

The Alabama Lawyer

May 2013 | Volume 74, Number 3

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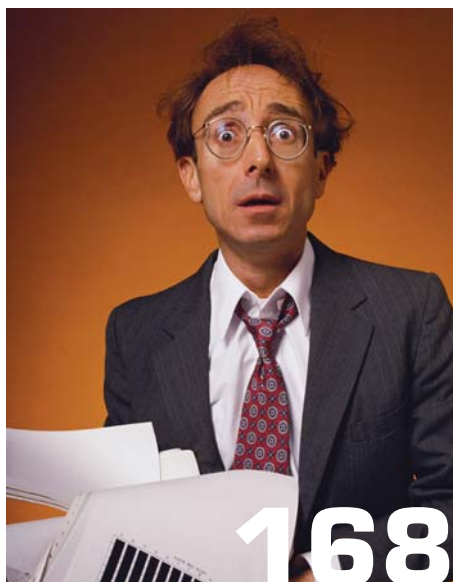
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The author is shown with a Peacock Bass in the Brazilian Amazon this spring.



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Michael C. Skotnicki holds two degrees from Auburn University. He graduated magna cum laude from the Cumberland School of Law of Samford University and served as a law clerk to Chief Justice Sonny Hornsby of the Alabama Supreme Court. He also served as a staff attorney, in succession, to Justice Henry Steagall, Terry Butts and Champ Lyons. After leaving the court, he practiced with two Birmingham

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

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

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



Phillip W. McCallum

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The Future of the Unified Judicial System: Unified but Uniform?

Do you know how or where the money collected as court costs or filing fees is being distributed across Alabama? Did you know that many of the fees that have been added or increased over the years are actually designated for a state or local purpose that has nothing to do with court administration?

The Alabama Unified Judicial System (UJS) collected approximately \$160 million a year through the clerks' offices over the last four fiscal years. The UJS serves as the largest collection agency in the state, yet only about half of the money collected as costs and fees is allocated to the administration of our courts. This inequitable appropriation of funds to the court system places the continued operation of the UJS in jeopardy.

With the help of the Administrative Office of Courts, the Alabama State Bar recently completed a study that, for the first time, presents a county-by-county snapshot of all state and local court

costs. These charts show the amounts collected for filings in every county and include local fees as well. Every fee is itemized and its distribution shown. Accessing the study is easy, and we invite everyone to take a look at www.alacourt.gov/distributioncharts.aspx. An interactive statewide map is also available so that you can quickly click on the county of interest to see the court costs in that county and where the money is going. A four-year comparative report of statewide filings and dispositions by type of case has been posted along with the statewide collections. This study is the result of an unprecedented collaboration between the ASB and the AOC. Special thanks go to **Kristi Skipper** (ASB Service Programs Administrative Assistant), **Brenda Ganey** (former AOC Trial Courts Facilitator and current court specialist in Baldwin County), alumni of the ASB **Leadership Forum** and several **Jones School of Law** interns working at the AOC.

**AUTAUGA COUNTY
 FEE DISTRIBUTION CHART**

Title 12, Chapter 19, Article 2, Code of Alabama 1975, generally governs the amount and manner of distribution of docket fees which shall be assessed and collected in district and circuit courts throughout the state. The docket fees are uniform throughout the state, except in those counties where additional court costs are authorized by local act. This chart outlines the docket fees and other fees and monies authorized by the statute to be collected. The distribution of the fees as required by the statute is set forth beside each fee.

Type Case and Fee Amount	SJIS ACCT. CODE	TOTAL FEE	10100 State General Fund	10500 Fair Trial Tax Fund	10935 State JUD/ DPS HB308	10940 DNA	10961 Adv Tech & Data Fund	40100 County General Fund	Statewide Fees	60100 Library Fees	60500 JU Court Jail Fund	60600 Court-house/ Supv Fees	Local Fees	Authority
CIRCUIT COURT														
Civil Docket Fee Complaints and Interpleaders more than \$50,000 (except domestic relations and workers' comp cases)	CV05	\$351.00	\$105.00	\$25.00	\$141.75	\$2.00	\$5.00	\$20.25		\$2.00	\$10.00	\$40.00		12-19-71(a)(4) 11-25-9, 12-19-72(4) 36-18-32(h) 45-1-80 Const Amend 661
Jury Demand	JDMD	\$100.00	\$41.00	\$10.00	\$45.50			\$3.50						12-19-71(a)(13) 12-19-72(12)

As you can see from the snapshot above, the study shows a filing fee in Autauga County is \$351 for a circuit civil complaint in which the relief requested is more than \$50,000, non-domestic, non-workers' compensation and without a jury demand. Of this amount, \$299 is designated as statewide fees (\$105 to the State General Fund; \$25 to the Fair Trial Tax Fund; \$141.75 to the State Judicial and DPS Fund; \$2 to the DNA Fund; \$5 to the Advanced Technology and Data Fund; and \$20.25 to the County General Fund), and \$52 is local fees (\$2 to the law library; \$10 to the Juvenile and Jail Fund; and \$40 to the Courthouse Supervisory Fee). If a jury demand is made, an additional \$100 is added to the fee with \$41 going to the State General Fund; \$10 to the Fair Trial Tax Fund; \$45.50 to the State Judicial and DPS fund; and \$3.50 to the County General Fund.

This study also shows that fees may vary wildly from county to county. As mentioned above, the same case filed in Madison County would cost \$481 as opposed to \$351 in Autauga County. This is a result of local fees added that are distributed to various causes. Access to this study should be beneficial to all attorneys as a resource to determine filing fees and to all citizens as well, showing transparency in where costs and fees paid to the courts are going. Many people believe that court costs are used for the funding of our courts and cannot understand why the courts have become so underfunded as costs have increased. This study shows that those monies are not all being used to fund the court system but are serving as a source of funding for many other projects. Having this detailed study available when court-cost increases are proposed is useful to the bar, judges and legislature so they are informed as to where the money is going.

There are seven budgets to be funded within the Judicial General Fund: The Unified Judicial System, Supreme Court of

Alabama, Court of Criminal Appeals, Court of Civil Appeals, Supreme Court Law Library, Judicial Retirement Fund, and Judicial Inquiry Commission. Since 2009, there has been a reduction of \$23.1 million in the Unified Judicial System budget. In 2011, the number of court clerks was reduced 30 percent, but was also responsible for collecting \$82 million, and have done so with fewer personnel. Court clerks are personally, civilly and criminally responsible for the collection of monies in their courts. Judges are now working with a statutory minimum of staffing, and 24 counties had a decrease in juvenile probation officers. Some counties are working with only one juvenile probation officer. The number of employees working at the Administrative Office of Courts has been reduced by 40 percent and is continuing to decrease. The state's population has grown by approximately 18 percent since the '90s.

The judiciary is a branch of government, not an agency, and accordingly is required to be adequately funded. Our courts must function to ensure that the people of Alabama have a dependable place to resolve their differences and seek justice. Jury trials must remain a priority as well. The economic impact of underfunding the court system is substantial. Studies in Georgia and Florida have shown that failure to operate the court system effectively and efficiently results in millions of dollars not pumping into the economy. Businesses looking to come into Alabama want to know that our court systems are operating properly and that we have predictability, continuity and stability within our courts. Delays in domestic relations and juvenile matters affect individuals in their daily lives and their productivity at work. Businesses depend upon resolving their problems, and they need the court system more in tough economic times than they do when things are going well. Simple foreclosures, collections

of debts and contract disputes are delayed, which affect the operation of businesses across our state. Criminal trials that are delayed result in the potential for speedy trial motions and over-crowded jails. Though increasing court fees to fund immediate needs may seem like an easy, short-term solution, at what point will citizens and businesses begin to question whether they can still look to the courts to solve their disputes or problems? In fact, statewide court filings have actually decreased from 1,316,191 in fiscal year 2009 to 1,018,697 in 2012. If court costs are to be the future funding source of the courts (and other areas of state and local government), how will this decrease in filings affect the general fund budget as a whole?

As the next step in our study of court costs and court funding, the Alabama State Bar is partnering with the **Public Affairs Research Council of Alabama** (PARCA) to complete a data-based detailed study of statewide and local court costs and their distribution and usage. The PARCA will also

review court funding and the use of court costs by the legislature in establishing the annual UJS budget and the general fund. A comparison of statewide and local data will be provided for the last 10 years regarding court funding and court-cost implementation through legislation. The PARCA study will also provide data and a comparative analysis to other southeastern states, and be used as a foundation for discussions regarding court costs and funding.

The Alabama State Bar plans to share the PARCA study findings at the 2013 Annual Meeting in Point Clear. Sometime later, a written report will be given to our state leaders and bar members. We believe the information provided by the work done on producing the combined state and local court-cost distribution chart and the work that will be done through the PARCA study will provide detailed data and analysis regarding our current court-cost system, the funding sources used to support our courts and the expenditures of those resources both statewide and locally. | [AL](#)

Alabama State Bar Partners with Public Affairs Research Council of Alabama to Study Judicial System Funding

The Constitution of Alabama 1901 vests the judicial power of the state in a unified judicial system. Administering justice through the courts is a fundamental duty of Alabama government. The people depend on the judiciary to fairly and impartially resolve their disputes and administer justice as efficiently as possible.

The constitution requires that “adequate and reasonable appropriations shall be made by the legislature for the entire judicial system, exclusive of probate courts and municipal courts.” State laws mandate the number of courts, number of judges, structure of judicial compensation, staffing requirements, and other facets of judicial administration. To be “adequate and reasonable,” state appropriations must be sufficient to cover such legal mandates.

What is the price tag for the proper administration of justice in Alabama today? While it is possible to develop a reasonable estimate that takes into account the mandates and other factors involved, no one has yet done so. As a result, there are debates about whether or not the courts have sufficient funding, and much of the discussion is tinged with politics. It is important to develop objective measures of what is an “adequate and reasonable” amount for the administration of justice in our state.

This leads to a second issue. What are the appropriate funding sources for judicial administration? In recent years, the leg-

islature has turned increasingly to fees and other kinds of assessments for the use of courts, known as “court costs,” that are collected by the court system itself. Over the past four years, court-cost collections have exceeded \$160 million per year. Until recently, there was no comprehensive information on the rates and distribution of these assessments, however, a county-by-county study of state and local court costs was completed by the Alabama State Bar in conjunction with the court system. The study reveals that, in many cases, these court costs are distributed not to the courts, but to other agencies of government. Furthermore, collection rates are low in some instances, especially in fines imposed on convicted criminals.

Although there is a great deal of information about both court costs and other sources of judicial funding, no compilation of this information is available. This data is vital to developing an understanding of what is adequate and reasonable insofar as judicial funding is concerned.

Because of the importance of the issues involved, the Alabama State Bar is partnering with the Public Affairs Research Council of Alabama to develop objective estimates of expenditure requirements for the judicial system and the sources of revenue that are available to meet those requirements. The results of the PARCA study will be completed by mid-summer, and discussed at the Alabama State Bar Annual Meeting this summer in Point Clear. | [AL](#)



SAVE THE DATE

JULY 17-20 2013

Alabama State Bar Annual Meeting Grand Hotel Marriott Resort, Golf Club & Spa, Point Clear, Alabama All the cool kids will be in Point Clear. Will your kids be there? While you attend the annual meeting and earn a year's worth of quality CLE credit, your family will be having a blast! And for anyone who's over the age of 30 there will be the usual cocktail parties, a Presidential reception, informal networking opportunities, law school alumni gatherings and more. Let out your "inner child." Plan to attend the annual meeting.



415 Dexter Avenue
Montgomery, Alabama 36104



Richard J.R. Raleigh, Jr.

Pursuant to the Alabama State Bar's *Rules Governing the Election of President-elect*, the following biographical sketch is provided of **Richard J.R. Raleigh, Jr.**

Raleigh was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2013-14 term and he will assume the presidency in July 2014.

Huntsville attorney Richard J.R. Raleigh, Jr. is a shareholder in Wilmer & Lee PA. Rich was born in Griffin, Georgia and graduated from the University of Alabama in 1992 and the University of Alabama School of Law in 1995.

He is admitted to practice in Tennessee and Alabama, and focuses his practice on litigation, including employment litigation, government contract litigation, trade secret litigation and general corporate litigation. He is also the managing shareholder of Wilmer & Lee, which has offices in Huntsville, Decatur, Athens and Birmingham, and represents businesses, governmental entities and individuals throughout Alabama and the Southeast.

Rich is currently serving in his ninth year (third consecutive term) as a bar commissioner for the 23rd Judicial Circuit.

After graduating from law school, Rich, who was a Distinguished Military Graduate and U.S. Army ROTC Scholarship Graduate at the University of Alabama, entered the United States Army Judge Advocate General's Corps. He served in Germany, Bosnia-Herzegovina and Macedonia. While deployed, Rich acted as an operational

law attorney, advising commanders on the law of war, rules of engagement and requirements related to the Geneva Convention and Hague Conventions. In Bad Kreuznach, Germany, with the 1st Armored Division, he served as a trial counsel (criminal prosecutor) and trial defense counsel (criminal defense attorney).

After serving his active duty military commitment, Rich returned to Alabama in 2000, to join Wilmer & Lee. His service to the Alabama State Bar began soon after. Then, in 2004, the last Alabama State Bar President from north Alabama, Dag Rowe, also a shareholder at Wilmer & Lee, encouraged Rich to run for bar commissioner. Since then, in addition to serving on the Board of Bar Commissioners, Rich has served on the state bar's Disciplinary Panels, and he served on the Executive Council during the presidential terms of Mark White and Alyce Manley Spruell. Rich is a long-standing member of the Mandatory Continuing Legal Education Commission, and presently serves on the ASB Standing Personnel and Bar Operations Oversight Committee, the Pro Bono and Public Service Committee and the VLP Long-Range Planning Task

Force. Previously, Rich worked on the Pro Bono Celebration Week Task Force, the Huntsville-Madison County Pro Bono Task Force, the ADR Committee, the Humor and History Task Force, the Public Interest Task Force, and various other state bar committees.

Rich, a graduate of the inaugural class of the Alabama State Bar Leadership Forum, serves on the Executive Committee of the Leadership Forum Section, has been on the Selection Committee for the last five Leadership Forum classes and helped organize the first Leadership Forum Alumni Retreat, which featured one of Rich's former bosses, Gen. George W. Casey, Jr., as the keynote speaker.

Rich is a Fellow in the Alabama Law Foundation, and he is dedicated to access to justice and pro bono issues. He is the immediate past president of the Board of Directors of the Madison County Volunteer Lawyers Program. In 2010, Rich received the President's Award for Meritorious Service to the Alabama State Bar for his work with the Volunteer Lawyers Program.

Governor Robert J. Bentley appointed Rich to the Council of the Alabama Law Institute in June 2011, and he is working on the ALI Restrictive Covenants in Contracts Committee.

Rich also serves his local community. He has worked with the Huntsville-Madison County Bar Association on numerous committees. He is a member of the Downtown Rotary Club. He served for seven years on the Board of Directors of the National Children's Advocacy Center, concluding his service as its president. He has also served as president of the Downtown Forty-Seven, on the Advisory Board of the Sparkman Center Boys and Girls Club and on the Board of the Old Town Historic District Association.

Rich attends the Huntsville First United Methodist Church with his wife of 17 years, the former Shannon Leigh Ellinghausen, of Bibb County, Alabama, who is an outreach coordinator in NASA's Space Launch System Program Office. Rich and Shannon have five-year-old twins, Sarah Medders and Tripp, who have attended every Alabama State Bar Annual Meeting since their birth in 2008. | [AL](#)



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thousands of lawyers who are members of The Alabama State Bar, who strive daily to serve the public and the legal profession.

Here are stories of the legions of lawyers and judges who successfully faced the challenges of their profession and created a powerful community of shared interests and commitments. Price: \$40 per copy. To order, go to: <http://www.alabar.org/historybook>



Keith B. Norman

keith.norman@alabar.org



Dan Meador and wife Alice enjoyed visiting with Greg and Alice Cusimano at last year's annual meeting.

Dan Meador: A Lawyer, Gentleman and Scholar

Our bar and the legal profession lost one of its giants with the death of Dan Meador in February. (See memorial by Fournier J. "Boots" Gale at <http://www.alabar.org/publications/al-lawyer-full/march2013/index.html>.) Dan's death brings to memory the first time I met him. He was visiting the Alabama State Bar not long after I started to work here. That was more than two decades ago.

The mild-mannered Greenville native was then a professor at the University of Virginia Law School and one of the country's leading constitutional scholars. A graduate of the University of Alabama Law School, Dan clerked for Justice Hugo Black and practiced law in Birmingham before he embarked on an academic career at the University of Virginia. He would later return to Alabama during the turbulent period of the '60s to serve for four years as the dean of the law school.

