</sup> Stated elsewhere in the Opinion, the Commission found that meals could be provided as long as “[t]he meal is not used as an opportunity to influence official action on the part of the county official/employee.” Ethics AO 2011-01 at 10.

The change in the language of section 7 appears to create a potential problem for many entities interacting with government officials, but especially for “lobbyists,” whose primary purpose is to influence official action. If a “lobbyist” takes a “public official” to dinner to discuss a policy or legislation, that meal may be interpreted as having been provided “for the purpose of influencing official action.” If so, it does not matter that the meal or event may fit within one of the exceptions contained in the definitions because under § 36-25-7, if a thing given or received is for the purpose of influencing official action, it is prohibited under all circumstances.

Therefore, based on the language now found in § 36-25-7, and on the interpretation of that language given by the Ethics Commission in Advisory Opinion 2011-01, it is risky for any entity—whether a “lobbyist,” “principal” or citizen—to provide anything at all to a “public official” if the giving of that thing is in any way connected with the discussion of, or attempt to influence, any policy, legislation or regulation.

## Conclusion

There is no question that the changes enacted by the Alabama Legislature to Alabama’s Ethics Act in December 2010 were substantial. As a result, many, if not most, of the rules and procedures that entities interacting with “public officials” and “public employees” had in place are no longer valid. Under the new ethics laws, anyone considering providing a meal, a gift, sponsorship of an event—anything—at which “public officials” or “public employees” will be present, must given serious thought beforehand to how



and whether to proceed. Whether or not the provision of that item is allowed will depend on numerous factors, including the character of the provider ("lobbyist" or "principal"), the purpose of the expenditure, the content of the event and the possible subjects that may be discussed. Because violations of the Ethics Act are class B felonies, it is recommended that parties contemplating such activities exercise caution, and consult either the Ethics Commission staff or an attorney before proceeding. ▲▲▲

## Endnotes

1. The *Code* contains separate definitions for "public officials" and "public employees." The definition of "public official" is very broad, and includes any person elected or appointed to a government position at the state, county or municipal level. "Public officials," therefore, include many individuals who serve in an unpaid capacity, whether as a member of local city councils or as a member of local government boards or commissions. Additionally, the definition of "family member" for "public officials" is significantly broader than the definition of "family member" for "public employees." Thus, restrictions as to what can be provided to "family members" are different for these two categories. With that exception, the restrictions on what can be provided to "public officials" and "public
2. SB14, which dealt extensively with what can and cannot be provided to "public officials" and "public employees" and became Act 2010-264, has an effective date of March 15, 2011. Thus, those changes to the law did not take effect until that date. HB11, which expanded the definition of "lobbying" and became Act 2010-262, had an effective date of January 1, 2011. Therefore, the additions to the definition of "lobbyist" became effective that date.
3. According to the definition of "legislative body," this includes measures considered by the state legislature, county commissions, city councils or commissions, town councils, and municipal councils or commissions, and committees of those bodies. *See* Ala. Code § 36-25-1(18).
4. "Lobbyists" are required to pay a fee and register with the State Ethics Commission, and must undergo mandatory ethics training. Additionally, under the new law, "lobbyists" may be under significant additional restrictions with regard to what they can and cannot do in their interactions with "public officials" and employees. Therefore, the determination of whether a person crosses the threshold and becomes a "lobbyist" is a significant one.
5. There is no definition for "work session" in the legislation.
6. Advisory Opinion 2011-01 also recognizes that prior to the 2010 changes, the language in § 36-25-7 had been interpreted to require a *quid pro quo*. As stated in the

Opinion, "[s]ince 1995, when the previous Ethics Law went into effect, all the activities set out in this opinion were permissible under the above-listed exceptions, unless they were offered in exchange for official action on the part of the public official or the public employee." Ethics AO 2011-01 at 7 (emphasis added).



**Edward A. Hosp** is a shareholder at Maynard, Cooper & Gale PC, practicing in the areas of government affairs, campaign finance law and litigation. Hosp served as legal advisor to the governor from 1999 to 2003 and on the staff of the United States Senate Committee on the Judiciary. Since 2003, Hosp has served as an adjunct professor at the University of Alabama School of Law teaching government ethics and election law. In 1994, Hosp received his law degree from Fordham University School of Law where he graduated cum laude and was inducted into the Order of the Coif. He served as a law clerk to the Honorable Harold Albritton, United States District Judge for the Middle District of Alabama from 1994-1995.

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# Controlling Costs in e-Discovery

By Jenna M. Bedsole and John Mallery

Your client calls. Several key employees have left to start a competing business. The client believes that the employees have taken crucial confidential documents or trade secrets either by e-mailing the information from their work computers to their personal computers or by downloading it onto external hard drives. The scenario presents issues of preserving or restoring information on your client's computers and, if litigation ensues, potential discovery involving the former employees' personal computers or external hard drives.

Mining for e-discovery can result in hundreds of thousands of documents. One gigabyte is the equivalent of 500,000 typed pages. Managing the vast amount of information can be expensive. Within the e-discovery rules, costs are a major concern. See Fed. R. Civ. P. 26(b)(2)(B) (“[A] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”); Fed. R. Civ. P. 26(b)(2)(C) (requiring a court to limit discovery if it determines the expense of the discovery outweighs its benefit). Courts have grappled with the enormous cost of e-discovery. “As businesses increasingly rely on electronic record-keeping, the number of potential discoverable documents has skyrocketed and so also has the potential for discovery abuse.” *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 653-54 (M.D. Fla. 2007) (noting importance in multi-district litigation for the parties to meet and confer to develop a discovery plan). “Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.” See *Rowe Ent., Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D. N.Y. 2002). Nevertheless, counsel can proactively save his or her client's time and money while at the same time offer quality representation. Below are a few tips.

## Before the Case

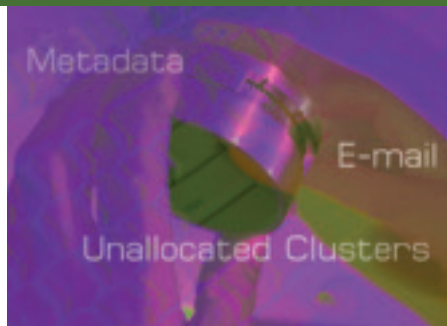
*Know the language.* Lawyers speak their own language—we talk about torts or motions for summary judgment or intercreditor agreements. We learn it in law school and in our practice; the legal lexicon is one of the tools of our trade. With the infor-

mation technology age, a new lexicon has developed. Here are some helpful words to know so lawyers can communicate more effectively with their clients, their computer experts and the court.

- a. *Metadata.* One of the most confusing terms that lawyers will encounter as they begin to address electronically stored information in the discovery process is “metadata.” Costly discovery disputes have arisen over a lack of understanding of the term. Metadata is not visible to the reader of a hard copy of a document—it is embedded data in the electronic form of the document. See Fed. R. Civ. P. 26(f)(3), Advisory Committee notes on 2006 Amendment (“Information describing the history, tracking, or management of an electronic file (sometimes called ‘metadata’) is usually not apparent to the reader viewing a hard copy or a screen image.”); see also *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005) (listing various definitions of metadata).

There are two types of metadata, *file-level metadata* and *application-level metadata*. *File-level metadata* is the term used to describe attributes of a file as it resides on a particular storage medium (hard drive, CD, thumb drive, etc.). Specifically, these are the created, modified and accessed times for the file on the device where it is stored. These are the date and time stamps as they appear in Windows Explorer. *Application-level metadata* are the date and time stamps as they are created in a particular application for a document. When using Microsoft Word, click on the “File” menu, then “Properties.” The data shown in the “Summary” and “Statistics” tabs are some of the metadata for that particular document. Application-level metadata stays with the document as it is transmitted or moved from one place to another. This type of information is useful if it is necessary to determine when a document was created, who created or modified the document and what organization created the document. However, not all applications create the same types of metadata as Microsoft Word and other Office applications.

b. *E-mail*. The word “e-mail” means completely different things to lawyers than to computer forensic experts. To a lawyer, e-mail is what we receive and respond to at our desks or PDAs. To a computer forensic expert, e-mail refers to the entire process. In an organization, e-mail is generally configured where a centralized mail server (a powerful computer—the heart of the system) runs e-mail server software, most commonly Microsoft Exchange. Running on the users’ desktops is an e-mail client, most commonly, Microsoft Outlook. The e-mail server hosts the “post office” where the users have their “mailboxes.” In Microsoft Exchange, the post office is contained in an individual file called an “edb” file (the file’s extension). Individual mailboxes can be extracted as individual files called “pst” files (personal storage files). PST files can also reside on users’ computers. Knowing what e-mail applications are used by your client can be very helpful during the discovery process.



For example, deleted temporary files, Internet History files, or deleted images can all potentially be recovered from unallocated clusters.

c. *Unallocated clusters*. Perhaps the most confusing term encountered during e-discovery is when a computer forensics expert starts discussing “unallocated clusters.” Before your eyes start to glaze over—by breaking down the phrase, it can be a little easier to understand. Data is stored on a hard drive in “clusters.” Active files, those files that you can see when you open Windows Explorer, are stored on clusters that are “allocated” to active files. Clusters that aren’t storing active files are said to be “unallocated.” This area of the hard drive is not accessible to the user—it is only used by the operating system (most likely Microsoft Windows) and the applications you run. Unallocated clusters are not empty. This is where you can find deleted files, whether deleted by the user or by the system. For example, deleted temporary files, Internet History files or deleted images can all potentially be recovered from unallocated clusters. Because this area of the hard drive is the “dumping ground” of the computer, there is no hierarchical structure of files, no organization by date and time stamps, simply no organization whatsoever. While it is possible to recover



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potentially relevant and responsive materials from unallocated clusters, it does require special training and tools to recover this information. *See generally Balboa Threadworks, Inc. v. Stucky*, No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265 \*10 (D. Kan. Mar. 24, 2006) (noting a forensic duplicate of a computer, or mirror image, can copy “[b]it for bit, sector for sector, all allocated and unallocated space including slack space, on a computer hard drive.”) (citing *Communications Center, Inc. v. Hewitt*, 2005 U.S. Dist. LEXIS 10891 (E.D. Cal. Apr. 5, 2005)).

## During Litigation

*Choose the right expert.* When choosing an expert, it is important to keep in mind that you are not simply choosing someone “who is really good with computers,” but someone who has very specialized expertise combined with excellent communication skills. Someone who understands technology but cannot explain it in simple terms to a judge and jury is useless. The skills needed by an expert are often “at odds” with the interests and skills that lead someone to choose a career in information technology. In short, people often choose working with computers because they do not like talking to people. Additionally, someone who is skilled in configuring, maintaining and troubleshooting a network is not likely to have been trained in any litigation-related technologies such as computer forensics.

The potential expert should be able to testify. Many data recovery companies only recover data. They do not testify and will not testify. By having an expert who is unable or unwilling to testify, you expose your client to potential chain-of-custody objections and the possibility that your “smoking gun” evidence will be inadmissible. Although an expert’s lack of previous testimony experience should not preclude you from selecting him or her, the expert should have the personality and the ability to think quickly to perform successfully during cross-examination.

When choosing an expert, look for someone who can demonstrate experience in this area well before December 1, 2006, the date the new *Federal Rules of Civil Procedure* were adopted to address electronically-stored information. When choosing a computer forensics expert, look for certifications such as EnCE (Encase Certified Examiner) and ACE (AccessData Certified Examiner)—vendor-specific certifications that demonstrate expertise with two of the most recognized computer forensics tools in the industry, EnCase by Guidance Software and Forensics Toolkit (FTK) by AccessData. Even more important would be a vendor-neutral certification like CCE (Certified Computer Examiner) or CFCE (Certified Forensic Computer Examiner, available to law enforcement only) that demonstrates



When choosing an expert, it is important to keep in mind that you are not simply choosing someone “who is really good with computers,” but someone who has very specialized expertise combined with excellent communication skills.

an understanding of the concepts underlying the practice of computer forensics, not just a specific tool.

Certifications should not be the only criteria in choosing an expert, as some experts may not hold any certifications. Perhaps the most important question to ask a potential expert is: “What computer forensics tools do you use?” If they simply respond with the name of one popular tool, look elsewhere. Computer forensics tools are pieces of software, and like any other piece of software, they have situations when they do not perform as expected. If your expert relies on only one tool, there is a chance that he or she only understands his or her tool of choice, not the underlying technologies disclosed during their analysis. The expert also might not be able to perform the assigned tasks should their only tool crash or malfunction.

Also, look for active involvement in trade associations such as the High Technology Crime Investigation Association (HTCIA). Initially restricted to those in law enforcement, this is one of the oldest and most established high tech crime-related organizations in the United States. Since dues are modest, some practitioners will join just to list membership on their CV. Look for those who have served on board positions and teach frequently at the annual International

Conference. Potential experts with a background in law enforcement can prove helpful as they will have an investigative mindset, but they may not have a good understanding of civil litigation. Describing a defendant as a “perp” may not be helpful to your case.