My first acquaintance with Dan actually occurred 15 years before we met. In the fall of 1978, our law school class was the first to begin and finish in the new

Law Center on the Alabama campus.

The new building was first conceived by Dan, who engaged noted architect Edward Durrell Stone to design the facility. Although the building was started and finished a number of years following his deanship (1966-1970), it was, nevertheless, symbolic of the many reforms Dan instituted at the law school that long outlived his tenure there.

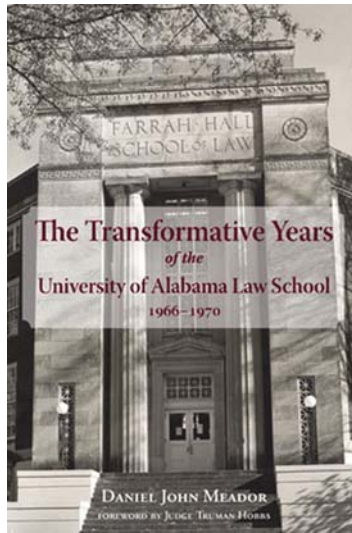
His vision was to transform the law school into an institution of national excellence. The academic programs were reformed, faculty recruitment was enhanced, the law school library was enlarged and the admissions and enrollment process was restructured. To help achieve his far-ranging goals for the school, Dan increased private funding by broadening the contributing base of the law school foundation.

Dan's ambitious plans were not popular with some inside as well as outside the university and ultimately led to his resignation. He returned to the University of Virginia as the James Monroe Professor of Law, one of the

three original chairs at the law school, and held the position until he was named the James Monroe Professor Emeritus upon his retirement. As a direct beneficiary of the reforms which were begun during his years as dean of Alabama's law school, many of which are still evident today, I am especially grateful for Dan's vision and leadership.

In this regard, I recommend Dan's book, *The Transformative Years of the University of Alabama Law School: 1966-1970*, as an excellent recap of that important era in the history of the law school. (See book review by Robert L. Potts at <http://www.alabar.org/publications/al-lawyer-full/nov2012/index.html>.)


Dan attended last summer's annual state bar meeting in Sandestin. His presentation, "Restructuring the United States Supreme Court," was well received and very timely. He frequently traveled to Alabama and was in Montgomery



last October to speak at the Bench and Bar Historical Society Annual Meeting. His remarks focused on Alabama's early capital at Cahaba which is the subject of his last scholarly work, *At Cahaba: From Civil War to the Great Depression*. This was a topic in which Dan was very interested. In fact, he was the founding president of a non-profit corporation created to seek and provide private financial support for the state historic park at Old Cahaba.

Dan's numerous accomplishments are recorded and well known so I will not catalogue them here. He was proud to be a member of the bar of this state, a distinction he held for more than 60 years. Dan will be

deeply missed in Charlottesville and Alabama but he leaves behind an academic, scholastic and literary legacy that will shine brightly for future generations of law students and lawyers alike. | AL




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Local Bar Award of Achievement

**Position Available:
Clerk of the Supreme Court
of Alabama**

**2013 Bankruptcy at the
Beach**

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented July 20 during the Alabama State Bar's 2013 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 bar associations must complete and submit an award application by **June 1, 2013**. Applications may be downloaded from www.alabar.org or by contacting Christina Butler at (334) 517-2166 or christina.butler@alabar.org.

Clerk of the Supreme Court of Alabama

The Supreme Court of Alabama is seeking applications from qualified candidates for the position of clerk of the court. The clerk is appointed by and serves the justices of the court. A detailed job description is available in the office of the supreme court clerk.

Minimum qualifications for the position include completion of a Juris Doctorate; 10 years' experience in the practice of law in the public or private sector, preferably including some appellate practice or service for an appellate court; and membership in the Alabama State Bar. Salary range is \$92,992.80–\$141,784.80, depending upon experience.

All applicants should send a cover letter and résumé, postmarked no later than June 15, 2013, to: Supreme Court of Alabama, c/o Office of the Chief Justice, Attn: Employment Applications, 300 Dexter Avenue, Montgomery, AL 36104-3741.

2013 Bankruptcy At The Beach

The Bankruptcy & Commercial Law Section of the Alabama State Bar invites you to attend the 26th Annual "Bankruptcy at the Beach" seminar. This family-friendly event is geared toward providing quality continuing legal education in consumer and commercial bankruptcy law, mixed with time for socializing with our colleagues and enjoying the great setting of the Sandestin Golf and Beach Resort.

This year's program includes some returning and some new faces. (See the agenda and biographies for our keynote speakers.) We are very excited about our lineup this year and hope you can join us at the beach for the seminar!

This year's "title sponsors" have generously agreed to commit to our seminar monetarily over and above the normal sponsorship amounts we usually ask and include: **Balch & Bingham LLP, Brock & Stout LLC, Burr & Forman LLP, CFEFA, and Rosen Harwood.** In addition, **Maynard Cooper & Gale PC** has made it possible to offer you Wi-Fi this year. This is especially important as all our materials will be electronic. *We will not offer printed materials.* We are also thankful to **Sirote & Permutt PC** who is this year's golf tournament sponsor.

Make your reservations now at the Hilton, as the cut-off date for getting our special block rate is May 20.

We welcome everyone to join the seminar and look forward to seeing you at the beach! | [AL](#)

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Client Security Fund

After 30 Years, Time to Evaluate and Update

By Michael E. Ballard,
Chair, ASB Client Security Fund Committee

Are you an attorney who flips to the back of *The Alabama Lawyer* each issue to see who was disciplined, suspended or disbarred?

If you answered yes, you are not alone. The actions taken against an attorney's license and the facts behind them are often sensational and widely discussed in the legal community.¹

Next question: When you read about these attorneys, do you ever wonder what happened to their clients? What happens to the clients of an attorney who unexpectedly passes away? After all, not all attorneys have partners or a firm to carry on the client's work. While such events involve only a small percentage of otherwise hard-working, dedicated and ethical practitioners, the damage inflicted on the clients of that few reflect negatively on the profession as a whole.

A limited resource

Since approximately 1983, the Alabama State Bar has been working on such matters and putting into place a revised and renewed Client Security Fund Committee. For the last 30 years, the Client Security Fund Committee has been there to help

reimburse clients who have been victimized by dishonest attorneys or whose attorney unexpectedly passed away. However, the fund is a limited resource for clients who have been victims of theft or defalcation, including the taking of the fee without rendering any service, and only provides some compensation when no other practical remedy is available. For the years 1983 through 2011, the work of the committee was supported solely by a \$100 contribution from each attorney then practicing and every new attorney.

Experienced attorneys are not the exception

When the committee first started reviewing applications for reimbursement, there was a general assumption by committee members that they would be seeing a high percentage of complaints against relatively new attorneys. This was one of the original reasons contributions were limited to the first four years of practice of all new attorneys. However, after almost 30 years, the committee has found that this is not necessarily the case. Instead, it was found that the vast majority of claims are filed against attorneys with many years of

experience. These attorneys typically have substance abuse problems, domestic problems or mental health issues. Increasingly, the committee is asked to reimburse clients after their attorney has suddenly died without completing the representation. Often, the attorney failed to place the client's unearned fee into a secure trust account as required by the Alabama State Bar. As a result, the client has not only lost his or her attorney, they have also lost the only money they had to pay for an attorney.

In 2011 alone, 179 claims were investigated and resolved. In disposing of the claims, the committee approved full or partial reimbursement for 91 clients and 11 trustees who were appointed to oversee a suspended or deceased attorney's practice. In total, some \$239,300 was disbursed to clients and trustees.

In calendar year 2012, the committee reviewed the investigations and determined 164 claims totaling \$1,096,209.07. Approved for reimbursement were 91 clients and 10 trustees appointed to oversee a suspended or deceased attorney's practice, totaling approximately \$189,884.

Limited resources vs. pending claims

Circumstances behind the claims varied from outright theft of settlement proceeds to failing to provide services for which the client paid. Of the remaining 77 claims, a few were tabled for more information and some were found to be without merit. In other claims, the committee found that the defalcation or loss was not reimbursable and a few were settled by other means (generally the attorneys or their families paying them back). Finally, some claims were reduced or denied based on the actual work performed by the attorney while others fell outside the scope of the rules for reimbursement.

As in years past, the Client Security Fund was there to reimburse these clients for some of their monetary losses. However, the committee has always worked with very limited resources and has only had the ability to recompense clients up to \$10,000 per claim and a maximum of \$20,000 per attorney. For example, if four clients each filed a \$10,000 claim against the same attorney, the combined reimbursement for those four clients could not exceed \$20,000. In many cases, this resulted in clients receiving pennies on the dollar.

At this time (January 18, 2013), the Client Security Fund Committee has before it 325 claims either being investigated by the Office of General Counsel or the committee or pending for committee action. The total amount of the reimbursement sought by these claims is a staggering \$5,122,390.76. The amount of pending claims has been growing for many years.

A greater ability to assist claimants

Although the committee does recover some money by judicial means, some by recruitment and some by restitution from the attorney (in most instances, a suspended or disbarred attorney must repay the Client Security Fund claims prior to being reinstated to the practice of law), the vast majority of funds used to compensate clients who have been injured come from the membership assessment. As a result, the committee undertook a several-year process, involving a task force study and committee study, to improve the fund and its ability to help clients. These studies resulted in the reworking of the Client Security Fund rules for the first time in almost 30 years. The result was an increase in required contributions to the fund from four annual payments of \$25 each to an annual \$25 contribution by all members.

The \$25 annual assessment is still low compared to many other states, but it will finally allow the committee to increase the amount of loss that can be reimbursed to the claimant. *The decision to require a \$25 annual assessment fee from all bar members was not taken lightly.* Rather, it was a result of many years of work by the Client Security Fund Committee and two separate task forces appointed several years apart by the leadership of the bar. The changes were supported by three separate Alabama State Bar presidents and the board of bar commissioners.

After reviewing the work and recommendations of the committee and the task forces, the president of the bar and the board of bar commissioners approved an increase in funding for the committee by authorizing the annual \$25 assessment of every attorney practicing in the state, including those admitted pro hac vice. In addition, the reimbursable amount for individual claimants and the total reimbursable amount for each attorney were increased. An individual claimant is now eligible to be reimbursed up to \$70,000 for their losses, while the total reimbursement that can be paid on behalf of an individual attorney is capped at \$200,000. With the increase in funding and reimbursable amounts, the Client Security Fund committee will have a greater ability to assist claimants who have suffered losses through no fault of their own.

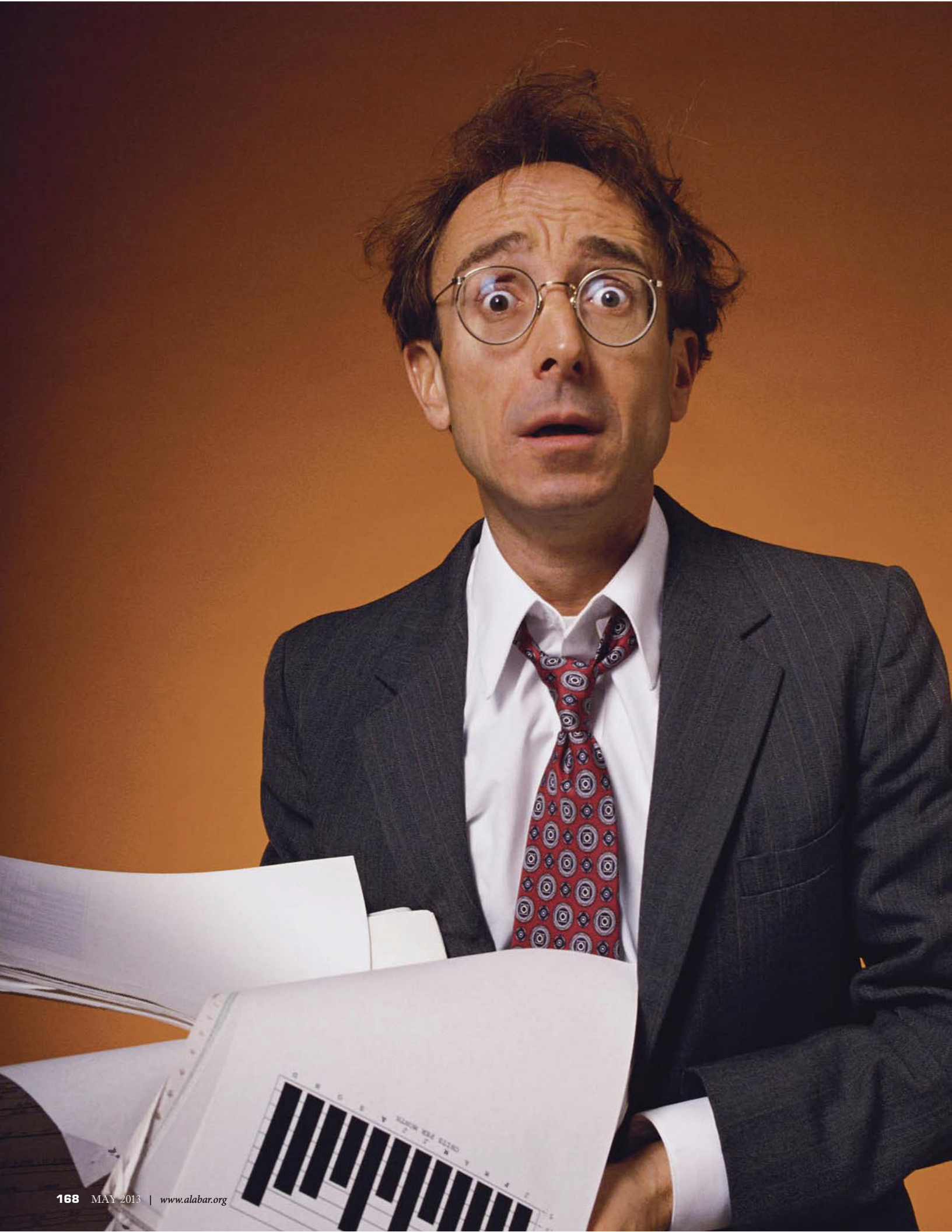
Other ways to help clients

As members of the legal community, you are also encouraged to assist those clients who may have been wronged by another member of the profession or whose attorney has died. There are several steps you can take to help these clients including the following:

- Assisting the client in recovering the client's file and determining what services were rendered, if any;
- Determining if the client is entitled to compensation by the Client Security Fund, filing a malpractice claim or filing a creditor's claim in an estate;
- Encouraging the client to file a police report and/or a claim with the district attorney's office in your jurisdiction if the client's attorney has stolen or misappropriated client funds;
- Assisting the client in completing the Client Security Fund application for reimbursement in a thorough and comprehensible manner supported by relevant documentation;
- Providing representation to the client, either pro bono or at a reduced rate; and/or
- Referring the client to a pro bono legal aid provider in your area.

It is important to remember that the Client Security Fund is a fund of last resort and clients may apply for reimbursement only after exhausting all other remedies. For more information about the Client Security Fund and how to refer a client who may qualify for reimbursement, see the fund application form at www.alabar.org. | [AL](#)

This article is prepared in large part with assistance from Lisa McGrane, client protection manager, State Bar of Nevada, and adapted to our state. My special thanks go to Ms. McGrane and other members of the American Bar Association Client Protection Committee for their input and permission to borrow liberally from their previous writings.



Omphaloskepsis¹ of the Federal Appellate Rules Committee:

Rule 32(a)(7) of the *Federal Rules of Appellate Procedure*

By David A. Bagwell

Say you have an appeal in the United States Court of Appeals,

and you are beginning your brief. Say you are a regular lawyer, who has a case occasionally in the Federal Court of Appeals, but you don't just, like, *live* there or anything. So you never can really remember, from case to case, exactly what the rules are, but since you are a good lawyer and at least *try* to do right, you sit down and read the most nearly pertinent rules every time you have an appeal. Therefore, you just can't quite remember exactly how many pages your brief can be, at the outer limit. Yeah, sure, you remember Judge Godbold's famous "twenty pages and twenty minutes"² dictum, but, heck, 20 pages is nothing to a lawyer, so, "like a fiend with his dope, or a drunkard with his wine" as Johnny Cash would have sung, you look up the page limitation *despite* Judge Godbold's sound advice.

The answer is easy, right? Appellate Rule 32(a)(7)(A) says that "[a] principal brief may not exceed 30 pages . . . unless it complies with Rule[s] 32(a)(7)(B) and (C)."

But, since you are not a *total* idiot, you see that your opponent's [appellant's] brief is numbered at 57 pages in Arabic numerals, even after eating up some number of pages numbered with lower-case Roman numerals³, and so you decide that there must be some ancient Celtic talismanic power in rules 32(a)(7)(B) and (C), some kind of "Mojo Hand" or something, which can magically transmogrify the limit of 30 pages into double that number. How can that possibly be the case? Why would the rules *do that*? But, if they *do* "do that," then you want it.

So, you wade into Rule 32(a)(7). In passing you note that the rule could not possibly have been actually *written* by any lawyer or judge, and probably never even actually *read* by any judge, but was instead written by a typographer. You note in passing that Rule 32(a)(5)(A) says that "[a] proportionally [-] spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally [-] spaced face must be 14-point or larger."

So you ask your secretary—if you are lucky enough to be in a firm which still allows you to have secretaries—"Is WordPerfect® 'proportionally-spaced' or

not, and what the hell does that mean, anyway?”, to which he replies, “I guess so; how should I know?”. You have no idea whether your word-processing software is “proportionately [-] spaced” or not, but you daringly just make a working assumption that it is, since the rule does not define the term, and your computer does not tell you, anywhere that you know to look.

Which brings you to the problem in Rule 32(a)(5)(A) that you “must include serifs.” Is this “serifs” thing the singular form of the Hebraic “Seraphim,” one of the nine orders of angels⁴, and thus an errant violation of the Establishment Clause of the First Amendment? Is this angels dancing on a pinhead? Or is this instead some Arabic version of “Sherif” or something, some citation of hated foreign law that the Supreme Court has gotten in trouble for lately, even though you know as an admiralty lawyer that Justice Story⁵ and all those old Marble Statue Guys always quoted foreign stuff way back then?

Putting on your jeweler’s *loup* for fine work, you look up the word “serif” in the condensed full *Oxford English Dictionary* on your top shelf, the sole source authority for all words in the English language, and you find that the origin of the word is obscure, but it means all those fancy decorative swirls at the ends of letters, and stuff, and you vaguely remember seeing the words “sans serif” somewhere in the list of thousands of fonts which you occasionally scroll through on your laptop, just to entertain your granddaughter while her supper is heating. So, whatever all this seraphim stuff is, just remember that serifs are required to be used, except in captions, and don’t you forget it, either. Upon *peine forte et dure*.

If you only needed to file fewer appellate briefs and so might have had time to read the complete *Wall Street Journal* every day like your rich lazy senior partners always do, then you might have remembered that Apple’s Steve Jobs told the graduating seniors at Stanford in 2005 that when he dropped out of college and started auditing courses, he audited a calligraphy class and learned “about serif and *sans serif* typefaces,” and that if he had not, “personal computers might not have the wonderful

...under
**Rule 32(a)(7)
(B)(i) a brief is
ok, no matter
how many
pages it has,
if “it contains
no more than
14,000 words.”**

typography that they do”⁶. But you aren’t a rich lazy senior partner and neither are you Steve Jobs or even a college dropout, so you did not know about serif and *sans serif* typefaces until now.

Once the Seraphim have plucked you out of the consuming fire of typography in Rule 32(a)(5)(A) and you are moving on to the Sanctum Sanctorum of Rule[s] 32(a)(7)(B) and (C), you are in over your head, fast.

First, you are astounded to see that under Rule 32(a)(7)(B)(i) a brief is ok, no matter how many pages it has, if “it contains no more than 14,000 words.” Take that, Judge Godbold!

OK, easy now; what does the Rules Committee consider “a word?” Is the article “a” considered “a word” by the *Federal Rules of Appellate Procedure*? You will search in vain for an answer, for the Rules Committee neither answered the question, nor referred you to any outside source authority or industry standard of the typography industry, to which the Appellate Rules Committee must have sold its soul in the Faustian bargain. You are on your own.

But now you see that you cannot invoke the talismanic brief-lengthening Rule 32(a)(7)(A) unless you comply with rules 32(a)(7)(B) and (C), and you see that in order to comply with Rule 32(a)(7)(A)

you must, as required by Rule 32(a)(7)(C)(i), submit a certificate “that the brief complies with the type volume limitation” of Rule 32(a)(7)(B)⁷.

You are relieved to note that under Rule 32(a)(7)(C)(i) even though you the lawyer must personally certify “the number of words in the brief,” likely upon penalty of perjury or “*peine forte et dure*” or something, “[t]he person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief.”

The first part of that process is “simple” [sic] and does not require the use of a word processor. You have to remember that some words in your brief are “words” which must be counted, but some words are not “words,” and need not be counted. It’s kind of like counting or not counting slaves and “Indians not taxed” under Article I, Section 2 of the Constitution of the United States, or asking the Catholic priest whether the Saturday night wedding with Mass “counts” for Sunday Mass or not [a priest’s favorite question]: some words *count*, and some don’t. So you carefully note which words count and which ones don’t, noting *en passant* that Rule 32(a)(7)(B)(iii) helpfully provides that “[h]eadings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.” There, that wraps that up neatly.

But how the heck do you get your word processor to tell you how many words are in your brief? What you do is, you come to work at about 4:00 a.m. and you turn on your computer and make a pot of coffee and click on the little bitty icon of your word processor software, and as it turns slowly on, you just stare at your word processor for a little while, to make it feel uncomfortable. It does not feel uncomfortable. It never does, even when it balks like a stubborn mule in a hot Alabama cornfield.

So you click on “help!” and in the little bitty “help” box, you type in something like “how the hell can you count words?”, or something, and after you ask the ques-

tion again and again, being more polite each time, you learn something like “click on ‘file,’ then ‘properties,’ then ‘information’” and you think “damn good thing I was a history major!”

First, you remember to select carefully the part of the words in your brief which “count,” since doing that wrong could cut you back 10 or more pages, half of Judge Godbold’s 20 pages right there. So, you “select the text,” hoping you don’t accidentally delete the whole brief in the process.

Then, you do it. You “click on ‘file,’ then ‘properties,’ then ‘information,’” just like ol’ “Help!” helpfully told you. Suddenly, before your very eyes, your machine counts the Indians untaxed in Georgia, and it tells you that your brief has 11,460 words. You look again in Rule 32(a)(7)(B)(i) and you see that the measure is a maximum of 14,000 words, and you yell “Hallelujah!,” startling the pregnant associate down the hall who just got to work early, trying to get a pre-natal head start on her 3,000 billed hours per annum required to be partner, so when she gets old *she* can read the *Wall Street Journal* too.

So now you know that you may safely “certify” on the certification form helpfully provided as Form 6 in the appendix of forms that you have less than 14,000 words in your brief, even though you know that you “really” [sic] have more than that, and more than 30 pages.

“At the end of the day,” as District of Columbia lawyers started saying about a decade or two ago [before they learned to say “kick the can down the road”], it does not really matter how many words you actually have in your brief; it only matters—not trying to be Clintonesque here, now—it only matters how you define the word “word.” “In the beginning,” as the Apostle John wrote with his Greeks in mind, “was The Word.” “And,” as he said, “the Word was God.” Same deal here, with Rule 32(a)(7). | AL

Endnotes

1. The Greek word for “be still” [from “Be Still and Know That I am God” in Psalm 46:10] is something which is similar to—and leads to—the word “Hezychasts,” which was a group of Byzantine or Greek Orthodox monks at Mount Athos, the “Holy Mountain”

of Greek Orthodox/Byzantines, in Greece beginning in the 5th century A.D. [or, the more politically-correct “C.E.” as they would have it nowadays], where the Hezychasts maintained one of many monasteries kept there by various religious orders. The Hezychasts “contemplated their navels” [the word for “navel” in Greek being “Omphalos,” the large stone at Delphi having been viewed as the Omphalos of the universe], believing that if they contemplated their navels fully enough, they would be lit by the light which suffused Christ at The Transfiguration. Whilst contemplating their navels, they wrote “omphaloskepses”: “essays written upon contemplation of the navel.” Same deal here, is my point, with the Federal Appellate Rules Committee.

2. Judge Godbold’s law review piece, “Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal,” 39 SW.L.J. 801 (1976) (condensed and reprinted in 15 *Litigation* 3, spring 1989), is said to be the most widely reprinted law review piece written in the United States and is regularly reprinted as a teaching and reference tool in law schools, bar associations, CLE programs and law firms. I am glad that it has surpassed “Perpetuities in a Nutshell” by W. Barton Leach.
3. Uh, oh; it’s obvious that it is also time for a refresher course on “format, page, numbering, value, set value” on your machine.
4. Of course you remember old St. Dionysius the Aeropagite, who wrote down what his teacher the Apostle Paul told him of what he learned during his vision of the third heaven (II Cor. 12:2), that the nine orders of the angels are divided into three hierarchies or “Trinal Trimplicities,” each of which is divided into three orders: the highest, the intermediate, the lower; that the first hierarchy, the highest and closest to the Most Holy Trinity, consists of the SERAPHIM, CHERUBIM and THRONES; and finally that the God-loving six-winged SERAPHIM stand closer than all before their Creator and Maker, as the prophet Isaiah saw, saying: “And the seraphim stood around Him, each having six wings” (Isaiah 6:2). They are fire-like since they stand before That One of Whom it is written: “For our God is a consuming fire.” (Heb 12:29); “His throne was a flame of fire” (Dan 7:9); “the appearance of the Lord was like a blazing fire” (Ex 24:17). Standing before

such glory, the seraphim are fire-like, as it said: “Who maketh his angels spirits; his ministers a flaming fire” (Ps 103:4). They are aflame with love for God and kindle others to such love, as is shown by their very name, for “seraphim” in the Hebrew language means: “flaming.” But, most of you knew that. Is this what the rule connotes?

5. But, he was only 35 when he went on the Supreme Court; with a little aging, like a fine bourbon or Chambertin, he might have learnt better.
6. *Wall Street Journal*, February 8, 2011, p. A-15.
7. Oh, you remember that; it’s the one that says you cannot have more than 14,000 words, or if it “uses a mono-spaced face and contains no more than 1,300 lines of text,” you are also ok.

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EBITDA

The Taxation of Earnouts in Taxable Acquisitions

By Jackson M. Payne

A buyer and seller frequently differ over the value of a business whose assets are to be sold or whose stock is to be sold and therefore the selling price to be paid for those assets or that stock. To close the gap between what the buyer is willing to pay and what the seller is willing to accept, and to consummate the sales transaction, the parties often agree that a portion of the selling price will be calculated and paid as contingent selling price payments or earnouts (the contingent payments).

For example, the parties may agree to base the earnout portion of the selling price upon the buyer's EBITDA from the acquired business (meaning its earnings from operations before interest, taxes, depreciation and amortization, calculated as if the acquired business were being operated as a separate and independent business during an agreed period). Of course, other financial hurdles could be used to calculate the earnout payment such as basing the calculation and payment of the earnout on the net income or annual revenues of the acquired business in excess of agreed target amounts. And, earnouts are frequently capped in amount and payment period.

The Installment Method

If a disposition of property (including a sale of a business with a contingent selling price) qualifies as an installment sale, the installment method¹ permits a seller to defer recognition of gain on the disposition. Thus, under the installment method, gain on an installment sale is spread over the period during which the installment payments are received, rather than being taxed in the year of sale.

An installment sale is defined as a disposition of property in which one or more payments are to be received after the close of the taxable year in which the disposition occurs.² However, there are a number of statutory restrictions that limit the use of the installment method.³ And, there are other rules that reduce or eliminate the benefit of the tax deferral in certain transactions. These include an interest charge imposed if the face amount of certain installment notes arising during and outstanding at the end of a taxable year exceed \$5.0 million.⁴

The installment method permits gain from eligible installment sales to be



Reporting of contingent sales under the installment method depends on whether there is a stated maximum selling price, a fixed period for contingent payment or neither.

reported as the seller receives installment payments.⁵ Each payment received is treated in part as (i) a nontaxable recovery of a portion of the seller's adjusted basis in the property; (ii) a taxable realization of a portion of the seller's gain; and (iii) interest. Thus, the seller is taxed only on the parts of the payment that represent gain on the sale and interest income. The amount of each payment that must be reported as gain is determined by multiplying the total amount of payments received during the year by the gross profit percentage.⁶ The gross profit percentage is equal to the ratio of the seller's gross profit⁷ to the total contract price.⁸

Example (1): A sells Blackacre in which A has an adjusted basis of \$50,000. Blackacre is subject to \$25,000 of qualified indebtedness. The purchaser agrees to a selling price of \$325,000, payable as follows:

Cash Down Payment	\$100,000
Installment Note (payable in 10 equal annual installments)	200,000
Assumption of qualified indebtedness	25,000
Total selling price	\$325,000

The seller's gross profit is \$275,000 (\$325,000 – \$50,000); the total contract price is \$300,000 (\$325,000 – \$25,000); and the gross profit percentage is 92 percent (\$275,000/\$300,000). Therefore, 92 percent of each installment shall be reportable as gain attributable to the sale and 8 percent thereof is nontaxable recovery of basis.

A seller must report interest included in each installment payment separately as ordinary income.⁹ If the installment sale obligation does not contemplate an interest payment or the amount of interest is inadequate, the seller may be required to treat a portion of each installment payment as imputed interest.¹⁰

The installment method can only be used to report gains. If an installment sale results in a loss, the installment method cannot be used. If the loss is a deductible loss, it is deductible only in the year in which the sale occurs.¹¹

Contingent Payment Transactions

Reg. Section 15a.453-1(c) governs the application of the installment method to contingent payment sales, such as earnouts. Reporting of contingent sales under the installment method depends on whether there is a stated maximum selling price, a fixed period for contingent payment or neither.

If the contingent payment is subject to a cap, then, for purposes of allocating basis among payments, the total capped selling

price is assumed to be the selling price.¹² That is, it is assumed that all contingencies will be resolved to maximize the selling price and accelerate payments to their earliest possible date. Because this method defers basis recovery and accelerates gain, it may not be in a seller's interest, from a tax viewpoint, to negotiate a cap much above the amount of payments it is likely to receive. If later events reduce the maximum price, it can be recomputed.¹³ If this recomputation results in a loss, the seller reports the loss on the sale at the time the loss becomes final.¹⁴

Example (2): A sells all of the stock of X corporation to B for \$100,000 payable at closing plus an amount equal to 5 percent of the net profits of X for each of the next nine years, the contingent payments to be made annually together with adequate stated interest. The agreement provides that the

maximum amount A may receive, inclusive of the \$100,000 down payment but exclusive of interest, shall be \$2,000,000. A's basis in the stock of X, inclusive of selling expenses, is \$200,000. Selling price and contract price are considered to be \$2,000,000. Gross profit is \$1,800,000, and the gross profit ratio is 90 percent (\$1,800,000/\$2,000,000). Accordingly, of the \$100,000 received by A in the year of sale, \$90,000 is reportable as gain attributable to the sale and \$10,000 is nontaxable recovery of basis.¹⁵

If no maximum selling price can be determined, but the contingent payment is limited to a specific time period, basis is generally recovered in "equal annual increments" during the time contingent payments can be received.¹⁶ If a payment received in any one year is less than the basis allocated for that year, there is no loss allowed, and, instead, the amount of unrecovered basis is carried forward to the following year.¹⁷

Example (3): A sells Blackacre to B for 10 percent of Blackacre's gross yield for each of the next five years. A's basis in Blackacre is \$5 million. Because the sales price is indefinite and the maximum selling price is not ascertainable from the terms of the contract, basis is recovered ratably over the period during which payment may be received under the contract. Thus, assuming A receives the payments (exclusive of interest) listed in the following table, A will report the following:¹⁸

Year	Payment	Basis Recovered	Gain Attributable to the Sale
1	\$1,300,000	\$1,000,000	\$300,000
2	1,500,000	1,000,000	500,000
3	1,400,000	1,000,000	400,000
4	1,800,000	1,000,000	800,000
5	2,100,000	1,000,000	1,100,000

Example (4): The facts are the same as in example (3), except that the payment in year one is only \$900,000. Since the installment payment is less than the amount of basis allocated to that year, the unrecovered basis of \$100,000 is carried forward to year two.¹⁹

Year	Payment	Basis Recovered	Gain Attributable to the Sale
1	\$900,000	\$900,000
2	1,500,000	1,100,000	400,000
3	1,400,000	1,000,000	400,000
4	1,800,000	1,000,000	800,000
5	2,100,000	1,000,000	1,100,000

If contingent payments are not limited by a fixed period or maximum selling price, and if it has been determined that a sale has occurred, basis generally is recovered ratably over 15 years.²⁰ No loss is permitted until the transaction ultimately closes. Basis in excess of the amount of a payment in any given year is carried forward to the next year, and to future years if necessary, until it is applied against proceeds or the future payment obligation is determined to be worthless.²¹ The seller may try to convince the IRS that the straight-line allocation inappropriately defers recovery of the seller's basis, although there is the risk that the IRS might lengthen the recovery period as well. The test is whether the straight-line allocation "would substantially or inappropriately defer or accelerate" recovery.