*Choose the expert early.* While this may seem at odds with saving costs, retaining an expert early in the case can help an attorney draft focused and specific discovery requests and is absolutely essential in creating search parameters and keyword search methodologies. Many lawyers have seen their discovery costs skyrocket when they crafted a list of keywords that generated thousands of false hits that resulted in untold costs to review the resultant documents. *See William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009); *Verigy US, Inc. v. Mayder*, No. 5:07-CV-04330-RMW, 2007 WL 3144577 (N.D. Cal. Oct. 24, 2007).

*Where’s the data?* Under the *Federal Rules of Civil Procedure*, the parties must produce in their initial disclosures either copies or provide the location of all documents, including electronic documents, they have in their possession and may use to support their claims or defenses. *See Fed. R. Civ. P. 26(a)(1)(A)(ii)*. The location of electronic documents is important to formulate an e-discovery plan. *See In re Seroquel*, 244 F.R.D. at 654. A party should know the capabilities of its computer system and how it can be searched and replicated without



altering data. Counsel should meet early with his or her client's information technology person(s) and discuss the operating systems and software. Then, the parties should discuss the form of production. *See In re Seroquel*, 244 F.R.D. at 655; *see Rowe Ent., Inc.*, 205 F.R.D. at 427 (suggesting production of e-mails electronically rather than in hard copy saves costs).

*Make your requests specific.* When seeking electronic discovery, know what your goals are. "[C]ourts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature." *See Balboa Threadworks*, 2006 U.S. Dist. LEXIS 29265, at \*8-9; *cf. Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D. N.Y. 2004) (suggesting that "when the opposing party proffers its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as 'hits' on the second, more restrictive search").



Agreeing on a search protocol can help prevent the disclosure of personal, privileged and non-relevant documents.

#### *Determine a relevant time frame.*

Although such a determination can involve "some degree of imprecision," the parties should agree on the temporal scope of discovery or the judge will. *See D'Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277, 280 (D.D.C. 2009) (limiting the computer forensic search to the date the complaint was filed and noting that sometimes "a judge must simply draw a reasonable line between the likely and the unlikely, the discoverable and the prohibited, the wheat and the chaff"). Identify key people rather than mining data from all employees. *See Rowe Ent., Inc.*, 205 F.R.D. at 427. Please note some courts have held the less specific a request, the more appropriate it is to shift the costs of production to that party. *See id.* at 429.

*Agree on a protocol.* Agreeing on a search protocol can help prevent the disclosure of personal, privileged and non-relevant documents. *See Hoover v. Florida Hydro, Inc.*, No. 07-1100 Section: "B" (4), 2008 U.S. Dist. LEXIS 87839 (E.D. La. October 1, 2008) (denying motion to quash subpoena for request of forensic computer inspection of personal computer

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upon agreement of search protocol); *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11<sup>th</sup> Cir. 2003) (appellate court reversed district court's order compelling direct access to producing party's databases after the district court failed to establish a protocol or search terms thereby permitting unwarranted, unfettered access).

To formulate a protocol, parties should “meet and confer” and should “rely heavily” on their computer experts. *See Balboa Threadworks v. Stucky*, No. 05-1157-JTM-DWB, 2006 U.S. Dist. 29265 (D. Kan. Mar. 24, 2006); *see also D’Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277 (D.D.C. 2009) (chastising parties who were unable to cooperate to establish a protocol so court established one for them). Most protocols involve variations of three steps: 1) imaging; 2) recovery; and 3) disclosure. *See Ameriwood Indust. Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo. Dec. 27, 2006); *Playboy Enter. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999).

- a. **Imaging.** Some courts order the party seeking e-discovery to select an expert trained in data recovery. *See Ameriwood*, 2006 U.S. Dist. LEXIS 93380, at \*19. The expert should be able to produce a mirror image of all the computers and portable or detachable hard drives. *See id.* Once the expert is selected, the producing party should be notified. *See id.* Importantly, the expert then should execute a confidentiality agreement agreed upon by the parties. *See id.* The work performed by the expert should be performed in a reasonably convenient time and place—such as after hours so as not to disrupt the producing party's business. *See id.*; *Simon Prop. Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000). Typically, only the expert and his or her employees are permitted to inspect the producing party's computer and equipment. *See Ameriwood*, 2006 U.S. Dist. LEXIS 93380, at \*17.

After the inspection, copying and imaging of each piece of computer equipment, the expert should provide the parties with a description of each piece of equipment produced and the expert's actions regarding each piece. The description should include details on the computer equipment such as the manufacturer, make, model, model number, and serial number. *See id.* at \*18.

- b. **Recovery.** After the expert creates copies and images of the hard drives, he or she should provide the recovered documents (including those which may have been “deleted”) to the producing party in “a reasonably convenient and searchable form.” *See id.* If possible, the expert should identify to the producing party the information indicating when any recovered “deleted” file was deleted and the available information about the deletion. *See id.* at \*19; *see*



After counsel for the producing party obtains the copies and images, counsel should review the records for privilege and responsiveness.

*Simon Prop. Group, L.P.*, 194 F.R.D. at 641. The expert should notify the requesting party the information has been produced. *See Ameriwood*, 2006 U.S. Dist. LEXIS 93380, at \*19.

- c. **Disclosure.** After counsel for the producing party obtains the copies and images, counsel should review the records for privilege and responsiveness. All responsive, non-privileged documents should be sent the requesting party. *See id.* at \*20. A privilege log that complies with Rule 26(b)(5)(A) of the *Federal Rules of Civil Procedure* should be included. *See id.*

If the requesting party raises a dispute about relevant documents or challenges to privilege and after the parties “meet and confer” as required by Rule 26, only then can the requesting party file a motion to compel. *See id.* at \*20-21. In the alternative, the requesting party's counsel may review the documents found in the search on an attorneys'-eyes-only basis. *See Rowe*

*Ent.*, 205 F.R.D. at 433. Counsel should then identify the relevant documents and provide them to the producing party's counsel. *See id.* The producing party's counsel can then object to any documents that are confidential and assert any appropriate privilege. *See id.* In *Rowe*, the court noted that any document reviewed by attorneys' eyes only did not waive privilege or confidentiality. *See id.*

- d. **Role.** The role of the computer forensic expert in the protocol can vary. The computer forensic expert either remains the expert of the requesting party or becomes an officer of the court. *See G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, 671 F. Supp. 2d 1203 (D. Nev. 2009). When the expert becomes an officer of the court, both parties agree on the independent expert. *See id.* The independent expert agrees to be bound by a protective order before beginning the search protocol. Any relevant documents discovered are first provided to the producing party for review and objection. *See id.* at 1220-21. The documents, along with the producing party's privilege log, are then submitted to the court for *in-camera* review and an order for production of relevant, non-privileged documents. *See id.* at 1221.

However, if the expert becomes an officer of the court, any discussion with the expert must have all parties involved and not be *ex parte*. *See id.* (holding expert's independence was compromised after requesting party engaged in multiple *ex parte* conversations and therefore requesting party forfeited opportunity to have independent forensic examination and all documents were returned to producing party).

**Keyword searches.** After the protocol has been established, counsel should meet with the client and the computer forensic expert to determine which words or “key words” will be used to search the imaged computers.

While it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review.

*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-257 (D. Md. 2008). In selecting key words to use in a search, attorneys should work closely with computer forensic experts. *See United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (noting the complexity of keyword searches as they involve the interplay of technology, linguistics and statistics and therefore computer experts, not lawyers and judges, should determine sufficiency and efficacy of search terms); *cf. Gross Constr. Assocs., Inc. v. American Mfrs. Mu. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009) (Mag. A.J. Peck) (opining lawyers should work closely with client in designing keyword search). At least one court noted with disapproval the requesting party's failure to provide information as to the key words used, the rationale for selection, the qualifications for the persons selecting the key words, and whether any analysis was performed to test the reliability of the keyword search. *See Creative Pipe, Inc.*, 250 F.R.D. at 260 (holding keyword searches require technical if not scientific knowledge); *see also In re Seroquel*, 244 F.R.D. at 662 (recognizing keyword searches as a method to identify documents but "[m]ust be a cooperative and informed process."). Keyword searches can be an effective way to avoid the production of privileged documents, but if a keyword search is selected it should be tested for quality assurance to show that it was properly implemented. *See Creative Pipe*, at 262.

On occasion, courts require parties to "meet and confer" to agree on supplemental search terms and phrases. *See Intel Int'l Group, Ltd. v. Neerghen*, No. 08 CV 3939, 2008 U.S. Dist. LEXIS 93694 (N.D. Ill. 2008) (third party was required to comply with subpoena requesting that it search its computers using agreed-upon search terms, while request for forensic mirror image was denied); *see In re Seroquel*, 244 F.R.D. at 662 (sanctioning party for determining key words in "secret" and failing to meet and confer with opposing counsel). Again, meeting and conferring with opposing counsel to resolve differences over key words will save time—both yours and the court's.

## After the Litigation

The expert should maintain a copy of the mirror images and all recovered data and documents until the agreed upon time after the litigation concludes. *See Ameriwood*, 2006 U.S. Dist. LEXIS 93380, at \*17-18. After the agreed upon time, the expert



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production and  
responses.

should destroy the records and provide written confirmation of the destruction. *See Simon Prop. Group*, 194 F.R.D. at 642.

The *Federal Rules of Civil Procedure* require, under both Rule 26 and Rule 37, the parties to confer in good faith to resolve discovery disputes. During litigation, e-discovery can be less costly if the parties work through their differences and agree on the terms of their e-discovery production and responses. Whether it involves the terms of the protocol, the scope of the expert's role, the key words to be used or the means of production, meeting and conferring saves everyone time and, ultimately, money. ▲▲▲



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*The state of incorporation or organization generally has the*

*exclusive right to regulate the “internal affairs” of the business.*





# The Internal Affairs Doctrine in Alabama

*By Jay M. Ezelle and C. Clayton Bromberg, Jr.*

**T**he Alabama Supreme Court's recent opinion in *Ex parte Bentley*<sup>1</sup> helps clarify the choice of law determination for internal disputes of foreign companies. Although Alabama has long recognized the principle that the law of the state of incorporation governs internal corporate relationships, Alabama courts have occasionally applied Alabama law to the internal affairs of a business. Therefore, counsel involved in a business dispute must be diligent to ensure that the court makes the correct choice of law determination. *Bentley*, as well as the decisions cited therein, provides strong precedent that internal business disputes should be decided based on the law of the state of organization.

## Internal Affairs Doctrine

A business is free to organize itself under the law of any state regardless of where it will be physically located or where it will transact business. The state of incorporation or organization generally has the exclusive right to regulate the "internal affairs" of the business. This exclusive right is known as the Internal Affairs Doctrine.<sup>2</sup> The Alabama Supreme Court has defined "internal affairs" as follows:

[W]here the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder,

director, president, or other officer, and is the act of the corporation, whether acting in stockholder's meeting, or through its agent, the board of directors, that then such action is the management of the internal affairs of the corporation...<sup>3</sup>

The purpose of the Internal Affairs Doctrine is to prevent inconsistent regulations of business in different states.<sup>4</sup> The doctrine protects the expectations of those involved with the internal affairs of the business by providing a level of predictability regarding the law that governs the business. Much like the terms of a contract that sets forth governing law, and therefore provides the parties a greater level of predictability as to how the contractual terms will be interpreted, applying the law of the organizational forum provides a greater level of certainty of the legal obligations of those who choose to be a part of a business organization.

Almost every state employs some version of the Internal Affairs Doctrine.<sup>5</sup> One of the leading cases on the Internal Affairs Doctrine is *VantagePoint Venture Partners 1996 v. Examen, Inc.*<sup>6</sup> In *VantagePoint*, the Delaware Supreme Court set forth three reasons for the application of the Internal Affairs Doctrine without exception. First, there is strong precedent from both the Delaware Supreme Court and the United States Supreme Court supporting the Internal Affairs Doctrine. The Delaware Supreme Court held that it "[i]s a long-standing choice of law principle





Nevertheless,  
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which the Alabama  
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the law of the state  
of incorporation.

which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation.”<sup>7</sup>

Second, the Internal Affairs Doctrine is supported by important public policy because it “prevent[s] corporations from being subjected to inconsistent legal standards...” and provides certainty and predictability.<sup>8</sup> The Delaware Supreme Court also relied heavily on the United States Supreme Court's discourse on the public policy underpinning the Internal Affairs Doctrine:

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.<sup>9</sup>

Third, the Delaware Supreme Court held in *VantagePoint* that application of the Internal Affairs Doctrine is mandatory under the Fourteenth Amendment Due Process Clause because “[d]irectors and officers of corporations ‘have a significant right...to know what law will be applied to their actions’ and ‘stockholders...have a right to know by what standards of accountability they may hold those managing the corporation’s business and affairs,’” and under the Commerce Clause because “[a] state ‘has no interest in regulating the internal affairs of foreign corporation.’”<sup>10</sup> In fact, the Delaware Supreme Court held that the only time that application of the Internal Affairs Doctrine is not required is the rare instance when “‘the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce.’”<sup>11</sup>

## Internal Affairs Doctrine in Alabama

The State of Alabama has adhered to the Internal Affairs Doctrine since 1921, when the Alabama Supreme Court first

held that the laws of Delaware regulated the relationship among shareholders in a corporation formed under the laws of the state.<sup>12</sup> In *Massey v. Disc Mfg., Inc.*, the Alabama Supreme Court stated that “the established rule of conflicts law is that the internal corporate relationship is governed by the law of the state of incorporation.”<sup>13</sup> Likewise, the Internal Affairs Doctrine is adopted by statute in Alabama. *Alabama Code* § 10-2B-15.05 precludes any attempt by the State “[t]o regulate the organization or the internal affairs of a foreign corporation authorized to transact business in [Alabama].”<sup>14</sup>

Nevertheless, there have also been lawsuits involving the internal affairs of a business organized in another state in which the Alabama Supreme Court chose to apply Alabama law—not the law of the state of incorporation. For example, in *Galbreath v. Scott*,<sup>15</sup> the Alabama Supreme Court applied Alabama law to a dispute between shareholders of a Florida corporation without any discussion of choice of law issues. The likely explanation is that the parties failed to seek the application of foreign law.<sup>16</sup>

In a recent decision, *Ex parte Bentley*,<sup>17</sup> the Alabama Supreme Court affirmed its recognition of the Internal Affairs Doctrine. The plaintiffs in the underlying action, Cobalt BSI Holding, LLC (“Cobalt”), a Delaware limited liability company based in Nevada, and Intergraph Corporation (“Intergraph”), a Delaware corporation based in Alabama, sued Bentley Systems Incorporated (“BSI”), a Delaware corporation based in Pennsylvania, and Gregory S. Bentley, Keith A. Bentley, Barry J. Bentley, Raymond B. Bentley, and Richard P. “Scott” Bentley (“the Bentley brothers”), residents of Pennsylvania, in Madison County Circuit Court, both directly and derivatively as shareholders of BSI.<sup>18</sup>

The action challenged an incentive-compensation plan, alleged that the Bentley brothers were operating BSI as their corporate alter ego and requested removal of the Bentley brothers from any managerial or directorial position at BSI.<sup>19</sup> The defendants filed a motion to dismiss, asserting that (1) Delaware was a more appropriate forum for the lawsuit under the doctrine of *forum non conveniens*, (2) an Alabama court may not interfere with the internal affairs of a Delaware corporation and (3) the court lacked personal jurisdiction over the

Bentley brothers.<sup>20</sup> The trial court denied the motion to dismiss, and defendants filed a petition for writ of mandamus arguing that the case should be dismissed for the same three reasons.<sup>21</sup> The Alabama Supreme Court denied the petition holding that (1) BSI was not entitled to dismissal on *forum non conveniens* grounds,<sup>22</sup> (2) the Internal Affairs Doctrine did not deprive the court of jurisdiction over defendants and (3) Alabama courts had personal jurisdiction<sup>23</sup> over the Bentley brothers.<sup>24</sup>

In deciding the issue of personal jurisdiction, the Alabama Supreme Court engaged in an in-depth discussion of the Internal Affairs Doctrine. The court defined the Internal Affairs Doctrine as “[t]he long-recognized principle that ‘[t]he courts of one state have no visitatorial power over the corporations of another state in matters of vital concern to internal policy and management....’”<sup>25</sup>

In *Bentley*, the Alabama Supreme Court quoted extensively from the United States Bankruptcy Court for the Northern District of Alabama’s opinion in *re Chalk Line Manufacturing, Inc.*<sup>26</sup> and described Judge James S. Sledge’s opinion as “[a] scholarly discussion of the state of Alabama law concerning the internal-affairs doctrine in an analogous factual context.”<sup>27</sup> In *Chalk Line*, the Bankruptcy Court was charged with deciding whether a shareholder or group of shareholders in a Delaware corporation could pursue an action in an Alabama court against other shareholders for breach of fiduciary duty, breach of duty to disclose and minority shareholder oppression.<sup>28</sup> In determining whether the shareholders could pursue the action in Alabama, the Bankruptcy Court had to decide (1) which state’s law applied and (2) whether the state’s law that did apply recognized the causes of action asserted in the complaint.<sup>29</sup> The Bankruptcy Court ultimately upheld Alabama’s long standing law that the Internal Affairs Doctrine required the application of Delaware law with regards to the claims.<sup>30</sup>

As the Delaware Supreme Court did in *VantagePoint*, the Bankruptcy Court set forth three reasons why it should apply the corporate law of the state of incorporation in *Chalk Line*. First, it cited Alabama case law affirming the long-standing choice of law principle that “[t]he law of the state of incorporation governs the internal corporate relation-

ship.”<sup>31</sup> In fact, the Bankruptcy Court looked to Delaware law regarding the scope of the Internal Affairs Doctrine, citing the case of *McDermott Inc. v. Lewis*, in which the Delaware Supreme Court held that the Internal Affairs Doctrine governed choice-of-law determinations involving “[t]hose activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders.”<sup>32</sup> Second, the Bankruptcy Court also recognized important public policy concerns in determining which state’s law should govern. Specifically, it cited the following analysis of the policy behind the Internal Affairs Doctrine:

[A]pplying local internal affairs law to a foreign corporation just because it is amenable to process in the forum or because it has some local shareholders or some other local contact is apt to produce inequalities, intolerable confusion, and uncertainty, and intrude into the domain of other states that have a superior claim to regulate the same subject matter.<sup>33</sup>

Third, the Bankruptcy Court also held in *Chalk Line* that application of the Internal Affairs Doctrine is required under the Due Process Clause, the Commerce Clause and Full Faith and Credit Clause of the U.S. Constitution. Adopting the Delaware Supreme Court’s analysis in *McDermott*, the Bankruptcy Court held:

Under the commerce clause *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), determined that a state may regulate interstate commerce indirectly, but emphasized that the burden placed upon interstate commerce may not be excessive in relation to the local interests served by the regulation. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Supreme Court ruled that under the commerce clause, a state “has no interest in regulating the internal affairs of foreign corporations.” *Id.* at 645-646. If that is so, then a court or state which attempts to displace the internal affairs doctrine carries a heavy burden to justify its actions.<sup>34</sup>

The Bankruptcy Court also noted that the United States Supreme Court’s recent decision in *CTS Corp. v. Dynamics Corp.*

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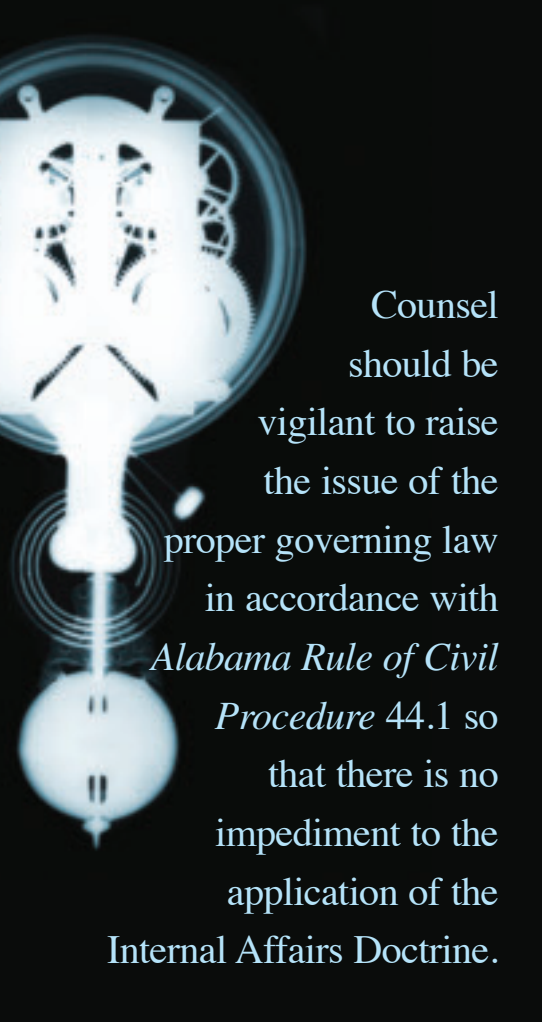
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Counsel should be vigilant to raise the issue of the proper governing law in accordance with *Alabama Rule of Civil Procedure* 44.1 so that there is no impediment to the application of the Internal Affairs Doctrine.

of America, 481 U.S. 69 (1987) offers additional support:

No principal [sic] of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders ... This beneficial free market system depends at its core upon the fact that a corporation - except in the rarest situations - is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the state of its incorporation.<sup>35</sup>

The Bankruptcy Court's scholarly opinion in *Chalk Line*, much like *Vantage Point*, provides three reasons that the Internal Affairs Doctrine should be uniformly enforced—state law, public policy and constitutional concerns. Although the Alabama Supreme Court in *Bentley* was only faced with the issue of whether an Alabama court had personal jurisdiction and, thus, found it unnecessary to adopt the entire rationale of *Chalk Line*, it did note its approval of the *Chalk Line* decision.<sup>36</sup>


Thus, the Alabama Supreme Court, through its approval of the Bankruptcy Court's opinion in *Chalk Line*, reaffirmed the vitality of the Internal Affairs Doctrine in Alabama and provided a roadmap to parties involved in such business disputes.

## Conclusion


Alabama courts have strictly adhered to the Internal Affairs Doctrine when determining issues related to corporate governance. *Bentley* and *Chalk Line* provide a roadmap for the application of the Internal Affairs Doctrine in any case involving claims relating to the internal affairs of a business. Counsel should be vigilant to raise the issue of the proper governing law in accordance with *Alabama Rule of Civil Procedure* 44.1 so that there is no impediment to the application of the Internal Affairs Doctrine. ▲▲▲

## Endnotes


1. No. 1081083, 2010 WL 2034943 (Ala. May 21, 2010).
2. Matt Stevens, *Internal Affairs Doctrine: California v. Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. Rev. 1047 (2007).



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3. *Ellis v. Mutual Life Ins. Co.*, 187 So. 434, 443 (Ala. 1939) (citations omitted).
4. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (holding that application of the law of the state of incorporation "[a]chieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation." (citing Restatement (Second) of Conflict of Laws § 302, comments a and e (1971))).
5. *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations For Its Continued Primacy*, 115 Harv. L. Rev. 1480 (2002). California is the notable exception as it enacted a statute that regulates the internal affairs of foreign corporations if: (1) more than one-half of its property assets, sales revenue and payroll expenses are located in California and (2) more than one-half of its voting securities are held by people with California addresses of record. Cal. Corp. Code § 2115(a).
6. 871 A.2d 1108, 1113 (Del. 2005) (holding that "it is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.").
7. *Id.* at 1112 (citing *McDermott, Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987)); see also *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).
8. *Id.* at 1112-1113.
9. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987).
10. 871 A.2d at 1113 (quoting *McDermott*, 531 A.2d at 216-217) (quoting in turn *Edgar*, 457 U.S. at 645-646).
11. *Id.* (quoting *McDermott*, 531 A.2d at 216-217 (quoting in turn *CTS*, 481 U.S. at 90)).
12. See *Boyette v. Preston Motors Corp.*, 89 So. 746 (Ala. 1921).
13. 601 So. 2d 449, 454 (Ala. 1992) (citations and internal quotation marks omitted).
14. Ala. Code § 10-2B-15.05. See also Ala. Code § 10-8A-1009 ("[i]t is the policy of this state that the internal affairs of foreign registered limited liability partnerships, including the liability of partners for debts,

obligations and liabilities of, or chargeable to, the partnership or another partner or partners, shall be subject to and governed by the laws of the jurisdiction in which such foreign registered limited liability partnership was formed."); Ala. Code § 10-12-46 ("[t]he laws of the state or other jurisdictions under which a foreign limited liability company is organized govern its organization, its internal affairs, and the liability of its members.").

15. 433 So. 2d 454 (Ala. 1983).
16. The controlling procedural rule relating to timing of raising a choice-of-law issue is *Alabama Rule of Civil Procedure* 44.1, which provides:  
  
A party who intends to raise an issue concerning the law of another state or of any territory or dependency of the United States or of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining such law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the *Alabama Rules of Evidence*. The court's determination shall be treated as a ruling on a question of law.  
  