Example (5): A sells Blackacre to B for \$100,000 in cash at closing and 10 percent of Blackacre's rental income. There is no stated maximum selling price and no fixed payment period. A's basis in Blackacre exclusive of selling expenses is \$150,000. Thus, basis is recovered in equal increments over a 15-year period. The annual nontaxable basis recovery is \$10,000 ($\$150,000 \div 15$).

Deferral Charge

Installment sales with deferred gain amounts in excess of \$5.0 million are subject to an interest-type deferral charge at the underpayment rate (federal short-term rate plus three percentage points).²² Thus, sellers in large transactions usually obtain little or no advantage from the installment method and therefore elect out.

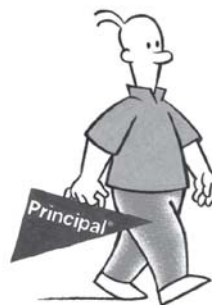
In an installment sale involving contingent purchase price, the seller may have to pay a deferral charge on gain from purchase price that is never received. In Technical Advice Memorandum ("TAM")²³ 9853002 (undated), the seller sold business assets to a buyer for a contingent note based on cash flow from the business. In reporting its deferred gain under §453A, the seller estimated that it would receive the maximum earnout and paid §453A deferral charges based on this amount. Later, market conditions deteriorated, and the seller received much less than the maximum earnout. The seller amended its return for the year of the sale to claim a refund of the deferral charge. The IRS denied the refund, concluding that the seller may not retroactively adjust its deferral charge.

The result in TAM 9853002 seems harsh, but, as the TAM points out, no more so than if the seller elects out of the installment

method and, in a closed transaction, includes the contingent payment obligation in its amount realized at closing. There, the seller would pay its tax based on the fair market value of the contingent payment obligation at closing, would recognize a loss later and would not be entitled to interest on the excess tax paid at closing.

Suppose the seller concludes that the fair market value of the contingent obligation is less than its maximum amount (i.e., seller expects to receive less than the maximum amount). In a non-installment sale, the seller's amount realized is determined with reference to the fair market value of the obligation, not its maximum amount. In an installment sale, however, it is not clear whether the calculation of gain contemplates fair market value or maximum amount. TAM 9853002 is inconclusive because in that case fair market value was equal to the maximum amount.

Both fairness and the desire to treat taxpayers in equivalent situations similarly argue for the use of fair market value; if the deferral charge is based on the fair market value of the contingent obligation, there is parity between installment and non-installment situations. But if the deferral charge were based on the maximum amount of the contingent obligation, installment treatment would be harsher than non-installment treatment. Nevertheless, it is unclear whether and how the §453A interest charge applies to contingent payment obligations under the installment method.



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Imputed Interest

Installment sales generally provide that each deferred payment on the sale will include interest or that there will be an interest payment in addition to the principal payment. If an installment sale does not provide for interest, then a part of each payment is recharacterized as interest.²⁴ The amount treated as interest is called “imputed interest” or “unstated interest.” If the imputed interest rules apply, both the seller and the buyer must treat a part of the installment sales price as interest. The unstated interest amount is includible in the seller’s ordinary income and deductible by the buyer.

The imputed interest rules of §§1274 and 483 relate to the measurement of interest and principal for tax purposes in a sale or exchange of property (other than publicly traded property) involving deferred payments. For transactions subject to the imputed interest rules, interest is imputed to the transaction if a minimum amount of interest is not stated. If a transaction provides for at least the minimum amount of interest, it contains “adequate stated interest.” When interest is imputed to a transaction, a portion of the stated principal amount of the debt instrument is recharacterized as interest for tax purposes. The imputed interest rules do not require an increase in the total amount of payments agreed to by the parties to a transaction, but merely recharacterize as interest, for federal tax purposes, a portion of the payments denominated as principal by the parties. In the case of transactions to which §1274 applied, imputed interest is treated as original issue discount and is accounted for under those rules. In the case of transactions subject to §483, imputed interest (and any stated interest) is accounted for under §446.

Section 1274 applies to any debt instrument issued in exchange for nonpublicly traded property where one or more of the payments under the debt instrument is due more than six months after the date of the sale or exchange.²⁵ Section 483 applies to deferred payment sales contracts to which §1274 does not apply. Contingent earnouts are generally not treated as debt instruments and, therefore, are subject to §483.

To prevent the imputation of interest, a debt instrument must provide for adequate stated interest. In general, adequate stated interest is provided if the obligation calls for interest over the entire term at a rate no lower than the applicable federal rate (AFR).²⁶ The AFR is determined and published by the IRS each month.²⁷

Electing out of the Installment Method

An installment sale is to be reported on the installment method unless the seller elects out. A seller who elects not to report an installment sale on the installment method must (i) determine the fair market value of the installment obligation and (ii) recognize gain on the sale in accordance with the seller’s method of accounting.

With respect to a contingent payment obligation, the fair market value of that obligation shall be determined by disregarding any restrictions on transfer imposed by agreement or under local

law and may be ascertained from, and in no event shall be considered to be less than, the fair market value of the property sold (less the amount of any other consideration received in the sale).²⁸

A seller using the cash receipts and disbursements method of accounting must report as an amount realized in the year of sale the fair market value of the contingent payment obligation. A seller using the accrual method of accounting must report an amount realized in the year of sale determined in accordance with that method of accounting, but in no event less than the fair market value of the contingent payment obligation.²⁹ Presumably, a return that reports a sale on the open transaction method, as discussed below, constitutes an election out of the installment method.

The regulations permit a seller to use the “open transaction method”—and to wait and see before realizing gain—only “in rare and extraordinary cases” in which fair market value of the contingent payments is not “reasonably ascertainable.”³⁰ Open transaction treatment means no amount is realized until payment is received (cash method sellers) or until all events occur which fix the right to receive the payment, and the amount can be determined with reasonable accuracy (accrual method sellers). Amounts realized are applied first against asset basis, deferring gain recognition to seller until all basis is recovered.³¹

As a result, open transaction treatment is usually advantageous, as compared with the installment method and also the general rule applicable to a seller’s election out of the installment method. Thus, the sellers can be expected to use open transaction treatment wherever possible. Keep in mind, however, that courts have been reluctant to accept a seller’s conclusion that the contingent payments received by the seller cannot be valued.³² Therefore, the open transaction method has limited applicability.

Treatment of the Buyer

From the buyer’s perspective, an acquisition involving a contingent purchase price is always accorded open transaction treatment. It makes no difference whether the seller uses the installment method or elects out and uses either the closed transaction or the open transaction methods. The buyer gets asset basis for contingent payments later, generally when the payments are made.³³

Under §1060, the buyer’s consideration is the cost of the assets acquired in the applicable asset acquisition.³⁴ Additional payments generally are allocated among the transferred assets, but only up to the fair market value of the assets and so tend to make their way to Class VII assets (goodwill).³⁵ Purchase price decreases are generally allocated in reverse order, starting with Class VII.³⁶

When a contingent payment of additional purchase price is made, to apportion the payment between principal and interest, the buyer discounts the payment using the same §483 or §1274 rules that apply to the seller. The buyer deducts the interest portion and adds the principal portion to its basis in the assets or stock purchased.³⁷ Note the asymmetry between the buyer’s and the seller’s treatments. The buyer is entitled to make an upward basis adjustment only upon making an additional purchase price payment to the seller.³⁸

Conclusion

Earnouts are often negotiated with little thought as to their tax effect on the seller. However, when the earnout is a significant portion of the selling price and the seller has a substantial basis in the assets to be sold, the earnout provisions should be carefully structured. And, to avoid a disadvantageous result, consideration should be given to (i) placing a realistic cap on the amount of the contingent payments, (ii) using make-up cautiously, because the gross profit ratio will not be decreased in the event that the actual contingent payments are less than the capped amount and (iii) having a relatively short payment period if no cap is placed on the contingent payments.


Installment method reporting may benefit a seller in a small transaction (\$5 million or below) by permitting deferral, especially if the seller anticipates receiving only small amounts of payments in the early years of a fixed period, because the basis recovery rules are unlikely to accelerate gain. In a larger transaction, the seller is unlikely to get much advantage from the installment method, because of the deferral charge in section 453A.

Even in a small transaction, the seller may find the installment method disadvantageous. This would occur, for example, if the maximum selling price considerably exceeds the amount actually paid after resolution of the contingencies, causing basis recovery to be delayed.

Finally, as previously discussed, if the buyer agrees to make contingent purchase price payments to the seller, the tax treatment of the buyer and of the seller are not consistent. Outside the installment method, the seller usually must include the estimated present value of future contingent purchase price payments in its taxable amount realized at the closing. The buyer, however, may not deduct these payments or include them in the basis of the purchased assets until the payments become fixed or are paid. | [AL](#)

Endnotes

1. §453(a). All section references are to the Internal Revenue Code of 1986, as amended, and the regulations thereunder, unless otherwise stated.
2. §453(b)(1).
3. These include sales of inventory §453(b)(2)(B); most dispositions by dealers §453(b)(2)(A); sales of publicly traded property §453(k)(2); gain on sales of depreciable property to related persons §453(g); the portion of any gain attributable to depreciation recapture §453(g); and sales of personal property under a revolving credit plan §453(k)(1).
4. §453A(c).
5. *Id.*
6. Reg. §15a.453-1(b)(2)(i).



...when the earnout is a significant portion of the selling price and the seller has a substantial basis in the assets to be sold, the earnout provisions should be carefully structured.

7. For purposes of computing gain under the installment method, the gross profit is equal to the excess of the selling price over the seller's adjusted basis in the property. Reg. §15a.453-1(b)(2)(v).
8. The term "contract price" means the selling price reduced by the amount of any "qualifying indebtedness" assumed or taken subject by the buyer but only to the extent that the indebtedness does not exceed the seller's basis in the property sold. Reg. §15a.453-1(b)(2)(iii).
9. See §61(a)(4).
10. §483.
11. Rev. Rul. 70-430, 1970-2 C.B. 51.
12. Reg. §15a.453-1(c)(2)(i).
13. Reg. §15a.453-1(c)(2)(i)(A).
14. Reg. §§15a.453-1(c)(2)(iii) Example (5), 15a.453-1(c)(3)(i).
15. Reg. §15a.453-1(c)(2)(i)(B) Ex. 1.
16. Reg. §15a.453-1(c)(3).
17. Reg. §15a.453-1(c)(3). *Cf. Schmidt v. Commissioner*, 55 T.C. 335 (1970) (no loss to shareholder on corporate liquidation until complete).
18. Reg. §15a.453-1(c)(3)(ii) Ex. 1.
19. Reg. §15a.453-1(c)(3)(ii) Ex. 2.
20. Reg. §15a.453-1(c)(4).
21. Reg. §15a.453-1(c)(4).
22. §453A.
23. A Technical Advice Memorandum ("TAM") is advice furnished by the Office of Chief Counsel upon request of an IRS director or area director in response to technical issues that develop in a proceeding.
24. §§483, 1274.
25. §1274(c)(1), (c)(3)(D).
26. See §1274(c)(2); Reg. §1.1274-2(c).
27. §1274(d).
28. Reg. §15a.453-1(d)(2)(iii).
29. *Id.*
30. Reg. §1.1001-1(g)(2)(ii).
31. *Burnet v. Logan*, 283 U.S. 404 (1931).
32. Cases involving the use of stock options illustrate this principle. See *Custom Chrome, Inc. v. Commissioner*, 217 F.3d 1117 (9th Cir. 2000); *Computervision Int'l Inc. v. Commissioner*, 1996 T.C. Memo 131 (1996); *Sun Microsystems Inc. v. Commissioner*, 1993 T.C. Memo 467 (1993).
33. Reg. §§1.461-1(a)(1), (2).
34. Reg. §1.1060-1(c)(1).
35. Reg. §1.1060-1(c)(2).
36. Reg. §§1.338-6(b) and 1.338-7, cross-referenced in Final Reg. §1.1060-1(c)(2).
37. Reg. §§1.461-1(a)(1), (2). See, e.g., *Merkel v. Commissioner*, 109 T.C. 463 (1997).
38. Reg. §§1.461-1(a)(1), (2).



Nothing says “getting to know you” like working as a team to get to the other side of this wide and wet obstacle called the “Bridge over Troubled Waters.” The attorneys, all members of the Leadership Forum Class of 2013, are, left to right, Scott Speagle, Meg Fiedler, Pamela Casey, Justin Williams, Patrick Strong, and Michael Walker.



Diandra DeBrosse practiced her balance beam routine as her team tackled “George’s Gorge,” one of the challenges at the Leadership Reactive Course at Maxwell Air Force Base.

Photos by Kristi Carr

THE ASB LEADERSHIP FORUM: Discovering the Leader Within

By Kristi Carr

For lawyers who typically spend their days in business attire,

this was decidedly different—jeans, sneakers and an outdoor military obstacle course. Meet the Alabama State Bar’s Leadership Forum Class of 2013.

On their first day together, forum participants found themselves on the grounds of Maxwell Air Force Base under the watchful eyes of trained officers. Some lawyers hesitated when the helmets were passed out, so there was an element of relief for the attorneys when the obstacles turned out to be pools of water, walls and fences, and the challenges, while physical in nature, required mental solutions.

Their comfort zone was soon shattered, however, when they divided into teams and attempted the courses. The goal was to move all team members and equipment from one side of each obstacle to the within 20 minutes. Not one was successful. Why?

A short debriefing by members of the U.S. Air Force provided some insight. The lawyers, all avowed Type-A personalities, had created chaos by all talking at once. And, they failed to take the time to really assess the situation or the tools they had to work with. An officer suggested a formula to follow—observe, orient, decide, act.

This would have helped at the “Bridge over Troubled Waters,” where team members were faced with a pool of water dotted with a few pylons. Equipment consisted of a wheelbarrow and three long boards. Had they taken more time to observe, they would have noticed that some pylons, which could support at least one team member, were closer to one another than others and that the best path was not necessarily a straight line. And it wasn’t until their time was half gone that the team thought to compare the lengths of the boards and discovered they had two long boards of equal length and one shorter board, a detail that could make a difference in their strategy.

(Continued on page 179)



Michael Walker, a member of the Leadership Forum Class of 2013, dresses for battle with the Leadership Reactive Course at Maxwell Air Force Base in Montgomery.



"Impressive!" was the common response to both Lt. Gen. David S. Fadok, commander and president of Air University, and his presentation to the Leadership Forum Class of 2013.

Something to Think About

The obstacle course was just a part of the first day but it underscored the belief that leaders are not so much born or made, but, rather, revealed. Participating in the forum sets lawyers on a path to self-discovery, and, as their experiences with the Leadership Reactive Course proved, it is not always a comfortable journey.

Forum participants had spent their morning with **Dr. Wayne Flynt**, professor emeritus at Auburn University, who used statistics to challenge their assumptions about politics, race and religion in their state.

After lunch, the lawyers heard from **Lt. Gen. David S. Fadok**, the commander and president of Air University. Fadok condensed his personal vision for leadership into three major tenets: people first, mission always, team and family; and having fun is serious business. A leader's toolbox of important traits, he said, should include integrity, unity of effort, initiative, creativity, enthusiasm, perseverance, and civility. The personal stories and video clips he presented proved so powerful that Birmingham participant **John W. Clark, IV** said, "Had I heard the general's speech 10 years ago, I would have been ready to enlist!"

The Forum's Backbone

"The ultimate goal of Leadership Forum," said Ed Patterson, assistant executive director of the Alabama State Bar, "is to build a cadre of leaders for our state and our bar. By exposing the participants to great leaders, they learn that, while there are different leadership styles, the core values of successful leaders remain ethics, professionalism and service.

Patterson is an advocate of "servant leadership," which is both a leadership philosophy and a set of leadership practices. Unlike traditional leadership models, servant leadership calls for sharing power, putting the needs of others first and helping

people develop and perform to the best of their abilities.

A Substantive, Fulfilling Program

Birmingham attorney **Andrew Nix** chairs the program committee of the Leadership Forum and is one of the 2013 forum's two overall co-chairs. A 2010 forum graduate, Nix noted that the Leadership Forum curricula was built on two major premises—"First, we want to get our trainees out of their comfort zone," said Nix. "Then we want to give them the tools and support so they can inject new blood into the Alabama State Bar and their own communities.

Before concluding the forum's first session in January, participants spent time with two professors from Emory University's business school. Self-awareness exercises helped them identify how others perceive them, how they relate to others and how to influence others over whom they have no direct authority.

On the last day of that session, two seasoned trial lawyers, former state bar presidents and leaders in the American Bar Association, **Frederic S. Ury** of Connecticut and **Thomas W. Lyons III** of Rhode Island, spoke to the group. They stressed the importance of ethics and civility to the future of the practice of law. ASB President **Philip W. McCallum** addressed issues now facing the state bar.