Ala. R. Civ. P. 44.1.
17. 2010 WL 2034943 (Ala. May 21, 2010).
18. *Id.* at \*1.
19. *Id.*
20. *Id.* at \*3.
21. *Id.*
22. The court held that BSI was not entitled to dismissal of the action on *forum non conveniens* grounds when BSI maintained an office in Alabama that employed over 120 people, more than 130 shareholders lived in Alabama, BSI held board meetings and distributed financial statements in Alabama, and there was no evidence that any of the acts that gave rise to the dispute occurred in another state. See *id.* at \*4-5.
23. The court held that it had personal jurisdiction over the Bentley brothers when they had "[s]ent many thousands of written and electronic communications to Alabama in furtherance of their interests in BSI; [had] made numerous telephone calls to and participated in

telephone conferences in this State; and [ . . . ] ha[d] traveled to this State on many occasions." See *id.* at \*11. Furthermore, the court looked to the fact that the Bentley brothers had been involved in prior litigation concerning BSI in Alabama and that BSI's second largest office was located in Alabama. See *id.*

24. See *id.* at \*4-12.
25. *Id.* at \*6 (citing *Ellis v. Mutual Life Ins. Co. of New York*, 187 So. 434, 444 (Ala. 1939) (quoting *Hoglan v. Moore*, 122 So. 824, 828 (Ala. 1929))).
26. No. 93-42773(11), 1994 WL 394978 (Bkrtcy. N.D. Ala. 1994).
27. 2010 WL 2034943, at \*6.
28. 1994 WL 394978, at \* 2.
29. *Id.*
30. *Id.* at \*7.
31. *Id.* at \*2 (citations omitted).
32. *Id.* (citing 531 A.2d 206, 214 (Del. 1987)).
33. *Id.* at \*7 (citing P. John Koziris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1, 98 (as cited in *McDermott*, 531 A.2d at 216)).
34. *Id.* at \*6.
35. *Id.* at \*6 (quoting 481 U.S. at 88).
36. 2010 WL 2034943, at \*10.



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## BP Filing Deadline

The vast majority of lawsuits filed against BP, and the other entities involved in the Deepwater Horizon incident and resulting oil spill, have been consolidated in a proceeding in federal court in Louisiana. If persons and entities having claims against these parties have not asserted their claims by April 20, 2011, some or all of their claims may be forever barred. Filing a claim with the Gulf Coast Claims Facility (Feinberg's process) does not constitute filing a claim in this court action.

The U.S. District Court, Eastern District of Louisiana, has allowed the joinder in the action (the filing of a claim) via a short form.

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J. ANTHONY MCLAIN



# Representation of an Estate and Client Identity

## QUESTION #1:

When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?

## QUESTION #2:

What is a lawyer's ethical responsibility when he discovers that the personal representative has misappropriated estate funds or property?

## ANSWER #1:

Generally, the lawyer represents the individual who hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the personal representative,<sup>1</sup> the lawyer represents the personal representative individually, unless the personal representative and lawyer agree otherwise. The lawyer must be careful not to give the impression, either by affirmative action or omission, that he also represents the beneficiaries of the estate. As a result, if the client is the personal representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the personal representative in order to avoid violating Rule 4.3.<sup>2</sup> A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.



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### ANSWER #2:

When a lawyer has actual knowledge that the personal representative has misappropriated estate funds, the lawyer's first duty is to remonstrate with the personal representative in an effort to convince the personal representative to either replace the misappropriated funds or to inform the court of the personal representative's misappropriation. If the personal representative refuses to do so, the lawyer should withdraw from the matter and, upon withdrawal, ask the court to order an accounting of the estate.

### DISCUSSION:

The Office of General Counsel frequently receives phone calls from lawyers requesting ethics opinions concerning the representation of an estate. In explaining the ethical dilemma the lawyer is facing, the lawyer often refers to himself as "representing the estate." The lawyer then describes a situation in which the interests of the estate or the fiduciary for the estate or a beneficiary may be in conflict. Often, whether a conflict of interest exists is entirely dependent on who the lawyer actually represents in regard to the estate. Additionally, the

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Alabama State Bar sometimes receives complaints filed against the lawyer by the beneficiaries of the estate or the fiduciary of the estate. In those cases, identifying the true client often will determine whether the lawyer has breached any ethical duties. As a result, defining the lawyer's actual client in an estate or probate matter is critical in determining whether a conflict of interest may exist and what duties a lawyer owes to the fiduciary and beneficiaries of the estate.

The Disciplinary Commission has never directly addressed the issue of who the lawyer represents when assisting in the administration or probate of an estate. At best, the Disciplinary Commission indirectly addressed the issue in RO 1989-105, in which the Commission was asked to provide a formal opinion on a lawyer's ethical duties when an executrix absconded with the assets of the estate. In that situation, the lawyer prepared a will for a client who subsequently passed away. Upon the client's death, the lawyer was asked by the deceased client's widow to probate her husband's will which named her as executrix. The testator was survived by his widow, an adult son and a minor son. After the lawyer assisted the executrix in collecting the assets of the estate, including cash, the executrix moved to Tennessee, taking with her the cash assets of the estate. Thereafter, the executrix refused to communicate any further with the lawyer. The lawyer requested an opinion as to whether he could disclose the executrix's actions to the other beneficiaries of the estate or to the court.

Relying on the former *Code of Professional Responsibility*, the Disciplinary Commission opined that the lawyer should first call upon the client to rectify the fraud and, if the client refused, then the lawyer should withdraw from the matter. The Disciplinary Commission went on to state that under the disciplinary rules, the lawyer had an obligation not to disclose the confidences and secrets of the client. Therefore, the lawyer could not disclose the executrix's apparent fraud to the beneficiaries or the court. While not directly addressing the issue of client identity, it is clear that the Disciplinary Commission considered the executrix to be the lawyer's sole client.

The Disciplinary Commission is also aware that the Office of General Counsel has given recent informal opinions concerning this issue. In their informal opinions, the Office of General Counsel has opined that the client is the estate. The lawyer represents the estate by acting for and through the fiduciary of the estate for the ultimate benefit of the beneficiaries of the estate. Because the lawyer is retained by the personal representative to represent the estate and because the personal representative is legally required to serve the beneficiaries, the lawyer also has an obligation to the beneficiaries. This relationship has been characterized as one where the fiduciary is not the only client, but merely the "primary client," while the beneficiary is the "derivative client." In some situations where there is a sole beneficiary of the estate, that beneficiary (ostensibly a non-client) may be entitled to the loyalty of the lawyer to much the same extent as the fiduciary.

In light of the lack of clarity as to the identity of the true client and the lawyer's resulting professional responsibilities, the Disciplinary Commission has determined that it is necessary to issue a formal opinion on the matter to provide greater guidance to lawyers practicing in the area of estates and trusts.

There are three theories regarding the identity of the client when a lawyer handles an estate. The American Bar Association, in Formal Opinion 94-380, recognized that the majority view is that the lawyer represents only the personal representative or fiduciary of the estate and not the beneficiaries of the estate, either jointly or individually. In reaching a similar conclusion, a number of other state bars have relied, in part, on state law that indicated that an estate is not a separate legal entity. In Ethics Opinion No. 91-2, the Alaska State Bar noted that an estate is "for probate purposes a collection of assets rather than an organization, and is not an entity involved in the probate proceedings."<sup>3</sup> In Formal Opinion 1989-4, the Delaware State Bar also concluded that under state law, the term "estate" only referred to the actual property of the decedent and did not have an independent legal existence. As such, the Delaware State Bar concluded that the estate could not be a "client" under their rules of professional conduct.

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A number of state courts have also held that the lawyer's sole client is the fiduciary of the estate. However, most of these decisions arise in the context of malpractice litigation and not as a result of an ethical dispute. For example, in *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994), the Supreme Court of Massachusetts held that the lawyers for two trustees of a testamentary trust owed no duties of care to the beneficiaries of the trust. In *Spinner*, beneficiaries of a testamentary trust sued the lawyers for the trustees of the trust after the trustees allowed the value of the trust to decline. The court determined that the lawyers' only clients were the trustees and, therefore, the lawyers were insulated from any liability as a result of the trustees' actions.<sup>4</sup> In *Goldberg v. Frye*, the California Court of Appeals stated as follows:

While the fiduciary, in the performance of this service, may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney, by definition, represents only one party, the fiduciary. It would be very dangerous to conclude that the attorney, through performances of service to the administrator, and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.

217 Cal. App. P3d 1258, 1268 (1990). Likewise, other state courts have also determined that a lawyer's only client is the fiduciary of the estate. *See, Huie v. DeShazo*, 922 S.W. 2d 920 (Tex. 1996); *The Estate of Fogelman v. Fegen*, 3 P3d 1172 (Ariz. 2000); *In re Estate of Wagner*, 386 N.W.2d 448, 450 (Neb. 1986).

The second approach to client identity in estate representation holds that the client is the estate itself. This view is identical to the entity theory of representation most commonly employed under Rule 1.13, *Ala. R. Prof. C.*, when representing businesses and corporations. Under this approach, the lawyer represents the "estate" as a freestanding legal entity. The lawyer does not have

a lawyer-client relationship with either the fiduciary or beneficiaries of the estate.<sup>5</sup> One argument in favor of this position is that estates and trusts are treated as separate legal entities for taxation purposes and, therefore, an estate or trust is a recognizable legal entity.<sup>6</sup> Under this approach, the fiduciary of the estate is merely an agent of the entity.<sup>7</sup>

Other courts have adopted the entity theory of representation for other reasons. In *Steinway v. Bolden*, the Michigan Court of Appeals, in adopting the entity theory or representation, noted that the lawyer is paid by the estate and not the personal representative:

We conclude that the clear intent of the Revised Probate Code and of the court rules is that, although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative. The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion.

185 Mich. App. 234, 238 (Mich. Ct. App. 1990).<sup>8</sup> The Illinois Court of Appeals has also adopted the entity theory of representation. *Grimes v. Saikley*, 904 N.E.2d 184 (Ill. Ct. App. 2009).

The third view holds that the lawyer jointly represents the fiduciary and beneficiaries of the estate. This view of estate representation has been most prominently advocated by Geoffrey C. Hazard, Jr. and W. William Hodes in *The Law of Lawyering*, § 57.3, 4. 3<sup>rd</sup> Edition (2005), in which the authors argue the following:

Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees, partners, vis-à-vis other partners, spouses, corporate directors and officers vis-à-vis their corporations, and many others, including parents. In the situations posited, because the lawyer is hired to



represent the fiduciary and because the fiduciary is legally required to serve the beneficiary, the lawyer must be deemed employed to further that service as well.

It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the “primary” client. [Footnote omitted] In this view, the beneficiary is the “derivative” client. The beneficiary, strictly speaking a non-client, may be entitled to the loyalty of the lawyer almost as if he were a client. [Footnote omitted]

A number of consequences follow from adopting the derivative client approach to representation of a fiduciary. First, the lawyer’s obligation to avoid participating in a client’s fraud . . . is engaged by a more sensitive trigger. The fiduciary is subject to a high standard of fair dealing as regards the beneficiary, but may face temptation to engage in improper overreaching. The lawyer therefore faces a correspondingly greater risk of being implicated in the fiduciary’s misconduct, and also has a greater duty to ensure that the purpose of the representation is not subverted.

Hazard & Hodes, *The Law of Lawyering*, § 2.7, 2-11 3<sup>rd</sup> Edition (2005). The derivative client approach as described above is most closely akin to that of where an insurance company hires a lawyer to represent one of its insureds. In *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988), the Alabama Supreme Court described that relationship as follows: “When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each.” *Id.* at 198. However, where a conflict arises between the interests of the insured and insurer, “the primary obligation is to the insured.” *Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.*, 17 So.3d 200, 217 (Ala. 2009).

The *Alabama Rules of Professional Conduct* do not determine whether an attorney-client relationship has been formed. Likewise, they do not identify a lawyer’s client in an estate administration. Unlike the Comment to

Florida Rule of Professional Conduct 4-1.7, which specifies that the personal representative is the client, the Comment to rules 1.2 and 1.7, *Ala. R. Prof. C.*, does not provide a clear answer as to the identity of the client in estate representation. Rather, the Comment to rules 1.2 and 1.7, *Ala. R. Prof. C.*, states as follows:

#### **Rule 1.2. Scope of Representation**

##### **Comment**

\* \* \*

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

#### **Rule 1.7. Conflicts of Interest**

##### **Comment**

\* \* \*

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

Many other state bars that have addressed this issue have often relied on case law or statutes to reach a definitive resolution. Unfortunately, the appellate courts in Alabama appear to have never directly addressed the issue. However, the courts in Alabama have issued a “few instructive cases.”<sup>9</sup> In *Wilkinson v. McCall*, 23 So.2d 577, 580 (Ala. 1945), the Supreme Court of Alabama noted that “[i]t is true usually that the executor employs counsel in his personal, not his representative capacity . . .” In *Smelser v. Trent*, 698 So.2d 873 (Ala. 1976), the court stated “[a] personal representative . . . has the power to hire attorneys to assist him in the administration of the estate.” *Id.* at 1096.

The supreme court’s holding is supported by various statutes in the *Alabama Code* of 1975. For instance,

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§ 43-2-682, *Ala. Code* 1975, which allows a fiduciary or lawyer to be compensated from the assets of the estate, states, in pertinent part, as follows:

Upon any annual, partial or final settlement made by any administrator or executor, the court having jurisdiction thereof may fix, determine and allow an attorney's fee or compensation... to be paid from such estate to *attorneys representing such administrator or executor...*

(emphasis added) Additionally, § 43-2-843(17), *Ala. Code* 1975, allows a personal representative to "[e]mploy necessary persons, including... attorneys... to advise or assist the personal representative in the performance of administrative duties..." Along with *McCall*, these statutes indicate that a lawyer is hired by the fiduciary to represent the fiduciary in his individual capacity. More recently, the Supreme Court of Alabama has stated that "a personal representative... has the power to hire attorneys to assist him in the administration of the estate." *Smelser v. Trent*, 698 So.2d 1094, 1096 (Ala. 1997).

In *Mills v. Neville*, 443 So.2d 935, 938 (Ala. 1983), the Supreme Court of Alabama indicated that the estate was the client. In *Mills*, the lawyer who drafted the testator's will later served as executor of the decedent's estate. While acting as executor, the lawyer hired himself to represent the estate and to pursue a wrongful-death action. In upholding the lawyer's actions, the court stated the following:

However much the beneficiaries are interested parties in the outcome of the administration of the estate, and therefore in the ensuing litigation, it is the estate which is the client here, and it is the court which supervises and approves the allowances to the attorney for the estate... For these reasons, we are convinced that the respondent's failure to consult with the minor beneficiaries here, if he failed to do so, did not result in a violation of [the applicable rule of professional conduct].

While recognizing that the estate was the client in a wrongful death lawsuit, the court also indicated that the lawyer had no ethical duty to consult with the beneficiaries of the estate.

Finally, in *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002), the beneficiaries of an estate sued a lawyer for failing to destroy the will of the testator. In *Benton*, the lawyer drafted a will for a client. Sometime later, the client delivered the will to the lawyer and asked him to destroy the will for the purpose of revoking it. The lawyer failed to follow the client's wishes and the client subsequently passed away. As a result, the will was later submitted for probate. The heirs and beneficiaries of the client sued the lawyer, claiming that had he followed the client's instructions, the beneficiaries would have received a larger portion of the estate. In rejecting the beneficiaries' claims, the Supreme Court of Alabama declined to change the law in Alabama "that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty, either by contract or gratuitously." The Disciplinary Commission finds the holding in *Robinson* instructive irrespective of the fact that it concerns a malpractice action regarding a lawyer's liability to beneficiaries in estate planning and the preparation of wills.

### Conclusion Regarding Client Identity

After considering the above-discussed cases, state bar opinions and other state cases, it is the opinion of the Disciplinary Commission that ordinarily, when a lawyer is hired by a personal representative to assist in the administration of an estate, the lawyer's sole client is the personal representative of the estate.<sup>10</sup> As a result, the lawyer would owe the personal representative a duty of loyalty and confidentiality just as he would any other client pursuant to Rule 1.6, *Ala. R. Prof. C.* The fact that the personal representative has obligations to the beneficiaries of the estate does not in itself either expand or limit the lawyer's obligations to the personal representative under the rules, nor would it impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

Upon commencement of representation, the lawyer should clarify with the personal representative the role of the lawyer, the scope of representation and the personal representative's responsibilities toward the lawyer, the court, the beneficiaries and other interested third parties.

## Lawyers' Duties to Third Parties

While the client ordinarily would be the personal representative, the lawyer must be careful not to give the impression, either by affirmative action or omission, that he also represents the beneficiaries of the estate. If the lawyer were to do so, it could be found that he has undertaken to represent both the personal representative and the beneficiaries of the estate which could result in conflicting loyalties and conflicts of interests. As a result, a lawyer must comply with certain duties upon undertaking representation of a personal representative or risk violating certain rules of professional conduct.

First and foremost, upon being hired by a personal representative to assist in the administration of an estate or trust, the lawyer should explain to the beneficiaries or other interested parties that the lawyer's sole client in the matter is the Personal Representative, individually. A lawyer who fails to do so could be in violation of Rule 4.3, *Ala. R. Prof. C.*, which states as follows:

### **Rule 4.3. Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In doing so, the lawyer should explain that he does not represent the beneficiaries' individual interests in the matter. One suggestion has been that the lawyer consider drafting an engagement letter that clearly defines the client and the scope of the lawyer's representation. This letter then should be sent to all interested persons.

Likewise, if a lawyer was to undertake to represent both a personal representative and a beneficiary or two co-personal representatives in an estate matter, and the parties' interests later diverged, the lawyer would be required to withdraw from the representation of each. Rule 1.7, *Ala. R. Prof. C.* By clearly identifying the client and advising the parties of the lawyer's role in the matter, the lawyer will be in a better position to identify and avoid possible conflicts of interests that may arise during the course of the representation.

## Duties When the Personal Representative Misappropriates Estate Assets

First, this opinion does not impose an affirmative duty upon the lawyer to monitor or double-check all of the personal representative's actions in administering

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the estate or to investigate whether the personal representative has wasted or misappropriated estate assets. Rather, this opinion only imposes duties upon the lawyer once the lawyer has actual knowledge that the personal representative has engaged in misconduct with estate assets.

Determining the lawyer's ethical responsibilities when he discovers that the personal representative of the estate has misappropriated estate funds is a difficult question as it calls for a balance between the lawyer's obligations to his client, the personal representative, and the lawyer's obligations as an officer of the court. Rule 1.6, provides as follows:

### 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Pursuant to Rule 1.6, a lawyer would not be allowed to disclose the misconduct of the personal representative to the court, the beneficiaries or any other interested third-party without the permission of the personal

representative. However, Rule 3.3, places certain obligations on the lawyer to affirmatively disclose misconduct by a client:

### 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.

Pursuant to Rule 3.3(a)(2), *Ala. R. Prof. C.*, the lawyer has a duty to disclose to the court any facts necessary to avoid assisting a client who is committing an ongoing, continuing criminal or fraudulent act. As the Comment to Rule 3.3, *Ala. R. Prof. C.*, states, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." As such, the dilemma the lawyer faces is whether the personal representative's misappropriation of estate assets is ongoing. If so, the lawyer would have an obligation to disclose such conduct to the court.

However, more often than not, the lawyer only learns of the misappropriation of estate assets after the fact. In such situations where the misconduct is not ongoing, the lawyer may not disclose the prior misconduct to the court pursuant to Rule 1.6. As a result, the lawyer's only recourse is to seek to persuade the personal representative to either replace any misappropriated funds or to voluntarily disclose to the court the personal representative's misconduct. If the personal representative refuses to do either, then the lawyer should withdraw from the representation and, upon withdrawal, request that the court order an accounting of the estate. By doing so, the lawyer avoids assisting the personal representative in any criminal or fraudulent acts. Further, by requesting that the court order an accounting upon the lawyer's withdrawal, the lawyer helps to shield himself from any accusations or allegations that he assisted or allowed the personal representative to engage in the misconduct. ▲▼▲

## Endnotes

1. This opinion is limited to questions regarding the representation of a personal representative in a probate administration, except as otherwise stated. The Commission expresses no opinion herein on the duties owed by a lawyer representing the trustee of an express trust, a guardian, conservator or attorney-in-fact.
2. Unless otherwise indicated, all references to a "Rule" herein are to the *Alabama Rules of Professional Conduct* as they exist at the time this opinion is adopted.
3. The Alaska State Bar, however, did note that for purposes of taxation, an estate is treated as an entity.
4. The only exception is where the lawyer conspired with, approved of or actively engaged in fraud committed by the trustees.
5. Virginia L. Blackwell, *Conflicts of Interest When An Attorney Represents An Estate*, 27 J. Legal Prof. 141 (2002-2003).
6. However, a number of state courts have specifically held that an estate is not a separate legal entity.
7. Jeffery N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 Fordham L. Rev. 1319 (1994).
8. The Michigan Court of Appeals recently affirmed the entity theory of representation in *In re Estate of Graves*, 102709 MICA (Mich. Ct. App. 2009).
9. Peter M. Wright, *Ethics Issues Facing the Fiduciary Attorney*, Sirote & Permutt PC, Birmingham, Alabama
10. Obviously, if the lawyer is hired by a beneficiary or other interested party, the beneficiary or interested party would be the lawyer's client.



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## The New Legislature

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In the house of representatives, 36 of the 105 legislators were not there in 2006 and 31 of them are first-time legislators. In the senate, 19 of the 35 were not there in 2006 and 11 of them are first-time legislators.

## The New Senate

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*S-3*  
**Arthur Orr**  
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**Roger Bedford**  
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Alabaster



*S-18*  
**Rodger Smitherman**  
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In the senate, the Judiciary Committee is chaired by lawyers **Cam Ward** and **Ben Brooks**; the Constitution and Elections Committee is chaired by **Bryan Taylor**; the Finance and Taxation (General Fund) Committee is chaired by **Arthur Orr**; the Fiscal Responsibility and Accountability Committee is chaired by **Phil Williams**; the Agriculture, Conservation and Forestry Committee is chaired by **Tom Whatley**; and the Energy and Natural Resources Committee is chaired by senators **Cam Ward** and **Ben Brooks**.



**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).*

## New House of Representatives

Members of the house who are lawyers, listed by their house districts, are:



*H-1  
Greg Burdine  
Florence*



*H-3  
Marcel Black  
Tuscumbia*



*H-16  
Daniel Boman  
Sulligent*



*H-27  
Wes Long  
Guntersville*



*H-46  
Paul DeMarco  
Birmingham*



*H-53  
Demetrius  
Newton  
Birmingham*



*H-60  
Juandalynn  
Givan  
Birmingham*



*H-63  
Bill Poole  
Northport*



*H-70  
Chris England  
Tuscaloosa*



*H-73  
Joe Hubbard  
Montgomery*



*H-88  
Paul Beckman  
Prattville*



*H-92  
Mike Jones  
Andalusia*

Of the lawyers in the house, only **Paul DeMarco** is a committee chair. He chairs the Judiciary Committee.

The number of practicing lawyers in the legislature has increased slightly with 12 senators and 12 house members. These 24 lawyers represent the University of Alabama School of Law (six), Cumberland School of Law (six), Jones School of Law (three), Birmingham School of Law (two), Miles School of Law (two), and out-of-state law schools (five).

## The New Leadership

The senate is presided over by Lt. Governor Kay Ivey of Montgomery and also led by President Pro Tem Del Marsh of Anniston. They have organized the senate into 20 standing committees (previously there had been 23).

The house of representatives is led by Speaker Mike Hubbard of Auburn and Speaker Pro Tem Victor Gaston of Mobile. They have organized it into 23 standing committees (previously there had been 17).

Of these 43 committees, only one committee chair has previously served in that capacity and that person switched from Democrat to Republican after the November 2010 election.

With this great change in leadership many of the new leaders and first-time legislators are not familiar with the Institute's work. When the legislature created the Alabama Law Institute over 40 years ago, to assure the legislature's code revision agency would be free of political pressure in their studies, the Institute was placed in a state-sponsored law school. This not only allows the Institute to prepare legislation free of Montgomery political pressure, but also to conserve costs by giving the Institute access to law professors who are experts in the field under review, to law students for research assistance and to the state's largest law library. The Institute is composed of lawyers from around the state who not only review each major draft of proposed legislation but are involved in the drafting process. These lawyers serve as volunteers, assuring that all aspects of the subject are considered.

## Legislative Orientation

The entire group of legislators met for the first time December 6-8, 2010 in Tuscaloosa for an orientation conducted by the Legislative Council and the Alabama Law Institute. They were given background information on the state's budget and economic outlook for the foreseeable future. In addition, they were addressed by

the new Speaker of the House Mike Hubbard, new President Pro Tem of the Senate Del Marsh, Lt. Governor-Elect Kay Ivey, Chief Justice Sue Bell Cobb, and Governor-Elect Robert Bentley.

They then convened in Montgomery where Governor Bob Riley had called them into Special Session for ethics reform.

## Special Session

The six “ethics” bills that were introduced and passed in one week are:

**SB 1 (Act 2010-763):** Gives the State Ethics Commission subpoena power

**SB 2 (Act 2010-761):** Prohibits payroll deductions for public employee groups’ membership dues, primarily directed toward AEA

**SB 3 (Act 2010-760):** Bans legislators from holding other state jobs. This would include legislators who are teachers working for Alabama cities, counties and the state.

**HB 9 (Act 2010-765):** Bans the transfer of campaign money between political action committees, often referred to as PAC-to-PAC transfers


**SB 10 (Act 2010-759):** Prohibits the pass-through appropriations from one agency to another

**HB11 (Act 2010-762):** Requires ethics training for elected officials and their employees in the executive, legislative and judicial branches and also requires anyone who lobbies for any of these branches to attend annual ethics training conducted by the State Ethics Commission

## Regular Session 2011

The Alabama Legislature convened March 1, 2011 for the Regular Session that must conclude by June 13, 2011.

Major issues facing the legislature are budgets, education, redistricting, pensions, and healthcare costs. ▲▼▲



# The PHV Application Process Is Paperless (and Painless!)

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

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

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

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

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

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

Contact IT Support at 1-866-954-9411, option 1 and then option 4, or [applicationsupport@alacourt.gov](mailto:applicationsupport@alacourt.gov) with questions or comments.



# PARALEGAL DAY IN ALABAMA

## May 4th is the day to say "thank you" to these team players

Did you know that in 1996 the State of Alabama designated the Wednesday of Law Week as Legal Assistant and Paralegal day?

Paralegals are trained legal professionals who benefit their employing law firms, clients, corporations and organizations every day through the delivery of cost-effective, high-quality legal work.