In February, the forum spent a day in Huntsville and heard many moving stories. NASA engineer **J. Scott Sparks** spoke of the courage under pressure demonstrated by those on the ground as they struggled to determine what caused the *Columbia* to break apart during re-entry in 2003, killing the seven astronauts on board. This was particularly poignant because the session took place during the month of the 10th anniversary of the ill-fated shuttle mission.

In March, the class was back in Montgomery to visit the state legislature, where they divided into groups to discuss and debate various bills on the floor.

They will visit the National Forensics Institute in Birmingham, which works with the Secret Service, Federal Bureau of Investigation and the U.S. Marshal's Service to prosecute cyber terrorism.

A graduation ceremony in Birmingham will highlight the fifth and final session of the Leadership Forum.

See You Next Year?

The ASB's Leadership Forum has gained national recognition and serves as a model for many other states. At home in Alabama, competition can be keen; this year only half of the applicants could be accepted into the program.

Rebecca G. DePalma chaired the 2013 selection committee. She is a 2010 Leadership Forum graduate and notes that to be considered, a lawyer must have been practicing law for five to 15 years. "Applicants provide a resume, a narrative summary and a substantial letter of recommendation," she said. "Criteria considered include demonstrated leadership ability, an understanding of the importance of servant leadership, previous application to the Leadership Forum, practice diversity, geographic diversity, and racial and gender diversity."

Being chosen demands commitment, as attendance is required at five three-day sessions, held monthly from January to May. Now in its ninth year, the Leadership Forum has graduated 232 Alabama lawyers, including two state representatives, two circuit judges, seven district judges, 15 state and federal prosecutors, two members of the Alabama Legislature, 12 general or assistant counsels of major corporations, and countless others who have gone on to prominence within their law firms and communities.

Check the Alabama State Bar's website, www.alabar.org, for the posting of the 2014 Leadership Forum application following the state bar's annual meeting in July. | [AL](#)



No Arbitration Agreement with the Plaintiff? No Problem: Making a Dispute Arbitrable by Use of Equitable Estoppel Doctrine (The Doctrine of “Intertwining”)

By Michael C. Skotnicki

In the usual case decided
by an arbitrator,

both the plaintiff and the defendant are signatories to a pre-dispute arbitration agreement. There are many circumstances, however, in multi-defendant consumer litigation where a defendant—one who is a *not* a signatory to an arbitration agreement with the plaintiff—may still compel arbitration if the *plaintiff* is a signatory to an arbitration agreement with another defendant.¹ By virtue of the doctrine of equitable estoppel, an arbitration signatory plaintiff may be estopped from denying that the arbitration agreement extends to the nonsignatory defendant.

In the context of arbitration agreements, when used by a nonsignatory defendant to compel a signatory plaintiff into arbitration, the doctrine of equitable estoppel has been called the doctrine of “intertwining.” This catchname appears to have become associated with the equitable estoppel doctrine in Alabama case law based upon language in the opinion of the Eleventh Circuit Court of Appeals in *McBro Planning and Development Co.*

v. Triangle Electric Construction Co., 741 F.2d 342 (11th Cir. 1984), where that term was used to describe the connection between the signatory plaintiff’s claims against the nonsignatory defendant and the arbitration agreement the plaintiff had entered into with someone else.²

In *McBro*, the Eleventh Circuit Court of Appeals held that a district court correctly granted a motion to compel arbitration of the claims that Triangle, a contractor, had brought against McBro, a construction manager, even though there was no arbitration agreement directly between those two parties. The Court based its ruling on the fact that both plaintiff Triangle and defendant McBro had separately entered into arbitration agreements with a third-party building owner in relation to the project, and that the claims alleged by Triangle against McBro related to the duties McBro owed to the building owner. The Eleventh Circuit noted that in similar circumstances another federal court of appeals had applied the doctrine of equitable estoppel and ordered arbitration because the plaintiffs’ claims were “intimately founded and intertwined with the underlying contract obligations” that were subject to arbitration.³

Early Judicial Resistance in Alabama

In 1995, the United States Supreme Court ruled that Alabama's statute prohibiting enforcement of pre-dispute arbitration agreements was against public policy because Section 8-1-41(3) of the *Alabama Code* was preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*⁴⁵ Until that time, there was little Alabama state law precedent for the multitude of questions that can arise in relation to enforcement of arbitration agreements, and so it is not surprising that, in the first years thereafter, the Alabama Supreme Court struggled in determining the strength of the equitable doctrine of intertwining as a basis for nonsignatories to compel arbitration.

The Alabama Supreme Court's early opinions on the subject were not favorable to the nonsignatory defendant seeking to compel arbitration of a dispute with an arbitration signatory plaintiff.⁵ *Ex parte Jones*, 686 So. 2d 1166 (Ala. 1996), is a good example of the Alabama Supreme Court's early position that the nonsignatory defendant lacked standing to enforce an arbitration agreement that the plaintiffs had entered into with others.⁶ In *Jones*, the plaintiffs entered into a loan agreement to borrow money to purchase a used automobile. The loan agreement contained an arbitration provision. The lender and its loan officer then procured a single-premium collateral insurance policy to cover the automobile and the amount of the premium was financed in the auto loan. The automobile was later destroyed by fire and the insurer paid the plaintiffs substantially less than the auto's value, resulting in a lawsuit against the lender, loan officer and the insurer. The trial court ordered the plaintiffs' claims against all the defendants to be arbitrated, based on the arbitration clause in the plaintiffs' loan agreement. The Alabama Supreme Court, however, reversed the order compelling arbitration of the claims against the insurer reasoning that the insurer had "no standing to seek enforcement of the arbitration provision" because the insurer was not a signatory to the first agreement and only came into the transaction through a separate agreement. Thus, in effect, the court equated the doctrine of intertwining with third-party beneficiary status of the nonsignatory



The court found *two points* to be important: (1) the plaintiffs' "claims against the signatory defendants and those against the nonsignatory defendants are *sufficiently intertwined* that all the claims must be arbitrated," and (2) the arbitration agreement the plaintiff had entered into was *worded broadly enough* to include the plaintiffs' claims against the nonsignatory defendants.^{11 12}

defendant to the plaintiff's contract that contained the arbitration provision. This reasoning conflicted with federal precedent on the intertwining doctrine and was abandoned by the court just two years later.

Acceptance and Development of the Doctrine of "Intertwining"

Ex parte Napier, 723 So. 2d 49 (Ala. 1998), is the first case which clearly signals the Alabama Supreme Court's acceptance of the doctrine of intertwining

as a means by which a nonsignatory defendant, absent third-party beneficiary status, could enforce an arbitration agreement contained in the plaintiff's agreement with other defendants.⁷ The plaintiffs in *Ex parte Napier* were the purchasers of a mobile home who sued the mobile home dealer and their lender, as well as an insurer and the insurance agent, alleging fraud in relation to the sale of the mobile home and a related insurance policy.⁸ The sales contract, which also included the terms of the installment purchase loan, contained an arbitration provision, and was the basis for the defendants' motion to compel arbitration.⁹ The trial court granted the motion and the plaintiffs appealed to the Alabama Supreme Court, arguing that the trial court had erred in ordering them to arbitrate with the insurer and its agent, who were not signatories to the arbitration agreement.¹⁰

The Alabama Supreme Court rejected this argument and found that the intertwining doctrine allowed the insurer and its agent to enforce the arbitration agreement the plaintiffs had entered into with the other defendants. The court found *two points* to be important: (1) the plaintiffs' "claims against the signatory defendants and those against the nonsignatory defendants are *sufficiently intertwined* that all the claims must be arbitrated," and (2) the arbitration agreement the plaintiff had entered into was *worded broadly enough* to include the plaintiffs' claims against the nonsignatory defendants.^{11 12} These two points are now recognized by the court as the two elements necessary for a nonsignatory defendant to compel arbitration against a signatory plaintiff.

Element One: The Doctrine of Intertwining Requires a Broadly-Worded Arbitration Agreement

The initial requirement for the application of the doctrine of intertwining is that the arbitration agreement the plaintiff

entered into with some other entity contemplates that the arbitration would include entities such as the nonsignatory defendant. Alabama case law holds that “a nonsignatory cannot require arbitration of a claim by the signatory against the nonsignatory when the scope of the arbitration agreement is limited to the signatories themselves.”^{13 14}

This rule was applied by the Alabama Supreme Court in *Monsanto Co. v. Benton Farm*, 813 So. 2d 867 (Ala. 2001), where a farming partnership sued a holder of certain licensed technology, a cottonseed manufacturer and a seed distributor for fraud and other claims.¹⁵ The delivery tickets and invoices for the seed purchased by the plaintiff contained an arbitration agreement between the seller (the seed distributor) and the plaintiff, without reference to other potential defendants.¹⁶ All of the defendants moved to compel arbitration, but the trial court only granted the motion of the seed distributor. On appeal, the Alabama Supreme Court affirmed the denial as to the technology holder and the seed manufacturer, based upon the court’s conclusion that “the arbitration provision . . . is limited to the buyer and seller” and, thus, was not broad enough to cover the plaintiffs’ claims against the other defendants.¹⁷

So what language in an arbitration agreement signals that a nonsignatory defendant may use the agreement to compel arbitration with the signatory plaintiff? The Alabama Supreme Court’s opinion in *Smith v. Mark Dodge, Inc.*, 934 So. 2d 375 (Ala. 2006), provides helpful examples of language in arbitration agreements that is broad enough to contemplate arbitration with nonsignatories.¹⁸ The court stated:

If an arbitration agreement is written in broad language so that it applies to “[a]ll disputes, claims or controversies arising from or relating to *this Contract or the relationships which result from this Contract*,” *Ex parte Napier*, 723 So. 2d 49, 51 (Ala. 1998) (emphasis added), or even in slightly narrower language so that it applies to “ALL DISPUTES, CLAIMS OR CONTROVERSIES ARISING FROM OR RELATING TO *THIS CONTRACT OR THE PARTIES THERE-TO*,” *Stamey*, 776 So.2d at 91 (capitalization in original; emphasis

added), this Court will proceed to determine whether arbitration may be compelled under the doctrine of equitable estoppel.

Conversely, if the language of the arbitration provision is party specific and the description of the parties does not include the nonsignatory, this Court’s inquiry is at an end, and we will not permit arbitration of claims against the nonsignatory.¹⁹

Accordingly, in *Mark Dodge*, the Alabama Supreme Court concluded that in referencing “affiliated entities,” the arbitration clause between the plaintiff automobile purchaser and the defendant automobile dealer contemplated that any arbitration could include the automobile manufacturer, which the court found was “intimately associated” with the dealer. Thus, the manufacturer could compel arbitration with the plaintiff through the doctrine of intertwining. It is important to note that the arbitration provision must suggest the possibility of including third parties within the scope of the agreement before a nonsignatory defendant can argue that it should be included in the arbitration proceeding.²⁰


Element Two: The Doctrine of Intertwining Requires “Two Threads”

The Alabama Supreme Court has refused to apply the doctrine of intertwining where the plaintiff’s claims against the nonsignatory may have been related to claims against a signatory defendant or related to the plaintiff’s contract (containing an arbitration agreement) with another entity, but where there was *not* a “pending or contemplated” arbitration proceeding involving the plaintiff and that entity.

This element was established by the opinion in *Southern Energy Homes v. Kennedy*, 774 So. 2d 540 (Ala. 2000), where a mobile home purchaser sued the dealer and the manufacturer for fraud and other claims.²¹ The trial court denied the defendants’ motions to compel arbitration, which were based on the arbitration

agreement in the sales contract between the plaintiffs and the dealer.²² However, critical to the decision, only the manufacturer appealed the denial of the arbitration motions and the dealer conceded that the resolution of the claims against it would be decided by the court.²³ This created a procedural dilemma: there was no arbitration proceeding involving the plaintiffs that the nonsignatory manufacturer could use as a basis to invoke the doctrine of intertwining. In a key paragraph, the Alabama Supreme Court noted:

[A] critical factor missing in this case that is necessary to allow [the non-signatory defendant] to compel the [plaintiffs] to arbitrate their claims against it based on a theory that their claims are inextricably intertwined with their claims against [the signatory defendant]. The concept of “intertwining” necessarily presupposes that the signatory to the arbitration agreement is or will be engaged in an arbitration proceeding with the plaintiff. In this case, [the signatory defendant]



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did not appeal the trial court's denial of its motion to compel arbitration. **Therefore, there is no pending or contemplated arbitration proceeding in which the doctrine of equitable estoppel could allow the [the nonsignatory defendant] to compel the plaintiffs to arbitrate their claims against it. In other words, "intertwining" requires at least two threads to weave together—one cannot intertwine a single thread.**²⁴

Other examples of where a nonsignatory defendant was frustrated in its attempt to compel arbitration because there was no pending or contemplated arbitration involving the plaintiff are *Ex parte Cox*, 828 So. 2d 295 (Ala. 2002), and *Jenkins v. Atelier Homes, Inc.*, 62 So. 3d 504, 512-13 (Ala. 2010).²⁵

A case in which a nonsignatory succeeded in compelling arbitration against a signatory plaintiff based upon the doctrine of intertwining is *ECS, Inc. v. Goff*

Group, Inc., 880 So. 2d 1140 (Ala. 2003).²⁶ In *ECS*, the plaintiff finance company had entered into an arbitration agreement with an insurer which stated, in relevant part, that "any dispute arising out of this Agreement, including its formation, validity, or applicability to the dispute, . . . shall be submitted to the decision of a board of arbitration."²⁷ The finance company later sued the insurance underwriter in one lawsuit and the insurance company in a second lawsuit, which was ordered to arbitration based on the arbitration agreement between the parties.²⁸ In the first suit, the underwriter moved for arbitration based upon the doctrine of intertwining, which the trial court denied.²⁹ On appeal, the Alabama Supreme Court reversed the ruling and held that the plaintiff was equitably estopped from contesting the nonsignatory defendant's ability to invoke the arbitration agreement.³⁰ The court noted that both elements of the doctrine of intertwining were present in that the scope of the arbitration agreement was not so restricted so

as to limit the arbitration to just the parties and their agents or assigns, and the plaintiff's claims against the underwriter were sufficiently intertwined with its claims against the insurer that had separately been ordered to arbitration.³¹

Conclusion

The equitable estoppel doctrine of intertwining is a powerful legal tool that a defendant may use in certain circumstances to compel arbitration of a plaintiff's claims against it even though there is no arbitration agreement between them, based upon the plaintiff's arbitration agreement with another defendant. At the same time, however, the two elements established by the Alabama Supreme Court over the last decade provide the opportunity for a plaintiff who has entered into an arbitration agreement to try and defeat enforcement of the arbitration agreement by a nonsignatory defendant. First, at the time of a suspect


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transaction the plaintiff might agree to enter into an arbitration agreement, but then negotiate a narrowly-worded provision that would only encompass claims against the other party to the contract, such that future use of the doctrine of intertwining by a related entity would be prevented. However, if the plaintiff entered into a broadly-worded arbitration agreement, the plaintiff could, if his primary claim were against a nonsignatory defendant, choose not to sue the party it entered into the arbitration agreement with, thereby possibly eliminating the required second element of a pending or contemplated arbitration involving the plaintiff.³² In sum, the doctrine of intertwining, as applied by the Alabama Supreme Court, serves the meritorious goal of having related claims against several parties resolved before the same tribunal so as to prevent the problem of inconsistent judgments, but does not do so unfairly because the doctrine is based on the fact that the plaintiff, in a sense, has agreed to a multiparty arbitration hearing by agreeing to a broadly-worded arbitration provision. | AL

Endnotes

1. There are, technically, two types of nonsignatories in relation to arbitration agreements. The first type is nonsignatory defendants—defendants who do *not* have arbitration agreements with a plaintiff who entered into an arbitration agreement with another entity. This article focuses on Alabama Supreme Court opinions discussing the legal rights of such defendants to compel arbitration of the plaintiff's claims based on the plaintiff's agreement with someone else.

The second type of nonsignatory discussed in the case law is the nonsignatory plaintiff who has brought claims against a defendant who has an arbitration agreement with another entity. Although the case law holds that the signatory defendant may compel the nonsignatory plaintiff to arbitration if the plaintiff brings claims based on being a third-party beneficiary of the contract involving the defendant that contains the arbitration agreement, see *ConsecoFin. Corp. v. Sharman*, 828 So. 2d 890 (Ala. 2001), the defendant is otherwise unable to make the non-signatory plaintiff resolve the dispute in arbitration. See *SouthTrust Bank v. Ford*, 835 So. 2d 990 (Ala. 2002); *ECS, Inc. v. Goff*, 880 So. 2d 1140 (Ala. 2003); *Green Tree-AL, LLC v. Reynolds*, 977 So. 2d 470 (Ala. 2007); *Edwards v. Costner*, 979 So.

- 2d 757 (Ala. 2007).
2. 741 F.2d 342.
 3. *Id.* (quoting *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981)). See also *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), cert. denied *sub nom*, 513 U.S. 869 (1994).
 4. *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).
 5. Patricia P. Ponder, "Alabama's Arbitration Cases: Where Does the Non-Signatory Stand?", 58 ALA. LAWYER 246 (1997).
 6. 686 So. 2d 1166.
 7. 723 So. 2d 49.
 8. *Id.* at 51.
 9. *Id.* at 52.
 10. *Id.* at 53.
 11. *Id.* (emphasis added).
 12. The arbitration agreement stated, in relevant part:
21. ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause of the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s).
 13. *Cook's Pest Control, Inc. v. Boykin*, 807 So. 2d 524 (Ala. 2001).
 14. This requirement of a broadly-worded arbitration provision, however, was not insisted upon by the court in its opinion in *Southern Energy Homes, Inc. v. Gary*, 774 So. 2d 521, 529 (Ala. 2000), where the court reduced the test for the doctrine of intertwining to just the single element of the plaintiffs' claims against the signatory defendant and the nonsignatory defendant being "inextricably intertwined." However, the opinion in *Gary* was expressly overruled by the court shortly thereafter in *Jim Burke Automotive, Inc. v. McGrue*, 826 So. 2d 122, 131 (Ala. 2002), and the two-element test for the doctrine of intertwining was re-established.
 15. 813 So. 2d 867.
 16. *Id.* at 873.
 17. *Id.*
 18. 934 So. 2d 375.
 19. *Id.* at 381 (internal citations omitted).
 20. See *Kenworth of Mobile, Inc. v. Dolphin Line, Inc.*, 988 So. 2d 534 (Ala. 2008).

21. 774 So. 2d 540.
22. *Id.* at 544.
23. *Id.*
24. *Id.* at 545 (emphasis added).
25. See *Fountain v. Ingram*, 926 So. 2d 333, 335-36 (Ala. 2005) ("We have held that the doctrine of intertwining does not apply when there is no ongoing arbitration to the parties to the arbitration agreement." (emphasis original)); *Auvil v. Johnson*, 806 So. 2d 343, 350 (Ala. 2001) ("The doctrine of intertwining extends the benefits of an arbitration agreement to a nonsignatory only if the claims against him are intertwined with the claims of a signatory who is going to arbitration.")
26. 880 So. 2d 1140.
27. *Id.* at 1143.
28. *Id.* at 1145.
29. *Id.*
30. *Id.* at 1146.
31. *Id.* at 1146-47.
32. See, e.g., *Jenkins, supra*.

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**William Waddell
Featheringill**

Robert Huel Harris

William Waddell Featheringill

Bill Featheringill died suddenly in Birmingham on December 9, 2012 at age 70, at the pinnacle of his remarkable career. Although a graduate of Columbia University Law School and a member of the Alabama and New York bars, he never held himself out to practice law for others. Instead, he was a highly successful entrepreneur who used his legal training to gain an edge in business planning, execution and competition, and who used much of the fruit of his success to support educational and philanthropic causes and to fund the Featheringill Foundation.

Bill believed that the health insurance and health care businesses in the United States were antiquated. With help from his advisor group of older CEOs, he was able early to strike an arrangement with UAB and create his own new company with himself as CEO, Complete Health. He was an effective leader to employees as well as experts like lawyers and accountants and bankers. He was excellent in keeping the investors and UAB fully aware of the risks, including those not obvious. He was generally the smartest person in the room and the room kept growing.

When Complete Health's revenues had grown sufficiently, a sale of all its stock to UnitedHealthcare was completed, with UAB making a profit in the \$100 million range. The Complete Health experience also enabled Bill to continue to grow various other start-ups. Before and after Complete Health, Bill made pioneering efforts, and enjoyed great successes, in business areas such as paging and mobile communication, digital document imaging, telecommunications, and electronic patient records, among others. Bill contributed his great talents to Brookwood Medical Center and many other companies.

To all his endeavors, Bill added the absolute requirement of complete integrity. Bill's integrity and insistence on fully committing himself whenever he signed up resulted in many recognitions and honors, including being named a trustee of Vanderbilt University and a member of the Board of Overseers of Samford University.

One of Bill's last gatherings was a party at the Birmingham Museum of Art, where he was also a trustee. At that time, he and his beloved wife, Carolyn, a very able lawyer and professor emeritus of the Cumberland Law School, were surprised by their daughter and son-in-law's naming a gallery in their honor. It was obvious to all observers that Bill's creativity and commitment to his community lived on in a new generation.

—Thomas N. Carruthers, Jr., Birmingham

Robert Huel Harris

Robert Huel Harris died at his home August 2, 2012 at age 82. He was a highly respected lawyer, having dedicated his life to the practice of law, and service to his family, church and community. Born July 9, 1930, in Columbus, Georgia to Eugene Griffin Harris and Mary E. Thompson Harris, Bob Harris later moved to and was raised in Goodwater.



Bob earned a Bachelor of Science Degree from Auburn University in 1951 and his Juris Doctor from the University of Alabama School of Law in 1954. A true scholar of the law, he graduated first in his law school class, and was a member of the *Law Review*, Farrah Order of Jurisprudence, Order of the Coif and Omicron Delta Kappa. Bob served with honor in the United States Army until his discharge as a captain in 1957. Following his discharge, he moved to Decatur and began his practice with Peach, Caddell & Shanks, later to become Harris, Caddell & Shanks PC. He practiced with this firm until his death—a total of 55 years.

Bob Harris was elected to the Alabama State Senate in 1966, where he served as a distinguished member of that body for two terms, until 1974. He was named “Outstanding Freshman Senator” in 1967, “Hardest Working Senator” in 1969 and again in 1973 and “Most Outstanding Senator” in 1971. He also served as a member of the Board of Trustees of Auburn University from 1972 to 1982. Continuing in his role as a scholar of the law, he served as chair of the *Code Revision Subcommittee* of the Legislative Council, responsible for preparation of the *Code of Alabama 1975*, the first revision of the *Code* since 1940. Bob was a founding director of First American Bank in Decatur. During his years of practice, he was elected a Fellow of the American College of Trial Lawyers and served as a valued member and former president of the Morgan County Bar Association.

Bob Harris was an active and faithful member of First United Methodist Church of Decatur from 1957 until his death, where

he served the church in many capacities, including teaching the Men’s Bible School Class from 1962 until his death.

He was preceded in death by his parents and a grandson, Barnes F. Lovelace, III. He is survived by his wife, Betty Sue Harris; five children, Laurie Norman and husband James, Amanda Harris Lovelace, Bobbie Skelton and husband Keith, Robert Huel Harris, Jr. and wife Debra, and Parks Harris and wife Elizabeth; six grandchildren, two great-grandchildren; a brother, Eugene Griffin Harris and wife Betty; and two nephews.

Bob was extremely well thought of by his clients, many of whom he represented for decades. He served his clients well, not only as a trial lawyer, but in answering every question, fulfilling the role of advocate, counselor and trusted advisor. He was often found immersed in law books and depositions, studying the aspects of a case, the question of a client or similar legal inquiry. Yet he was always available to help his partners and associates, answering questions and providing guidance (and many times a suggestion to do more research on a particular issue). Bob’s representation of his clients sets an example to be followed; may we all be so well remembered for our actions. Bob represented Decatur Utilities for more than 40 years. In a resolution adopted by its board following his death, it was said, “[he] was much more than the sum of his professional accomplishments. He had a keen wit and unparalleled sense of humor. Those who had the privilege of camping, hunting, and fishing with Bob, or just visiting with him, will long remember his stories and the laughter they generated . . . This man, remarkable in every way, will be sorely missed by all those who knew him and relied upon him. The DU Board and its employees, to paraphrase one of Bob’s favorite expressions, have one less ‘arrow in their quiver.’”

Further, as said by Hon. Richard Shelby, in speaking to the United States Senate, *in memoriam*, “Bob was an inspiration to me, a caring father and husband, and a valuable asset to his community, his church and to Auburn University. . . His contributions to the Decatur legal community, his church, and the State of Alabama will forever be remembered.”

Bob Harris touched so many of us with his knowledge, his passion and his wit. He will truly be missed.

—Jeffrey S. Brown, Decatur

Chancey, Phillip Wayne, Jr.
Atlanta
Admitted: 1993
Died: January 22, 2013

Davis, Paula Denise
Birmingham
Admitted: 2005
Died: February 15, 2013

Farnell, Daniel Reese, Jr.
Birmingham
Admitted: 1984
Died: December 31, 2012

Gant, Andrew McConnico, Jr.
Birmingham
Admitted: 1965
Died: February 20, 2013

Hood, Robert Hunter
Oneonta
Admitted: 1982
Died: February 26, 2013

Lauten, William Robert
Mobile
Admitted: 1949
Died: January 13, 2013

Mims, James W.
Talladega
Admitted: 1980
Died: November 28, 2012

Partridge, Samuel Scott
Deatsville
Admitted: 1997
Died: February 23, 2013

Roemer, Mary Elizabeth Parmer
Montgomery
Admitted: 1955
Died: January 7, 2013

Sandlin, Ronald Phillip
Birmingham
Admitted: 1997
Died: February 23, 2013

Schell, William Braxton, Jr.
Birmingham
Admitted: 1978
Died: January 24, 2013

Smith, Lucian L., Jr.
Montgomery
Admitted: 1955
Died: January 1, 2013



Wilson F. Green

By Wilson F. Green

Wilson F. Green is a partner in Fleenor & Green LLP 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.



Marc A. Starrett

By Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Pharmaceuticals

***Wyeth, Inc. v. Weeks*, No. 1101397 (Ala. Jan. 11, 2013)**

NOTE: This case is on petition for rehearing. The question presented: whether under Alabama law, may a drug company be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture or distribution of a brand-name drug, by a plaintiff claiming physical injury from use of the generic-equivalent drug manufactured and distributed by a different company? On original submission, the court answered in the affirmative by an 8-1 majority.

Equitable Tolling

***Weaver v. Firestone*, No. 1101403 (Ala. Jan. 11, 2013)**

Held: (1) the "savings" provision (or "discovery rule"), codified in *Ala. Code* § 6-2-3, saves an otherwise untimely claim only where the plaintiff was unaware of his injury or his cause of action, but it does not save a claim where the plaintiff knows of his claims but not of the identity of the proper defendant; (2) equitable tolling requires exercise of "reasonable diligence," which would, if necessary, require the

filing of a complaint against solely fictitious parties (under Rule 9(h)) within the applicable statute of limitations, even though there would be no one to serve, such a complaint would provide evidence that the plaintiff intended to pursue her claims.

Direct Actions

Admiral Ins. Co. v. Price-Williams, No. 1110993 (Ala. Jan. 11, 2013)

Price-Williams (“PW”) obtained judgment against fraternity officers covered by Admiral policy, on theories of (1) assault and battery and (2) negligence and wantonness in failing to implement fraternity risk management program. PW then brought direct action against Admiral under *Ala. Code* § 27-23-2, the direct action statute. The trial court entered judgment after a bench trial in favor of PW. The supreme court affirmed, rejecting Admiral’s argument that the covered claims (negligence) and non-covered claims (A&B) were so intertwined as to destroy coverage. The court reasoned that the wrongful acts under the two theories were separate and distinct.

Forum Non Conveniens

Ex parte Waltman, No. 1111598 (Ala. Jan. 11, 2013)

Owens (Hale Co. resident) sued Waltman (Tuscaloosa Co. resident) and Waltman’s employer, Griffin (a corporation with a principal office in Perry Co.) in Circuit Court of Perry County, for injuries sustained in accident occurring in Tuscaloosa County. Defendants moved for *forum non conveniens* transfer, arguing that since workers’ comp benefits were also involved, Perry County had a strong interest for nexus purposes. The trial court severed the comp claims but denied transfer of the tort claims. The supreme court granted mandamus relief, reasoning that under its recent line of “interests of justice”/“nexus” cases, “the petitioners have established that Tuscaloosa County has a stronger connection to the claims in this case than has Perry County.”

Retroactivity

Alabama Insurance Guaranty Ass’n. v. Mercy Medical Ass’n., No. 1111206 (Ala. Feb. 15, 2013)

Held: 2009 amendments to the Alabama Insurance Guaranty Act, *Ala. Code* § 27-42-1 *et seq.*, did not apply retroactively because they substantively changed the law. The opinion contains a good discussion of retroactivity standards and the nature of a substantive change or alteration in vested rights.

Annexation; Contiguity

City of Irondale v. City of Leeds, No. 1111347 (Ala. Feb. 15, 2013)

Leeds sued Irondale, seeking to invalidate Irondale’s purported annexation by petition (under *Ala. Code* § 11-42-21, which authorizes annexation by petition for property “contiguous to the corporate limits” of the annexing municipality) of certain property owned by the Cahaba River Land Trust up to and including property within the bed of the river. The circuit court granted summary judgment to Leeds, holding that the property did not satisfy the contiguity requirement because under Art. 1, Sec. 24 of the Alabama Constitution and related authorities, the portion of the Cahaba in issue was navigable and, therefore, by law a public thoroughfare, such that the river broke the contiguity of parcels necessary to annex by petition. The supreme court affirmed.

Arbitration

Bear Brothers, Inc. v. ETC Lake Development, LLC, No. 1110688 (Ala. Feb. 15, 2013)

In Justice Bryan’s first opinion, the court held that *Ala. R. App. P.* 4(d), which allows for direct appeal from an order granting or denying a motion to compel arbitration, does not support an appeal of a motion to stay claims admittedly subject to litigation, pending the completion of arbitration of related claims.

Sheriffs

Haywood and Hall v. Alexander, No. 1111316 (Ala. Feb. 22, 2013)

Inmates sued Sheriff Alexander, alleging that sheriff’s employee had used his position as an administrator at the jail to sexually abuse and/or to assault Haywood and Hall while they were incarcerated in the jail. The circuit court granted Sheriff Alexander’s motion to dismiss based on immunity. The supreme court affirmed in part, holding in relevant part: (a) since plaintiffs were post-conviction inmates, their claims were properly brought under the Eighth Amendment and not the Due Process Clause; (b) sheriff was entitled to absolute immunity under the Eleventh Amendment and § 14 as to official capacity claims, and, as to state-law claims, § 14 immunity in both individual and official capacities; (c) sheriff was not entitled to qualified immunity on federal claims against sheriff in her individual capacity, at least on a motion to dismiss.

Insurance

***Nationwide Mut. Ins. Co. v. Wood*, No. 1111486 (Ala. Feb. 22, 2013)**

The court received and accepted the following certified question: "Under Alabama law, is an insurance company bound to a settlement agreement negotiated on behalf of an injured minor, if that minor dies before the scheduling of a *pro ami* hearing which was intended by both sides to obtain approval of the settlement?" The court answered the question in the affirmative.

Parental Liability

***Beddingfield v. Linam*, No. 1101163 (Ala. March 8, 2013)**

In premises liability action against parents arising from teenager's discharge of fireworks which injured fellow teen, the court held: (1) there was no substantial evidence of negligent entrustment of the fireworks on claims against shooter's parents, because they did not purchase the fireworks that were present at the lake house and did not know that the fireworks were on the back porch of the lake house; and (2) Alabama law does not recognize a cause of action based on a parent's negligence or wantonness in supervision of his or her own child.

From the Court of Civil Appeals

Premises Liability

***Waters v. Paul Enterprises, Inc.*, No. 2110683 (Ala. Civ. App. Jan. 4, 2013)**

In premises liability action, the trial court granted summary judgment to Paul, based on lack of invitor's duty to warn of "open and obvious" conditions. The court of civil appeals reversed, reasoning that there was a fact question as to whether the danger was open and obvious.

Workers' Compensation

***CVS/Caremark Corporation v. Washington*, No. 2110185 (Ala. Civ. App. Feb. 15, 2013)**

In workers' comp case, employee applied for and received unemployment comp benefits, then claimed permanent total disability and filed comp action for benefits. CVS did not plead judicial estoppel as affirmative defense, but introduced evidence at trial of the unemployment comp claim and employee's representations therein to the state that she was able to work. The trial court granted permanent total benefits, finding

that judicial estoppel was waived as a defense for failure to plead, and that the issue was not tried by consent because the evidence of the unemployment comp claim was admissible to rebut plaintiff's case in chief generally. The court of civil appeals affirmed.

Appeals

***Penick v. Southpace Management, Inc.*, No. 2111007 (Ala. Civ. App. Feb. 8, 2013)**

Appellant's failure to post adequate security within the time for appeal was not fatal to appeal's timeliness.

Co-Employee Suits

***Bates v. Riley*, No. 2110974 (Ala. Civ. App. Feb. 1, 2013)**

Held: *Ala. Code* § 25-5-11(c)(2)'s requiring the "removal" of a safety device by a co-employee to support a willfulness claim does not encompass or include the temporary, manual disabling of a safety device that otherwise remains attached to the machine and operates as it was designed to perform.