On April 23, 1996, the Alabama senate permanently designated *Legal Assistant and Paralegal Day* as the Wednesday of Law Week. A resolution was signed by McDowell Lee, then-secretary of the senate.

We hope you will take the opportunity this year on May 4th to thank the paralegals in your firms and organizations. They are proud to be working with you on your legal team as professionals for the benefit of Alabamians across the state.

## Senate of Alabama



MONTGOMERY, ALABAMA

OFFICE OF THE SECRETARY

## Resolution

PERMANENTLY DESIGNATING EACH WEDNESDAY OF LAW WEEK  
AS LEGAL ASSISTANT AND PARALEGAL DAY IN ALABAMA

By Senator Windom

WHEREAS, the legal assistant profession has evolved and developed in legal communities across Alabama and the United States over the last 20 years; and

WHEREAS, legal assistants, also known as paralegals, comprise a group of men and women who, with the highest professional responsibility and ethics, strive to enhance the public service provided by Alabama's lawyers, judges, administrative agencies, and a multitude of other community-minded organizations and individuals; and

WHEREAS, legal assistants maintain and support the daily operations of the state and federal courts, providing much-needed and cost-effective services to Alabama's judicial system; and

WHEREAS, on any given day, legal assistants research law, investigate facts, interview witnesses, and prepare legal documents which assist attorneys and other legal professionals in the efficient and timely administration of justice for the citizens of Alabama; and

WHEREAS, the citizens of Alabama are urged to recognize the legal assistants and paralegals in Alabama who make important contributions to our lives and the legal community and are encouraged to share in the appreciation and gratitude we express with this recognition; now therefore,

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That we hereby declare that the Wednesday of Law Week in 1996, and each year thereafter, is officially and permanently designated as Legal Assistant and Paralegal Day in Alabama.

I hereby certify that the above is a true, correct and accurate copy of Senate Joint Resolution No. 95, adopted by the Legislature of Alabama on April 23, 1996.

  
McDowell Lee  
Secretary of Senate



# Rules Governing Admission to the Alabama State Bar

IN THE SUPREME COURT OF ALABAMA

March 2, 2011

## ORDER

It is ordered that Rule VI(B), *Rules Governing Admission to the Alabama State Bar*, be amended to read in accordance with the appendix attached to this order;

It is further ordered that the amendment of Rule VI(B) be effective May 1, 2011.

It is further ordered that the following note from the reporter of decisions be added to follow Rule VI(B):

"Note from the reporter of decisions: The order amending Rule VI(B), *Rules Governing Admission to the Alabama State Bar*, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 3d."

Cobb, C.J., and Woodall, Stuart, Bolin, Parker, Murdock, Shaw, Main, and Wise, JJ., concur.

## APPENDIX

Rule VI(B). Bar Examination

### A. Bar Examination Subjects

(1) *Academic Bar Examination.* The Academic Bar Examination shall consist of the Uniform Bar Examination ("the UBE") and the Alabama Essay Examination ("the AEE"). The UBE is prepared by the National Conference of Bar Examiners and includes the Multistate Essay Examination ("the MEE"), the Multistate Performance Test ("the MPT"), and the Multistate Bar Examination ("the MBE"). The AEE is prepared by the Board of Bar Examiners.

(a) The MEE. The MEE is a three-hour essay test. The purpose of the MEE is to test the examinee's ability (1) to identify legal issues raised by a hypothetical factual situation; (2) to separate material that is relevant from that that is not; (3) to present a reasoned analysis of the relevant issues in a clear, concise and well-organized composition and (4) to demonstrate an understanding of the fundamental legal principles relevant to the probable resolution of the issues raised by the factual situation. The MEE may test the following subjects: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments (Commercial Paper); Secured Transactions). Some questions may include issues in more than one area of law.

(b) The MBE. The MBE is a one-day multiple-choice test. The purpose of the MBE is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning in analyzing fact patterns.

The MBE will test the following subjects: Contracts, Torts, Real Property, Evidence, Criminal Law, and Constitutional Law.

(c) The MPT. The MPT is two 90-minute tests covering the following skills: problem-solving, legal analysis and reasoning, factual analysis, communication, organization and management of a legal task, and recognizing and resolving ethical dilemmas.

(d) The AEE. The AEE shall not exceed three hours in length. This portion of the examination will cover subjects not tested by the UBE.

(2) *Legal Ethics Examination.* The Multistate Professional Responsibility Examination ("the MPRE," see Rule VI(B)(F) prepared by the National Conference of Bar Examiners shall be used as the examination on Legal Ethics and Professional Responsibility.

An applicant must pass both the Academic Bar Examination and the Legal Ethics Examination to be certified as a successful candidate.

### B. Preparing, Conducting and Grading Examinations

(1) *Preparing Examinations.* The Board of Bar Examiners shall be responsible for preparing the AEE, under guidelines established by the board with the approval of the Board of Commissioners. The MBE, the MEE and the MPT will be prepared by the National Conference of Bar Examiners, which shall determine the contents of those examinations and test.

(2) *Conducting Examinations.* The Board of Bar Examiners shall have the right, power and authority to adopt rules consistent with the laws of the State of Alabama or the orders of the supreme court or the Board of Bar Commissioners governing the control, methods and details of conducting examinations.

The Secretary of the Alabama State Bar, at the time an applicant is certified to the Board of Bar Examiners under these rules, shall issue to the applicant a card containing a personal identification number, the purpose and use of which shall be carefully explained to the applicant. The secretary shall preserve a duplicate of that number in the secretary's office. When taking the examination, the applicant may not sign his or her name to or upon any paper or document, or identify his or her examination answers other than by that number, and is forbidden to disclose that number to any member of the board or to any other person. If any applicant violates this requirement in any particular, the Board of Bar Examiners shall not consider the applicant's examination papers, and, if it be discovered that disclosure of the number was made, the applicant shall be subject to disciplinary action for deceit and misrepresentation. This requirement shall again be called to the attention of the applicant by the Board of Bar Examiners before the applicant is permitted to begin the examination.

The express purpose of the immediately preceding paragraph is to provide a method by which the Board of

Bar Examiners, in passing upon the sufficiency of answers to questions propounded by it, shall be unacquainted with the identity of the person whose answers it is passing upon.

(3) *Grading Examinations.* Essay-examination questions and performance-test questions will test the applicant's ability to reason logically, to analyze legal problems accurately, to demonstrate knowledge of the fundamental principles of law, to be able to apply these principles, and to perform basic legal tasks. The grade of the paper shall be measured by the reasoning power shown as well as by the correctness or incorrectness of the answers. Answers to MEE questions shall be analyzed and graded using the model answers provided by the National Conference of Bar Examiners and according to general principles of law. Answers to AEE questions shall be analyzed and graded using the model answers prepared by the Board of Bar Examiners and according to Alabama or federal law, as appropriate. Essay-examination questions and performance-test questions will be scored by the Board of Bar Examiners. The Board of Bar Examiners shall re-grade all the answers of any applicant whose initial combined score, computed as set forth in Rule VI(B)(C)(1), is 253, 254 or 255.

Using the personal-identification numbers assigned to identify the respective applicants, the Board of Bar Examiners shall certify final grades to the Secretary of the Alabama State Bar no later than April 15 following a February examination and September 15 following a July examination.

The secretary shall make a permanent record in the secretary's office of the grades attained by each examinee in each subject and shall inform each examinee whether he or she has passed or failed the examination.

An examinee who fails the academic portion of the bar examination will be furnished the following information at the time the examinee is notified of the failure: his or her total Academic Bar Examination score; his or her AEE scaled score and the raw score on each AEE question; and, if the examinee took the UBE in Alabama, his or her MBE scaled score, total scaled score on written examinations (MEE and MPT), total UBE scaled score and the raw score on each question on the MEE and the MPT.

Within 60 days after the announcement of the results, a failing examinee shall be entitled to examine his or her own papers in the state bar for the purpose of ascertaining that grades were transcribed correctly, and, upon payment of \$5 per section of any essay examination or performance test, the examinee shall be entitled to receive a copy of his or her answer or answers, a copy of the AEE questions and a copy of the AEE model answer or answers. The UBE questions and model answers are protected by copyright owned by the National Conference of Bar Examiners, and examinees should contact the National Conference of Bar Examiners to obtain copies of those.

(continued on page 164)

### C. Results of Examinations

- (1) *Basic Rule.* Raw scores on the MEE and the MPT portions of the UBE shall be weighted so that the MEE is worth 30 percent and the MPT is worth 20 percent. The total weighted raw score on the MEE and the MPT combined shall be scaled to the MBE. The applicant's scaled score on the MEE and the MPT portions of the UBE shall be expressed on the MBE range of scores (0–200) and shall be combined and weighted equally with the applicant's scaled MBE score to determine the examinee's total UBE scaled score.

The raw scores on the AEE shall be scaled to the MBE, and the scaled score shall be multiplied by two to express the AEE score on the same scale as the UBE score (0–400). The UBE score shall be weighted 80 percent and the AEE score shall be weighted 20 percent to determine an examinee's combined score on the Academic Bar Examination. An applicant who achieves a combined score of 256.000 or above passes the Academic Bar Examination.

- (2) *Transfer of MBE Score.* An applicant who has taken and passed a bar examination in another jurisdiction, who has been admitted to practice in that jurisdiction, and who made an MBE scaled score of 140 or above will be excused from taking the MBE. The transferred MBE score will be valid for a period of 20 months after taking the MBE on which the transferred score was received. The applicant's transferred MBE score will be combined with the applicant's scaled scores on the MEE and the MPT portions of the UBE and on the AEE according to the basic rule. Applicants who transfer an MBE score to seek admission in Alabama will not earn a transferable UBE score that can be used to seek admission in other jurisdictions.

The applicant shall have the option to take all sections of the Academic Bar Examination; if the applicant chooses this option, the scores of all sections will be combined under the basic rule.

- (3) *Carryover of MBE Scores.* An applicant who has taken and failed the bar examination but made an MBE scaled score of 140 or above will be excused from taking the MBE. The MBE scaled score will be carried over to any future examination for which the examinee is eligible, provided that the examination is administered within 20 months after the earlier bar examination in which the applicant scored 140 or above on the MBE was administered, and the MBE scaled score will be combined with the applicant's scaled scores on the MEE and the MPT portions of the UBE and on the AEE according to the basic rule. Applicants who carry over an MBE score from an earlier bar examination to seek admission in Alabama will not earn a transferable UBE score that can be used to seek admission in other jurisdictions.

The applicant shall have the option to take all sections of the Academic Bar Examination; if the applicant chooses this option, the scores will be combined under the basic rule.

- (4) *Carryover of Written Test Score.* An applicant who has taken and failed the bar examination, but who made a scaled score on the MEE and the MPT portions of the UBE or on the AEE that is equivalent to or greater than an MBE scaled score of 140, as determined in accordance with the basic rule, will be excused from taking those sections of the bar examination that contribute to the scaled written score. The scaled written score will be carried over for any future bar examination for which the examinee is eligible, provided that the examination is administered within 20 months after the earlier bar examination in which the carryover score was received, and the scaled written score or scores will be combined with the applicant's MBE score according to the basic rule. Applicants who carry over a scaled score on the MEE and the MPT to seek admission in Alabama will not earn a transferable UBE score that can be used to seek admission in other jurisdictions.

The applicant shall have the option to take all sections of the Academic Bar Examination; if the applicant chooses this option, the scores of all sections will be combined under the basic rule.

- (5) *Time of Election to Transfer or Carry Over Scores.* Elections regarding the transfer from another jurisdiction of an MBE score or the carryover of an MBE score or the carryover of a scaled MEE, MPT or AEE score from a previous examination taken in Alabama must be made at the time an application to sit for an examination is filed.
- (6) *Transfer of UBE Score.* An applicant who has taken and successfully completed the entire UBE in a single administration in another jurisdiction may transfer the total UBE scaled score and be excused from taking the UBE in Alabama. The transferred UBE score will be valid for a period of 20 months after taking the UBE in which the transferred score was received. The transferred UBE score will be combined with the applicant's scaled written score on the AEE according to the basic rule.

- D. Access to Information Regarding the AEE. At least 12 months in advance of the first administration of the AEE pursuant to this rule, the Board of Bar Examiners shall prepare and distribute to all students in Alabama law schools (individually or through the schools) and to the deans of all Alabama law schools an information booklet on the AEE. This booklet shall include a description of the examination, including a statement of its purpose and the areas of law to be covered; the instructions that will accompany the examination when it is administered; and the subject matter or topic outline required by Rule VI(B)(1)(a). Following the first administration of the examination under this rule, the information booklet shall be revised to include the questions and corresponding model answers from the first examination. The Board of Bar Examiners shall thereafter update the information booklet at such times as it deems appropriate and shall include in that booklet representative sample

questions and corresponding model answers from prior examinations. The board shall routinely distribute the booklet to all applicants and shall make the booklet available upon request. A reasonable fee, to be determined by the Board of Bar Examiners with the concurrence of the Board of Bar Commissioners, may be charged to parties outside the routine distribution who request copies of the booklet.