Forum Non Conveniens

***Ex parte Veolia Environmental*, No. 2120270 (Ala. Civ. App. March 8, 2013)**

Etowah County plaintiff sued employer, situated in Talladega County, for injury occurring in Talladega County. Employer moved for transfer under both prongs of *Ala. Code* § 6-3-21.1, offering evidence (1) that Herring's injury occurred in Talladega County, (2) that Veolia's principal place of business is located in Talladega County, (3) that expected witnesses were employed by Veolia in Talladega County, (4) that Veolia would find it inconvenient to defend the action in Etowah County, (5) that expected witness Riddle would find it inconvenient to travel to Etowah County for trial, and (6) that, according to Moore, "most witnesses reside nearer to Talladega County than to Etowah County." Trial court denied transfer, and Veolia petitioned for mandamus. Characterizing the showing as "meager," the court of civil appeals denied the writ, reasoning that the showing did not satisfy either the "convenience of parties and witnesses" or the "interests of justice" prong of *forum non conveniens*.

From the United States Supreme Court

RICO

***Smith v. U.S.*, No. 11-8976 (U.S. Jan. 9, 2013)**

Held: a defendant prosecuted under section 1962(d) of RICO for conspiracy bears the burden of demonstrating that the defendant withdrew from the conspiracy; thus, withdrawal is tantamount to an affirmative defense. (Note: the decision is in the context of a criminal prosecution, not a civil case.)

Mootness

Already, LLC v. Nike, Inc., No. 11-982 (U.S. Jan. 8, 2013)

"[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."

Federal Question Jurisdiction

Gunn v. Minton, No. 11-1118 (U.S. Feb. 20, 2013)

28 U.S.C. § 1338(a), which provides federal district courts with exclusive jurisdiction over patent cases, does not deprive the state courts of subject matter jurisdiction over plaintiff's state law claim alleging legal malpractice in the handling of his patent case.

Standing

Clapper v. Amnesty International USA, No. 11-1025 (U.S. Feb. 26, 2013)

Held: (1) the standard for determining standing based on an alleged future injury is that the threatened injury must be "certainly impending" to constitute injury in fact; and (2) plaintiffs cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.

Consumer Protection

Marx v. General Revenue Corp., No. 11-1175 (U.S. Feb. 26, 2013)

A district court may award costs to prevailing defendants in Fair Debt Collection Practices Act (FDCPA) cases without finding that the plaintiff brought the case in bad faith and for the purpose of harassment.

Class Actions

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, No. 11-1085 (U.S. Feb. 27, 2013)

Although required to prevail on the merits, substantive proof of materiality is not a prerequisite to certification of a securities-fraud class action seeking money damages for alleged violations of SEC Rule 10b-5.

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From the Eleventh Circuit Court of Appeals

Summary Judgment

Feliciano v. City of Miami Beach, No. 12-11397 (11th Cir. Feb. 5, 2013)

The court reversed the district court for failing to accept as true, and therefore as substantial evidence, the plaintiff's own testimony to defeat summary judgment.

FLSA; Retaliation

Moore v. Appliance Direct, Inc., No. 11-15227 (11th Cir. Feb. 13, 2013)

The Court affirmed the district court's judgment against defendant, the CEO of AD, in an FLSA retaliation case, where the judgment was against the CEO personally but was for single damages (the trial court refused to enter a double-damage

award). The Court held that the evidence was sufficient to render the CEO, who was also the 75 percent shareholder of AD, the “employer” under FLSA. The Court also held, in an issue of first impression within the Circuit, that the award of double damages is discretionary and not mandatory under the statute.

Antitrust Standing

***Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, No. 11-10901 (11th Cir. March 4, 2013)**

Held: in order to establish antitrust standing in a monopoly-maintenance case, plaintiff must show that a potential competitor had the intent and was prepared to enter the relevant market.

FLSA

***Lamonico v. Safe Hurricane Shutters, Inc.*, No. 11-15743 (11th Cir. March 6, 2013)**

Held: (1) *in pari delicto* was not a defense to FLSA claims based on plaintiffs’ status as undocumented aliens, because undocumented aliens are “employees” under the FLSA; (2) FLSA individual liability is not limited to corporate officers of an employer, because the FLSA defines “employer” more broadly; (3) failure to instruct jury on fluctuating workweek method was not error, because fluctuating workweek method is not the only method or even the default method for calculating damages when an employee is paid a weekly salary; (4) witness was not unavailable as a declarant under Rule 804(a)(3) simply because he said he did not recall the prior conversation; Rule 804(a)(3) applies only if the declarant is unable to remember the “subject matter,” i.e., if “he has no memory of the events to which his hearsay statements relate.”

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Ineffective Assistance

***Chaidez v. United States*, No. 11-820 (U.S. Feb. 20, 2013)**

Having previously held in *Padilla v. Kentucky*, U.S. 356 (2010) that defense counsel renders ineffective assistance by failing to advise the defendant that pleading guilty to an offense will result in deportation, the court in *Chaidez* held that *Padilla* announced a new rule that does not retroactively apply to cases already final on direct appeal.

Habeas; Deference

***Johnson v. Williams*, No. 11-465 (U.S. Feb. 20, 2013)**

When the state court’s judgment expressly addresses some, but not all, of the claims later raised by a defendant in his federal habeas petition, there is a rebuttal presumption that the judgment adjudicated the claims on their merits and is therefore entitled to deferential review by the federal court under 28 U.S.C. § 2254(d), part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

Double Jeopardy

***Evans v. Michigan*, No. 11-1327 (U.S. Feb. 20, 2013)**

The Double Jeopardy Clause bars retrial where the trial court grants a judgment of acquittal at the close of the state’s case on the ground that it failed to prove a certain fact as an element of the offense, even though its interpretation of that element was error.

From the Eleventh Circuit Court of Appeals

Habeas; Statute of Limitations

***Zack v. Tucker*, No. 09-12717 (11th Cir. Jan. 9, 2013)**

The one-year limitation period in which to file a habeas petition under 28 U.S.C. § 2244 applies on a claim-by-claim basis, rather than to the petition as a whole.

***Zack v. Tucker*, No. 09-14628 (11th Cir. Feb. 5, 2013)**

An untimely motion seeking to alter the defendant’s sentence was not “properly filed” and, thus, did not toll the U.S.C. § 2244 limitation period.

From the Alabama Supreme Court

Search and Seizure

***Ex parte State of Alabama*, No. 1120498 (Ala. Mar. 1, 2013)**

The court granted the state’s petition for a writ of mandamus, thereby directing the trial court to issue a search warrant for an alleged gambling facility. The state had shown that probable cause existed to believe that the facility contained illegal gambling devices.

Chemical Endangerment

Ex parte Ankrom, nos. 1110176 and 1110219 (Ala. Jan. 11, 2013)

The word “child” in *Ala. Code* § 26-15-3.2 (prohibiting the chemical endangerment of a child) includes unborn children, regardless of viability.

From the Alabama Court of Criminal Appeals

Ineffective Assistance

Surratt v. State, CR-11-1589 (Ala. Crim. App. Feb. 15, 2013)

Defendant failed to show that counsel was ineffective by failing to object to the admission of a statement, made during

a hearing, that he had raped the victim. The evidence was merely cumulative and did not support the “prejudice” prong under *Strickland v. Washington*, 466 U.S. 668 (1984). The court further found that conflicting evidence of the victim’s age supported the denial of a judgment of acquittal on the charge of second-degree rape under *Ala. Code* § 13A-6-62(a)(1).

Rape Shield

Israel v. State, CR-11-1281 (Ala. Crim. App. Feb. 15, 2013)

Among other holdings, the court held that proof of the victim’s motive is not admissible under the Alabama rape shield rule, *Ala. R. Evid.* 412, and, thus, found no error in the refusal to admit evidence purporting to show that minor victim’s report came after her mother learned of other sexual activity. | [AL](#)



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Notices

Reinstatements

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Disbarments

Suspensions

Public Reprimands

Notices

- **Lisa Elms Boone**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2013 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2011-643 by the Disciplinary Board of the Alabama State Bar.
- **Sherryl Snodgrass Caffey**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 30, 2013 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 09-2664(A) before the Disciplinary Board of the Alabama State Bar.
- **Mary Isabelle Eaton**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2013 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 2010-1111 and 2011-1392 by the Disciplinary Board of the Alabama State Bar.
- **William Ronald Waldrop**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2013 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 2008-1050(A) and 2008-1117(A) by the Disciplinary Board of the Alabama State Bar.
- **Gary Thomas Ward, Jr.**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 31, 2013 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 09-1542(A) et al. before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- On January 8, 2013, the Supreme Court of Alabama entered an order reinstating Dothan attorney **William Terry Bullard, Sr.** to the practice of law in Alabama based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar. Bullard had been suspended for 91 days, effective June 1, 2012. [Rule 28, Pet. No. 2012-1648]
- Bessemer attorney **Eric James Copeland** was reinstated to the practice of law in Alabama, with conditions, effective November 16, 2012, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed July 9, 2012 by Copeland. Copeland was

transferred to disability inactive status, effective August 8, 2011, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(b), Pet. No. 2011-1316]

- Summerdale attorney **Laurence Peter Sutley** was reinstated to the practice of law in Alabama, effective December 26, 2012, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed June 5, 2012 by Sutley. Sutley was suspended from the practice of law in Alabama, effective February 9, 2009, by order of the Disciplinary Board of the Alabama State Bar. [Rule 28, Pet. No. 2012-1149]

Transfers to Disability Inactive Status

- Birmingham attorney **Robyn Bufford Bennett** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective December 5, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2012-2143]
- **William Jackson Freeman**, formerly of Birmingham, was transferred to disability inactive status pursuant to Rule 27(b), *Ala. R. Disc. P.*, effective December 11, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(b), Pet. No. 2012-2231]
- Dothan attorney **Deborah Smith Seagle** was transferred to disability inactive status, effective December 6, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the December 6, 2012 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a petition to transfer to disability inactive status filed by Seagle. [Rule 27(c), Pet. No. 2012-2210]
- Decatur attorney **Robert Foster Tweedy** was transferred to disability inactive status pursuant to Rule 27, *Alabama Rules of Disciplinary Procedure*, effective January 14, 2013. [Rule 27, Pet. No. 12-2233]
- Huntsville attorney **Wallace Wayne Watkins** was transferred to disability inactive status, effective December 12, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the December 12, 2012 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a petition

for immediate and summary transfer to disability inactive status filed by the Office of General Counsel pursuant to Watkins's request. [Rule 27(b), Pet. No. 2012-2232]

Disbarments

- Huntsville attorney **Annary Aytch Cheatham** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective retroactively to August 30, 2011, the date of Cheatham's previous interim suspension. The supreme court entered its order based upon the December 14, 2012 order of consent to disbarment of the Disciplinary Board of the Alabama State Bar. Cheatham consented to disbarment based on four investigations concerning her handling of lender and client funds and the excessive billing of clients. [Rule 23(a), Pet. No. 2012-2266; Rule 20(a), Pet. No. 2011-1435; ASB nos. 2010-247, 2011-589, 2011-1025 and 2011-1793]
- On February 6, 2013, the Supreme Court of Alabama adopted the January 22, 2013 order entered by Panel I of the Disciplinary Board of the Alabama State Bar disbarring Mobile attorney **Lila Virginia Cleveland** from the practice of law in Alabama. This disbarment was entered pursuant to Cleveland's filing a consent to disbarment on January 18, 2013. Cleveland waived her right to any further proceedings and the right to appeal. [Rule 23(a), Pet. No. 2013-182]
- Birmingham attorney **Kelvin Leonard Davis** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective retroactively to April 17, 2012, the date of Davis's previously ordered interim suspension. The supreme court entered its order based upon the January 22, 2013 order of consent to disbarment of Panel I of the Disciplinary Board of the Alabama State Bar. Davis consented to disbarment based upon a pending investigation into his handling of lender and/or third-party funds in his trust account. [Rule 23(a), Pet. No. 2013-178; Rule 20(a), Pet. No. 2012-669; ASB No. 2012-1368]
- Tuscaloosa attorney **William Alfred Hopton-Jones, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective January 23, 2013. The supreme court entered its order based upon the November 30, 2012 report and order of Panel I of the Disciplinary Board of the Alabama State Bar disbarring Hopton-Jones. In ASB No. 2011-1244, Hopton-Jones was found guilty of violating rules 3.3(a)(1), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Hopton-Jones filed a personal Chapter 7 bankruptcy petition and, in the petition, he falsely

stated his county of residence in an effort to avoid venue in the jurisdiction in which he normally practices. The use of the false address was discovered by the court during a separate investigation into the filing of similar false bankruptcy petitions by Hopton-Jones's attorney. As a result, the court found that Hopton-Jones had committed a fraud upon the court and revoked and vacated his bankruptcy discharge. In ASB No. 2012-152, Hopton-Jones was found guilty of violating rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.* It was reported to the bar that Hopton-Jones accepted \$1,500 from a client for representation in a bankruptcy case. After accepting payment, Hopton-Jones left the state and moved to Oregon without filing the client's petition. Hopton-Jones further admitted that he never deposited unearned fees and/or filing fees for the Chapter 7 bankruptcy case into his trust account. [ASB nos. 2011-1244 and 2012-152]

- Enterprise attorney **John Lancaster McClung** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective December 18, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel I, of the Alabama State Bar wherein McClung was found guilty of violating rules 1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.16(d), 8.1(b), and 8.4 (a), (c) and (g), *Ala. R. Prof. C.* After accepting clients' cases, McClung did little or no work in the matters and would not communicate with the clients. [ASB nos. 06-1073(A), 08-1177(A), 09-1172(A), 09-1193(A), 09-1445(A), 09-1571(A), 09-1896(A), 09-2007(A), 09-2293(A), and 10-536]
- Russellville attorney **John Fredrick Pilati** was disbarred from the practice of law in Alabama, effective January 8, 2013, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Pilati's consent to disbarment, which was based upon Pilati's having been found guilty of five counts of deprivation of civil rights while acting under color of law in violation of 18 U.S.C. §42 in the United States District Court for the Northern District of Alabama on March 7, 2008. [Rule 23, Pet. No. 12-2267; Rule 22(a), Pet. No. 08-22; ASB No. 07-79(A)]
- On September 12, 2011, Panel II of the Disciplinary Board of the Alabama State Bar issued an order disbarring Huntsville attorney **Carl Michael Seibert** from the practice of law in Alabama, for violating multiple rules of professional conduct. In ASB No. 2009-2174(A), the Disciplinary Board found Seibert guilty of violating rules 3.4(c), 5.5 A.2, 8.4(a) and 8.4(g), *Ala. R. Prof. C.*, for knowingly disobeying a court rule. Seibert violated Rule 26 of the *Rules of Disciplinary Procedure* by using a disbarred attorney to assist in his law practice. The board found that Seibert had used a disbarred attorney as an associate attorney and had assisted the disbarred attorney in the unauthorized practice of law. In ASB No. 2009-2234(A), the Disciplinary Board found Seibert guilty of violating rules 3.3(a)(1), 3.3(a)(2), 3.3(a)(3), 5.5 A.2, 8.4(a), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* The board found that Seibert knowingly made false statements of material fact to a court, knowingly failed to disclose a material fact to a court when disclosure was necessary to avoid assisting a criminal or fraudulent act by the client and knowingly offered evidence that he knew to be false. These violations arose from Seibert's active participation in a scheme to mislead the court regarding the financial participation and personal involvement of a disbarred attorney and convicted felon in a bail-bonding business. Seibert subsequently appealed the Disciplinary Board's findings of guilt and order of disbarment to the Supreme Court of Alabama. On October 19, 2012, the Supreme Court of Alabama issued a certificate of judgment upholding the decision of the Disciplinary Board of the Alabama State Bar. [ASB nos. 2009-2174(A) and 2009-2234(A) and supreme court case No. 1101538]
- The Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Board, Panel I, disbaring attorney **William Orr Smith** from the practice of law in Alabama, effective December 26, 2012. The disbarment was entered as reciprocal discipline regarding the June 13, 2011 revocation of Smith's license to practice law by the Virginia State Bar.
- Montgomery attorney **Leon David Walker, III** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective January 30, 2013. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel II, of the Alabama State Bar wherein Walker was found guilty of violating rules 1.4(b), 1.15(a), 8.1(a) and 8.4 (a), (b), (c) and (g), *Ala. R. Prof. C.* Walker represented a client in divorce proceedings. At Walker's suggestion, the client placed \$29,000 in Walker's trust account. A couple of days later, the client and his wife reconciled and asked for the money to be returned. Thereafter, Walker gave excuse after excuse as to why he could not return the money. Walker subsequently refunded the money in two installments, but told the client to contact him before cashing the checks. When the client informed Walker he was going to cash the checks, Walker placed stop-payment orders on the checks. [ASB No. 2011-1744]