- E. Access to Information Regarding Other Examinations. The Board of Bar Examiners shall make available to applicants sample and informational materials that will acquaint applicants with the general content and format of the MBE, the MEE and the MPT. This requirement may be met by routinely distributing to all applicants the information booklets on these examinations published by the National Conference of Bar Examiners, and by advising applicants of the availability, through the National Conference of Bar Examiners, of sample questions and analyses. A reasonable fee, to be determined by the Board of Bar Examiners with the concurrence of the Board of Bar Commissioners, may be charged to parties outside the routine distribution who request copies of the materials.
- F. The MPRE. Before admission to the bar, each applicant must have successfully passed the MPRE. To successfully complete the MPRE, the applicant must achieve a scaled score of at least 75, as that score is determined by the testing authority. Successful completion of the MPRE by an applicant at any time within the 12-month period before the taking of the Academic Bar Examination will be accepted, and such successful completion may be carried over for a period of 20 months from the time the first Academic Bar Examination is taken, if the applicant does not pass the Academic Bar Examination. If an applicant has passed the Academic Bar Examination but has not successfully completed the MPRE, he or she shall have a period of 20 months from the date of the Academic Bar Examination in which to successfully complete the MPRE. Applicants who transfer a UBE score from another jurisdiction must successfully complete the MPRE no earlier than 12 months before the UBE was taken in the transferring jurisdiction and no later than 20 months from the time the first AEE is taken.

Completed application materials for testing, as well as all other correspondence, inquiries and requests concerning application materials and the administration and processing of the National Conference of Bar Examiners' MPRE should be directed to:

National Conference of Bar Examiners  
MPRE Application Department  
P.O. Box 4001  
Iowa City, Iowa 52243  
(319) 337-1304

- G. Time of Bar Examination. The examination will be given on Monday, Tuesday and Wednesday of that week in February and in July in which the MBE examination is administered. The AEE will be on Monday, the MPT and the MEE on Tuesday and the MBE on Wednesday.





## Transfer to Disability Inactive Status

- Oneonta attorney **Harold Jerome Colley** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective November 23, 2010, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 10-1819]

## Disbarment

- Birmingham attorney **Jacob Calvin Swygert, Jr.** was disbarred from the practice of law in Alabama, effective October 19, 2010, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 19, 2010 order of Panel II of the Disciplinary Board of the Alabama State Bar.

In ASB No. 09-1039(A), Swygert was determined to be guilty of violating rules 1.3, 1.15(a), 1.15(b), 1.15(d), 1.15(e), 4.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4 (g), *Alabama Rules of Professional Conduct*. According to the formal charges, in or around January 2008, Swygert signed a letter of protection to a chiropractic center on behalf of a client. Swygert subsequently settled the case in June 2008 and withheld funds from the client to pay the chiropractic center. Swygert failed to contact the chiropractic center and failed to honor the letter of protection. Swygert subsequently failed or refused to provide a response to the Office of General Counsel of the Alabama State Bar regarding this matter.

In ASB No. 09-2552(A), Swygert was determined to be guilty of violating rules 1.3, 1.4(a) and (b), 8.1(b), and 8.4(a) and (g), *Ala. R. Prof. C.* According to the formal charges, in or around December 2006, Swygert was retained to represent a client in a wrongful death suit after the client's daughter was killed in an automobile accident. Swygert advised the client that he had

settled the matter for \$20,000 and that he would later pursue a suit against the client's own insurance company. Swygert failed to pursue the lawsuit on behalf of the client, failed to provide the client with an accounting of the \$20,000 and failed to communicate further with the client about her case. Swygert subsequently failed or refused to provide a response to the Office of General Counsel of the Alabama State Bar regarding this matter.

In ASB No. 09-2758(A), Swygert was determined to be guilty of violating rules 1.3, 1.4(a), (b), 1.16(d), and 8.4(a) and (g), *Ala. R. Prof. C.* According to the formal charges, Swygert was retained to represent a client on a *de novo* appeal to the circuit court after a judgment was entered against the client concerning a car accident. The client did not know that Swygert decided to quit practicing law sometime in May 2009. The client's case was called for a hearing in June 2009. Swygert failed to appear for the hearing and failed to notify the client of the hearing. As a result, the client's appeal was dismissed and the judgment was affirmed. Swygert then filed a motion to withdraw with the Jefferson County Circuit Court, in which he admitted that he had quit practicing law and had failed to provide the court with his new mailing address. As a result of Swygert's failures, the client was not made aware that his case had been set for hearing.

Formal charges were filed against Swygert in ASB nos. 09-1039(A), 09-2552(A) and 09-2758(A). The formal charges and summons were served by publication in *The Alabama Lawyer* July 15, 2010. Swygert failed to file an answer to the formal charges and a default judgment was entered August 17, 2010. An order setting a hearing to determine discipline was sent to Swygert by certified and regular mail at his last known address on August 26, 2010. A hearing to determine discipline was conducted October 19, 2010 by Panel II of the Disciplinary Board. Swygert failed to appear at this hearing. Following the hearing to determine discipline, the board ordered that Swygert be disbarred. [ASB nos. 09-1039(A), 09-2552(A) and 09-2578(A)]

## Suspensions

- Birmingham attorney **Dagney Johnson** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective December 1, 2010. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Johnson's conditional guilty plea in which Johnson admitted that she violated rules 1.15(a), (f) and (g), *Ala. R. Prof. C.* In ASB No. 08-221(A), Johnson was appointed as a guardian ad litem for a special needs child in a divorce case. During the course of the representation, both parties agreed that Johnson would take possession of funds to be used for the education and treatment of the special needs child. In or around February 2008, Johnson placed the funds into a money market account. In March and April 2008, Johnson used a debit card attached to the account for personal expenses. In April 2008, Johnson was notified by the bank that the account needed to be altered from a money market account to a regular checking account due to the high number of debit card transactions. Johnson contended that she mistakenly used the wrong debit cards and believed she was using the debit card attached to her firm account. Johnson did not replace the monies that she improperly withdrew from the account until July 2008. Johnson also failed to maintain an IOLTA trust account. [ASB No. 08-221(A)]
- Birmingham attorney **Richard Glynn Poff, Jr.** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for one year, effective November 18, 2010. The supreme court entered its order based on the decision of the Disciplinary Board, Panel I, of the Alabama State Bar in which Poff was found guilty of violating rules 1.1, 1.3, 1.4(a), 1.4(b), 1.16(d), and 8.4 (a), (d) and (g), *Ala. R. Prof. C.* Poff was also ordered to make restitution in the amount of \$53,500 to the client.

Poff was retained by a doctor to represent him in legal malpractice actions to be filed against various lawyers and law firms relating to their representation

of the doctor in multiple proceedings relating to his license to practice medicine in West Virginia and in other states, as well as represent the doctor in other civil matters in Georgia and federal court in West Virginia. The board found that in all of the cases in which Poff was retained by the doctor, Poff did not complete even one. Poff did not give appropriate attention to the legal work he was hired to do, did not adequately prepare or investigate the claims and did not comply with court rules, deadlines or orders. His conduct prejudiced the client and caused unnecessary and unreasonable delay. Poff's neglect, lack of preparation, lack of knowledge of or compliance with court rules and deliberate disobedience of a court order rose to the level of incompetence. Poff also failed to reasonably communicate with his client during the course of the representation. Although Poff often did communicate with the doctor, his communications were inaccurate and incomplete and did not provide the client with sufficient information to make informed decisions about the representation or inform the client of the status of each matter. When Poff was terminated by the doctor, Poff failed to promptly deliver the client file or account for and refund the unearned portion of the more than \$170,000 he had been paid for his services. [ASB No. 07-09(A)]

- By order of the Alabama Supreme Court, Decatur attorney **Joseph Benjamin Powell** was suspended from the practice of law in Alabama for 90 days, retroactive to January 30, 2009, the effective date of his interim suspension. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar accepting Powell's conditional guilty plea in which he pled guilty to violations of rules 1.3, 1.4(a), 1.15(a), and 8.4(a) and (g), *Ala. R. Prof. C.* Powell admitted that he failed to respond to reasonable requests for information from his client, willfully neglected a legal matter entrusted to him, failed to provide information to a client reasonably sufficient to allow the client to make an informed decision regarding the representation, and failed to properly manage his client trust account. Powell was reinstated to the practice of law in Alabama, effective October 20, 2010. [Rule 20(a), Pet. No. 09-1056; ASB nos. 09-1091(A), 09-1149(A) and 09-1319(A)]

- Childersburg attorney **William Kenneth Rogers, Jr.** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for 91 days. The Disciplinary Commission ordered that the suspension be held in abeyance and Rogers be placed on probation for two years pursuant to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Commission accepted Rogers's conditional guilty plea in which he pled guilty to violations of rules 1.15(a), 5.3(a), 5.3(b) and 5.3(c)(1), *Ala. R. Prof. C.* Rogers pled guilty to failing to maintain an IOLTA trust account as required by Rule 1.15(a), *Ala. R. Prof. C.* Rogers also pled guilty to failing to supervise a non-lawyer employee in regards to preparation and filing of bankruptcy petitions on behalf of his clients. [ASB No. 10-945]

## C L E COURSE SEARCH

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



**[www.alabar.org/cle](http://www.alabar.org/cle)**



# DISCIPLINARY NOTICES

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- On November 23, 2010, Birmingham attorney **John Michael Wood** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Wood's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 2010-1820]

## Public Reprimands

- Birmingham attorney **Martin Kassab Berks** received a public reprimand with general publication on December 10, 2010 for violations of rules 1.4(a), 1.5(c), 1.15(b), 5.3, and 8.4(a), *Ala. R. Prof. C.* Berks failed to adequately supervise a non-lawyer assistant who was responsible for maintaining Berks's trust account and disbursing settlement proceeds to his clients. As a result, Berks failed to disburse settlement funds to clients in a timely manner, failed to adequately communicate with clients regarding their settlements and failed to provide clients with a written statement demonstrating an accounting of monies collected on behalf the clients. [ASB No. 07-117(A)]
- On October 29, 2010, Birmingham attorney **Douglas Howard Cooner** received a public reprimand without general publication for violations of rules 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Cooner engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he made false statements to a lawyer who was representing his former client. Cooner's former client retained the services of a Georgia law firm to assist her with an immigration issue. When the former client requested her file, Cooner informed her that there was an outstanding balance of \$500 owed to him and that he was asserting a lien on the file. Counsel for Cooner's former client wrote Cooner a letter requesting a more specific description of the

\$500 fee that was invoiced as "attorney legal service." The letter also indicated that the client had contacted the Office of General Counsel and was informed that a lawyer should provide a breakdown of what services were performed and the cost of those services upon request by the client. Cooner responded to the letter and made a statement that he had a close friend from law school who worked for the Alabama State Bar. Cooner further stated that he was told by an attorney in the Office of General Counsel that the Georgia law firm had not contacted the Office of General Counsel of the Alabama State Bar regarding the lien and the request for a breakdown of services. Cooner's statement was untruthful as he did not have a friend working at the Alabama State Bar and he never contacted the Office of General Counsel. When questioned about the situation by an assistant general counsel of the Alabama State Bar, Cooner stated that he was old friends with the Georgia lawyer and that the Georgia lawyer knew he was joking. When contacted, the Georgia lawyer denied knowing Cooner and stated that he did not take the statement as a joke. [ASB No. 07-62(A)]

- Montgomery attorney **Jacob Ari Dubin** received a public reprimand with general publication on October 29, 2010 for violations of rules 1.4(a), 1.15(a) and 1.16(c), *Ala. R. Prof. C.* In addition to the public reprimand, the Disciplinary Commission of the Alabama State Bar ordered that Dubin be placed on probation for one year pursuant to Rule 8(h), *Ala. R. Disc. P.* Dubin was also ordered to refund the client \$2,100 and to enroll in and satisfactorily complete the Practice Management Assistance Program of the Alabama State Bar within one year.

In ASB No. 08-223(A), Dubin pled guilty to violating rules 1.4(a), 1.5(a), 1.15(a) and 1.15(e), *Ala. R. Prof. C.* This matter involved Dubin's possible representation of a client on an appeal from a criminal conviction if the client decided to pursue an appeal after sentencing.

The client paid Dubin \$2,500 which was to be held in trust pending the appeal. Any unused portion was to be refunded to the client if the client chose to forgo an appeal. Dubin did not enter into a written fee agreement with the client. Dubin agreed to attend the client's sentencing hearing and have the notice of appeal ready for filing if necessary. Dubin failed to appear at the sentencing due to a scheduling conflict. In addition, by the time of the client's sentencing, Dubin had left private practice and taken another position as staff counsel to the Montgomery County Probate Court. Thereafter, Dubin withdrew from representation and issued the client a refund of \$313.27. In doing so, Dubin attempted to charge the client for unnecessary work and issued the refund from his operating account rather than his trust account. During the course of the bar's investigation, Dubin admitted that he improperly converted funds belonging to the client prior to earning the funds. Dubin also admitted that he commingled personal funds with client funds in his trust account by depositing checks for appointed work into his trust account. Dubin was unable to provide all trust account records that were required to be maintained and was unable to account for all deposits and checks related to his trust account as requested by the Office of General Counsel. [ASB No. 08-223(A)]

- Montgomery attorney **Jacob Ari Dubin** received a public reprimand with general publication on October 29, 2010 for violations of rules 1.4(a), 1.15(a) and 1.16(d), *Ala. R. Prof. C.* In addition to the public reprimand, the Alabama State Bar Disciplinary Commission ordered that Dubin be placed on probation for one year pursuant to Rule 8(h), *Ala. R. Disc. P.* Dubin was also ordered to enroll and satisfactorily complete the ASB Practice Management Assistance Program within one year.

In ASB No. 09-2420(A), Dubin pled guilty to violations of rules 1.4(a), 1.15(a) and 1.16(d), *Ala. R. Prof. C.* This matter involved Dubin's representation of a client in a post-divorce modification. The client paid a retainer fee of \$750. Dubin failed to deposit the retainer fee into his trust account. Dubin subsequently filed a notice of appearance on July 3, 2008. On or about July 30, 2008, Dubin informed the client via e-mail that he had accepted

another position as legal counsel and would be unable to represent him in the matter. Thereafter, the client had difficulty contacting Dubin about the unearned portion of his retainer. On or about November 12, 2008, Dubin issued a \$650 refund to the client. However, this was more than three months after Dubin terminated his representation of the client. [ASB No. 09-2420(A)]

- Jasper attorney **Joseph Wilburn Hudson** received a public reprimand with general publication on October 29, 2010 for violations of rules 1.3, 1.4(a), 1.15(a), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* In or around February 2008, Hudson was retained by a client to file a bankruptcy petition. Hudson was paid \$1,400 to handle the matter. Hudson informed the client that he filed the bankruptcy and that a decision would be forthcoming. Hudson later admitted that he did not file the bankruptcy petition on behalf of the client. Hudson also admitted that he failed to deposit the \$1,400 fee paid by the client into his trust account. [ASB No. 09-2438(A)]
- Birmingham attorney **Emory Keith Mauldin** was ordered to receive a public reprimand without general publication for violations of rules 1.3, 1.4(a), 8.1(b), 8.4(a), and 8.4(d), *Ala. R. Prof. C.* In December 2005, Mauldin was retained to probate a last will and testament. Mauldin filed the initial paperwork in January 2006. Thereafter, Mauldin failed to file any other pleadings, motions or documents concerning the case. Mauldin informed the client a court date had been set for April 19, 2008. The client advised Mauldin that April 19, 2008 was a Saturday. Mauldin informed the client he would get back in touch with her on the matter but failed to do so. Thereafter, the client repeatedly attempted to contact Mauldin but he did not return her telephone calls. Subsequently, the client filed a complaint with the Alabama State Bar. The complaint was assigned to the Birmingham Bar Association for investigation. The investigator with the Birmingham Bar sent two letters to Mauldin requesting a written response to the complaint. Mauldin failed to respond. Mauldin was also left telephone messages to contact the investigator with the Birmingham Bar but he failed to do so. Mauldin willfully neglected a matter entrusted to him, failed to keep the client reasonably informed about the

# DISCIPLINARY NOTICES

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case and failed to respond to repeated requests from a disciplinary authority. [ASB No. 08-187(A)]

- Guntersville attorney **Ellsworth Charles Ogden, III** received a public reprimand with general publication on October 29, 2010 for violations of rules 1.4(a), 1.5(a), 1.15(a) and (b), 1.16(d), and 8.4(a), *Alabama Rules of Professional Conduct*. Ogden represented a client in a civil action to collect past-due rent. After a default judgment was entered, Ogden's client and the other individual entered into an agreement in which Ogden's client would be paid \$800 a month for 14 months in satisfaction of the judgment. Thereafter, Ogden's client died and Ogden subsequently received a total of \$7,200 from the individual toward payment of the judgment. At the time Ogden received the funds, he failed to properly maintain those funds in trust and failed to promptly notify his client's estate upon receipt. The personal representative for the estate began making inquiries concerning the funds and requested an accounting. Ogden did not respond to those requests for more than a year. When Ogden finally responded, he provided a bill that included a description of the work performed, but did not contain specific time entries. Ogden did not provide the specific time entries until after a grievance was filed with the Alabama State Bar, and the entries indicated that he billed for more than eight hours after the death of his client and contained inflated time entries when compared to the description of the work performed. Ogden charged a clearly excessive fee and was ordered to make restitution to the client's estate in the amount of \$2,371.87. [ASB No. 08-237(A)]
- Montgomery attorney **Joe Morgan Reed** received a public reprimand without general publication on December 10, 2010 for violations of rules 7.2(b) and 7.3(a), *Ala. R. Prof. C.* In or around July 2010, Reed met with an inmate client at the Elmore County Jail. At the conclusion of the meeting, Reed allowed the inmate to take 50 items of his advertising materials so that the inmate could pass out the advertising materials to other inmates. The advertising materials were never filed with the Office of General Counsel as required by Rule 7.2(b), *Ala. R. Prof. C.* [ASB No. 10-301(A)]
- Monroeville attorney **Leston Curtis Stallworth, Jr.** received a public reprimand without general publication for violations of rules 1.1, 5.3, 8.4(d) and 8.4(g), *Ala. R. Prof. C.*, on October 29, 2010. In or around June 2009, Stallworth was retained to represent a couple in an uncontested divorce. Stallworth undertook to represent the wife in the matter and had the husband sign an acknowledgement of non-representation form. Thereafter, Stallworth filed the complaint for divorce along with a stipulation and agreement concerning the couple's division of property and custody of their minor children. The provisions in the stipulation concerning the custody of the children were internally inconsistent. Additionally, the document indicated that the parties signed the document May 18, 2009; however, the documents indicated that they were notarized May 11, 2009. As a result of these inconsistencies, the court refused to sign the proposed order. Stallworth was informed of the inconsistencies by the circuit clerk's office. Rather than submitting a new and original stipulation and agreement as requested by the court, Stallworth's secretary removed or caused to be removed an original page of a court filing. By doing so, the integrity of the court file was compromised. While Stallworth's secretary was the one who engaged in the conduct, he, as her lawyer supervisor, was ethically responsible for her actions. Additionally, the court reported that Stallworth had a history of submitting inconsistent orders and had previously submitted orders that did not match the agreement of the parties. [ASB No. 09-2303]
- On October 29, 2010, Birmingham attorney **Cynthia Hooks Umstead** received a public reprimand without



general publication for violations of rules 1.4(a) and 8.1(b), *Ala. R. Prof. C.* On or about May 14, 2008, Umstead was retained by the complainant to file an uncontested divorce. The complainant paid Umstead \$750 in attorney's fees. Umstead drafted the complaint and mailed it to the complainant's husband, who was incarcerated, but the paperwork was returned due to an error in the address. In the second attempt to serve the husband with the divorce complaint, Umstead misspelled his name. In July 2009, the complainant learned that Umstead failed to correct the paperwork and have the husband served. The complainant made several attempts to contact Umstead but she failed or refused to communicate with her. On July 31, 2009, a copy of the complaint filed by her client was sent to Umstead by U.S. first-class mail requesting that she respond within 14 days. Umstead failed to submit a timely response. After Umstead was notified by certified mail of her failure to respond, procedures were undertaken to summarily suspend her license to practice law. Umstead eventually submitted her response on October 26, 2009, after an assistant general counsel contacted the attorney who had previously represented Umstead in a separate bar disciplinary matter. In her response, Umstead admitted the allegations in the bar complaint. She blamed her late response on a secretary who worked for her and other lawyers in the building. She stated that the secretary was not updating the lawyer's calendars, not delivering messages and not distributing the mail to the other lawyers. Umstead stated that the secretary had since resigned. Although Umstead placed blame on others, she was ultimately responsible for diligently pursuing her client's matter.

Umstead's conduct in this matter violated rules 1.4(a) and 8.1(b), *Ala. R. Prof. C.*, in that she failed to adequately communicate with her client and she failed or refused to respond to the bar regarding a disciplinary matter. Umstead's prior discipline was also a consideration in this decision. [ASB No. 09-2011(A)]

- Phenix City attorney **Elliot Joseph Vogt** was ordered to receive a public reprimand with general publication for violations of rules 1.3, 1.4(a), 1.4(b) and 8.4(a), *Ala. R.*

*Prof. C.* In or around April 2008, Vogt was retained by a client to probate her deceased husband's estate. Vogt was paid \$1,500 to handle the case. Vogt advised the client of the initial court date. When the client appeared for court Vogt telephoned her and informed her that court would not be held. Thereafter, Vogt advised the client to appear at two additional court dates. The client appeared at both of these court dates and again Vogt telephoned the client, informing her both times that the court dates had been postponed. Vogt then offered various excuses as to why the case was postponed. The client subsequently learned that Vogt never filed anything with the probate court in her case. Vogt willfully neglected a matter entrusted to him and failed to keep the client reasonably informed about her case. [ASB No. 09-1063(A)]

- Birmingham attorney **Louis James Willie, III** received a public reprimand without general publication on December 10, 2010 for violations of rules 1.3 and 1.4, *Ala. R. Prof. C.* In or around May 2009, Willie was retained to represent a client in a garnishment matter. Willie informed the client that he would attempt to have the garnishment set aside, or, in the alternative, attempt to negotiate a lesser amount. Thereafter, Willie contacted the collection attorney to attempt to negotiate the garnishment but was not successful. Willie did nothing else on behalf of the client. The client attempted to contact Willie by telephone and e-mail about the case. Willie failed to return the client's telephone calls or respond to e-mails. [ASB No. 09-1760(A)]

## Miscellaneous

- On August 31, 2010, the Disciplinary Board of the Alabama State Bar, Panel III, entered an order accepting the conditional guilty plea of Anniston attorney **Amos Lorenzo Kirkpatrick** for a violation of Rule 8.4(g), *Ala. R. Prof. C.* Kirkpatrick was placed on probation until October 15, 2012. Kirkpatrick's discipline was based upon his conviction for harassment in the District Court of Calhoun County which involved inappropriate contact with a female client. [ASB No. 08-130(A)]



# Alabama State Bar Publications Order Form

The Alabama State Bar is pleased to make available to individual attorneys, firms and bar associations, at cost only, a series of pamphlets on a variety of legal topics of interest to the general public. Below is a current listing of public information pamphlets available for distribution by bar members and local bar associations, under established guidelines.

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15	\$125	\$125	\$152	\$270	\$398	\$600	\$960
20	\$152	\$152	\$202	\$340	\$515	\$775	\$1,325
30	\$230	\$241	\$339	\$525	\$797	\$1,545	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Annual Premium							
AGE:	30	35	40	45	50	55	60
10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
15	\$195	\$200	\$255	\$485	\$725	\$1,150	\$1,830
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# ABOUT MEMBERS AMONG FIRMS

Continued from page 173

## Among Firms

**Adams & Reese** announces that **C. Britton Bonner** has joined as *special counsel*.

**Bailey & Glasser LLP** announces the opening of their office and that **James Bruce Perrine** has joined as a partner.

**Beasley, Allen, Crow, Methvin, Portis & Miles PC** announces that **John E. Tomlinson** is now a shareholder.

**The Law Office of Jack Carney LLC** announces that **Shayana Boyd Davis** and **Katherine M. Thompson** have joined as *of counsel*.

**Eversole Law LLC** announces that **Richard C. Perry** has joined the firm.

**Gentle, Turner & Sexton** announces that **Diandra S. DeBrosse** has become a partner.

**Holtsford Gilliland Higgins Hitson & Howard PC** announces that **Steven A. Savarese, Jr.** has joined the firm.

**Knight, Griffith, McKenzie, Knight & McLeroy LLP** announces that **Zeb Little** has joined as a partner, **Trent Lowry** has joined as an associate and the firm's name has changed to **Knight Griffith LLP**.

**Leo & Brooks LLC** announces that **Gregory H. Revera** has joined the firm and the name has been changed to **Leo Law LLC**.

**Lentz, Whitmire, House & Propst LLP** announces that **Christy Wallace Richardson** has been named a partner. The firm is now **Lentz, Whitmire, House, Propst & Richardson LLP**.

**Marsh, Rickard & Bryan PC** announces that **Derrick Mills** and **William Andrews** have been named partners.

**Maynard Cooper & Gale** announces that **Paul Frederick** has joined the firm.

**Stephen G. McGowan LLC** announces that **Carl J. Burrell** and **Christopher H. Nahley** have joined as *of counsel*.

**Prince, Glover & Hayes** announces that **G. Coe Baxter** has joined as an associate.

**Pope, McGlamry, Kilpatrick, Morrison & Norwood LLP** announces that **George Walton Walker** has joined as a partner.

**Patrick H. Tate** announces that **Patrick L. Tate** has joined the firm.

**Windom & Tobias LLC** announces that **Bryan E. Comer** has joined the firm. ▲▲▲

## Just One Look

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