Suspensions

- On January 8, 2013, Heflin attorney **Russell Thomas Emrick, III** was interrimly 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 accepted Emrick's consent to the interim suspension of his license to practice law because of his recent felony conviction. [Rule 20(a), Pet. No. 2012-2293]
- On January 8, 2013, Birmingham attorney **Thomas Christian Fernekes** was summarily 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 Fernekes'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. 2013-111]
- Bessemer attorney **Joel Robert Good** was suspended from the practice of law in Alabama for three years, by order of the Supreme Court of Alabama, effective retroactively to July 13, 2011, the date of Good's previous interim suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Good's conditional guilty plea, wherein he pled guilty to violating rules 1.3, 1.4(a), 1.5(a), 1.15(a), 1.15(b), 1.15(c), 3.4(c), 8.1(b), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* In ASB No. 2011-745, the Office of General Counsel received three insufficient funds notices indicating that Good had overdrawn his trust account. Through an investigation of Good's trust account records, it became apparent that client funds were misappropriated by Good, and that Good had violated a court order concerning the disbursement of settlement proceeds. In ASB No. 2011-1423, Good was hired to represent a client regarding an adoption. The client paid Good \$750 for a home study to be conducted, and an additional \$700 for representation. Good failed to place the \$750 for the home study in his trust account and failed to forward payment to



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the appropriate party for a home study. Thereafter, the client was unable to contact Good regarding his case and filed a bar complaint. After the bar complaint was filed, Good refunded his client \$750 for the home study and \$700 for legal fees. [Rule 20(a), Pet. No. 2011-1129; ASB nos. 2011-745 and 2011-1423]

- Alpharetta, Georgia attorney **Roberta L. Hacker** was suspended from the practice of law in Alabama, effective July 6, 2012, for noncompliance with the 2011 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 12-649]
- Vestavia attorney **Anne Marie Hicks** was suspended from the practice of law in Alabama, effective January 7, 2013, for noncompliance with the 2011 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 12-652]
- Birmingham attorney **Kristin Elizabeth Johnson** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective August 23, 2010. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Johnson's conditional guilty plea wherein Johnson pled guilty to violating rules 1.4(a), 1.16(d), 8.1(b), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* Johnson was previously suspended August 23, 2010 and has not been reinstated. In ASB No. 2010-729, Johnson was hired to represent a client in obtaining a green card as a special immigrant religious worker. The client paid an initial retainer of \$2,000. Thereafter, Johnson failed to adequately communicate with the client. In May 2010, a letter enclosing a bar complaint was sent to Johnson advising her that the bar was in receipt of a complaint filed by the client. Johnson was requested to submit a response, in writing, to the complaint, but no response was received from Johnson. Thereafter, numerous attempts were made to contact Johnson, however, she did not respond. In ASB No. 2011-1722, the complainant paid Johnson \$200 for a consultation, and also gave Johnson a set of documents that Johnson was to use in evaluating her case. After consultation, the complainant was unable to contact Johnson or to retrieve her documents. A copy of the complaint was sent via regular and certified mail to Johnson's last known address, however, the certified mailing was returned to the bar as undeliverable. No response was ever received from Johnson. [ASB nos. 2010-729 and 2011-1722]
- Northport attorney **Kristofor W. Kavanaugh** was suspended from the practice of law in Alabama, effective January 7, 2013, for noncompliance with the 2011

Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 12-650]

- Birmingham attorney **John Edward Norris** was suspended from the practice of law in Alabama for six months by order of the Disciplinary Commission of the Alabama State Bar, effective October 18, 2012. The suspension was ordered held in abeyance and Norris was placed on probation for two years. The order of the Disciplinary Commission was based upon Norris's conditional guilty plea to violations of rules 8.4(b) and 8.4(g), *Ala. R. Prof. C.* In June 2012, Norris pled guilty to two counts of assault III and one count of boating under the influence of alcohol. [ASB No. 2012-1457]
- Centre attorney **Rodney Loring Stallings** was intermily suspended from the practice of law in Alabama, effective October 1, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 1, 2012 order of the Disciplinary Commission of the Alabama State Bar, in response to a petition filed by the Office of General Counsel evidencing that Stallings's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2012-1690]
- Monroeville attorney **Leston Curtiss Stallworth, Jr.** was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective October 18, 2012. The suspension was ordered held in abeyance and Stallworth was placed on probation for two years. The order of the Disciplinary Commission was based upon Stallworth's conditional guilty plea to violations of rules 1.4(a), 1.15(a) and 8.4(g), *Ala. R. Prof. C.* In exchange for Stallworth's plea, ASB No. 2012-1076 is dismissed. In ASB No. 2011-887, Stallworth was hired to represent the complainant for a flat fee of \$2,000 to file a lawsuit against a motor company regarding a mail truck that had been purchased by the client's wife. Approximately a week later, the client's wife totaled the truck in an accident. After totaling the truck, the insurance company would not pay the claim, asserting that the truck was not insured at the time of the accident. The client's wife subsequently hired Stallworth to represent her in the dispute with her insurance company. According to the client's wife, Stallworth said that she and her husband had hired him for separate legal matters and she would need to pay a separate fee of \$500. The client's wife informed Stallworth that she only had \$350, and Stallworth agreed to handle the matter for \$350. Stallworth did not take any further action against Greenville Motor Co. due to the client's vehi-

cle being totaled in the accident. Stallworth failed to place the fees into his trust account, and also made personal payments directly from his trust account and commingled personal and client funds. In addition to the suspension, Stallworth was ordered to refund \$2,000 to his clients. [ASB nos. 2011-887 and 2012-1076]

- McIntosh attorney **Stacey LaShun Thomas** was suspended from the practice of law in Alabama for 180 days, by order of the Supreme Court of Alabama, effective December 19, 2012. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Thomas's conditional guilty plea, wherein Thomas pled guilty to violating rules 1.3, 1.15(a), 1.15(b), 1.15(g), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* Thomas was retained to probate the estate of her client's father for a flat fee of \$7,600. A hearing was scheduled in the matter, however, Thomas failed to appear at the hearing and the court ruled against the client and taxed costs against him. The client had also retained Thomas to represent him involving the eviction of a tenant from one of the client's rental properties. Thomas obtained a default judgment for past due rent, and later obtained a garnishment on the tenant's wages. Thomas had the payments issued directly to her. Thomas cashed the garnishment checks, but failed to deposit the checks into a trust account. Additionally, Thomas failed to maintain an IOLTA account as required by the *Alabama Rules of Professional Conduct*, and failed to remit some of the garnishment payments to the client. In addition to receiving the 180-day suspension, Thomas has been ordered to pay restitution in the amount of \$500 to the complainant. [ASB No. 2011-1912]

tion for violating rules 1.15(c), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* In December 2008 and January 2009, Potts deposited \$175,092.70 into his trust account, pursuant to a settlement agreement resolving litigation regarding an estate matter. In January 2009, Potts's firm, along with co-counsel, filed a joint motion for approval of attorneys' fees, costs and related necessary expenses, stating that Potts's firm and co-counsel were contractually entitled to a fee of approximately \$180,000. At this time, co-counsel claimed he was entitled to 50 percent of the fees in the case. Thereafter, a dispute arose between Potts and co-counsel concerning the payment of attorneys' fees in another matter and, as a result, Potts informed co-counsel that he was placing a lien on co-counsel's share of the attorneys' fees in the estate matter. Prior to approval by the court, Potts began transferring the funds held in trust, including those claimed by co-counsel, to Potts's firm's general account as earned fees. Later, the court held an in-chambers hearing on the motion for attorneys' fees, and, at that time, Potts became aware that creditors of the estate were seeking the funds he was supposed to be holding in trust. After the hearing, Potts transferred approximately \$38,000 that was remaining in the trust account into his firm's general operating account. At the time of transfer, the court had not yet approved the payment of attorneys' fees. Potts was subsequently awarded attorney's fees, costs and expenses by the court and eventually reached an agreement with co-counsel concerning his share of the fees. In an unrelated matter, Potts filed a petition to modify his divorce agreement and sought a reduction in the amount of child support based on a substantial reduction in income. Prior to a hearing on the petition, Potts amended his 2009 tax return to remove approximately \$31,000 of personal expenses he had previously claimed as business expenses. [ASB No. 2010-1580]

Public Reprimands

- On January 11, 2013, Decatur attorney **Peter Monfore Neil** received a public reprimand without general publication for violating rules 7.3(b)(1)(ii) and 8.4(a), *Ala. R. Prof. C.* In March 2012, a complaint was filed against Neil by a bankruptcy attorney alleging that Neil had sent two improper solicitation letters to the attorney's clients, offering to represent the clients in a lawsuit. Specifically, the solicitation letters were mailed to the clients prior to their being served with notice of the lawsuit filed against them, and prior to the passage of seven days from the date of service. [ASB No. 2012-574]
- On November 2, 2012, Florence attorney **Frank Butler Potts** received a public reprimand without general publica-

- On January 11, 2013, Florida attorney **Maria P. Sperando**, who was admitted to practice law in Alabama, pro hac vice, received a public reprimand without general publication for violating rules 8.1(a) and 8.4(g), *Ala. R. Prof. C.* In July 2011, Sperando filed a Rule VII Application for Admission to Practice in the Alabama State Bar. On the application, Sperando denied that she had ever "been subject to any suspension proceedings." However, in May 2000, Sperando's status was revoked and she was suspended from practicing in North Carolina for one year. Sperando's pro hac vice privileges had been previously revoked in another North Carolina court for ethical and professionalism violations, and Sperando failed to disclose that discipline during a conduct hearing. [ASB No. 2012-1934] | [AL](#)



J. Anthony McLain

Ethics Potpourri for \$50: Fees, Gigabytes, Fellows and Files

In the present scheme of things, the legal profession struggles against a tide of public criticism, ridicule and downright condemnation. While the majority of lawyers recognize the problems incidental to this negative perception, what are we as a profession doing to refute this with our daily actions?

This column usually presents a formal opinion of the Disciplinary Commission, which opinion is often requested by lawyers in Alabama from the Office of General Counsel. However, due to recent inquiries of bar leaders and members, I felt the need to deal with certain areas which continue to be fraught with confusion and misunderstanding by lawyers in Alabama as well as the general public.

Fees—Right, Fight or Fantasy?

A primary motivation behind many bar grievances is an attempt by a client to receive a fee refund or reduction. The threat of the (former) client is that the lawyer must refund all or a portion of a fee or “I’ll report you to the bar!” Call it leverage, threat or extortion, but several complaints reviewed by the Disciplinary Commission are nothing more than fee disputes between the lawyer and client. And most involve the “smaller” fee-generating cases, thereby forcing the lawyer to decide whether it is worth his or her time and effort to fight the dispute, or just refund per the client’s demands.

Certain of our local bar associations utilize a fee mediation process to resolve some of the fee dispute complaints. This diverts the matter from a disciplinary investigation to a mediated resolution of the client’s dissatisfaction with the lawyer’s fee.

The Disciplinary Commission has rendered opinions establishing that there is no such thing in Alabama as a “non-refundable” retainer, and that child support arrearage cases should be handled on a contingency fee basis in only the most extraordinary situations, with significant, knowing consent being required of the client in those extraordinary situations.

However, complaints are still received by the Disciplinary Commission where “creative” lawyers attempt to circumvent these proscriptions with complex contract language. All of this comes at the cost of the public’s perception of “greedy lawyers.” The actions of the few again indict the profession as a whole.

Surf’s Up! Ride the Internet!

The concept of advertising permeates the legal profession as it does most other professions and vocations. The numbers continue to reflect a general distaste by the public for any advertising, be it the newest laxative or bargain basement legal services. Why do you think they invented the DVR?

The United States Supreme Court has said that lawyer advertising is permissible, but may be regulated. What does regulation have to do with taste, though? And it appears that the general public, while obviously responsive to advertising of

all types, can just as easily be offended by certain attempts to “get” them as clients.

The Board of Bar Commissioners of the Alabama State Bar responded to certain complaints from the public by seeking from the Alabama Supreme Court a rule change which placed a 30-day moratorium on contact by lawyers with potential personal injury or wrongful death clients. The supreme court forthwith adopted just such a rule. The court has also adopted Rule 7.3(b)(1)(ii) and (iii) which place a seven-day-after-service wait period in other civil and criminal cases.

Yet, certain lawyers continue to argue that their permissible letters of solicitation are not “covered” by the rule, or that they do not have to comply with other requirements of the advertising rules as they are too “burdensome” or “vague.” The concern for the profession and its image again takes a back seat to an individual lawyer’s personal motives.

Then along come the Internet, social media sites, tweeting and texting. With the exponential advancements in technology, the public is now being bombarded with emails and other advertising schemes which are most difficult to police, and even more difficult to regulate. Again, does the public really want to be “spammed” by lawyers and other ecommerce? Are late-evening “courtesy calls” the next step for hawking legal services?

Lastly, the legal profession is now advancing “specialists” in certain areas of the law. While the statistics maintained by the bar do not reflect a huge surge of lawyers seeking specialist status or certification, some lawyers play loosely with other accolades or accomplishments when having their letterhead and business cards printed.

Rule 7.5, *Alabama Rules of Professional Conduct*, states that a lawyer shall not use a firm name, letterhead or other professional designation which implies a connection with a government agency or a public or charitable organization. The rule further requires that a firm with lawyers not licensed to practice in Alabama must, if such lawyer’s name appears on the firm’s letterhead, state that the lawyer is *not* licensed to practice in Alabama. And before you use “fellow,” “charter member,” “knight” or other moniker in connection with any academy, inn, union or congregation, please make sure such is an approved certifying organization consistent with Rule 7.4, *A.R.P.C.* Otherwise, including such listing on letterhead, business cards or beverage holders could constitute a violation of the rule.

Flight, Files and Fights

An increasing number of calls are being received by the Office of General Counsel from clients whose lawyer is leaving his or her firm, to relocate to another firm or “go solo.” The

anxious client is concerned as to who will be his lawyer, where his file will end up and what is going to happen to his case.

The opinions of the Disciplinary Commission state that absent a valid attorney’s lien, the file belongs to the client and shall go/stay where the client wants it to go/stay. However, some lawyers allow their representation of the client to be overshadowed by their contractual dispute with their “former” firm, and, thus, hinder the advancing of the client’s case. Not wise, not prudent.

In ABA Formal Opinion 99-414, the ethical obligations of a lawyer upon withdrawal from one firm to join another were addressed, concluding that lawyer’s obligations include: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services; (2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer’s former firm.

The opinion goes on to say that notification to current clients is required, and does not constitute impermissible solicitation. However, such notice must fairly describe the client’s alternatives and should provide the client with information sufficient to allow the client to make an informed decision with regard to future representation. Obviously, the better method of notification to the client would be a joint communication by the lawyer and the firm. When other issues prevent such joint notification, the obligations listed above are *de minimis* and are in addition to those of a fiduciary. And, under no circumstances, should personal or contractual disputes between the lawyer and the firm impede the timely and adequate provision of legal services to the client.

Let’s Be Careful out There

The rules and their interpretations were never designed to make the practice of law burdensome. Remember, these are rules of ethics, not rules of prohibition. As lawyers, we owe the public and other members of this profession conduct which not only comports with the rules, but also demonstrates civility and professionalism.

If nothing else is remembered about this commentary, remember this—I have yet to receive a complaint against a lawyer for being *too* ethical. Try to be the first. | AL



Balch & Bingham LLP announces that **R. Bruce Barze, Jr.** has been selected for membership in the Association of Defense Trial Attorneys (ADTA). The ADTA invites only one defense trial attorney to be its prime member per one million in population for each city, town or municipality across the United States, Canada and Puerto Rico.



Barze

Balch & Bingham also announces that **Clark A. Cooper** has been re-elected as Alabama's state delegate for the American Bar Association (ABA) House of Delegates. Cooper will serve a three-year term as Alabama's only ABA state delegate, and is one of 50 total delegates.



Cooper

Huie, Fernambucq & Stewart LLP announces that **Martha Thompson** has been invited to join the Claims and Litigation Management Alliance. The CLM is a nonpartisan alliance of professionals whose goals are to create a standard of litigation management in pursuit of client defense. | [AL](#)



Thompson

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

— Henry Ford.



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A Lively and Interesting Session

This article is being written following the 11th legislative day of the 2013 Regular Session of the Alabama Legislature. This means that a little more than a third of the allowed limit of legislative days has elapsed. Through today, 733 bills have been filed, 90 have been passed by the house of origin and eight have been passed by both houses. These statistics are slightly down from the average of the past few years, but it has been a lively and interesting session all the same.

For purposes of this article, I will focus on the bills that have already been passed in at least the house of origin and are in good position for final passage. Please note that action on the budgets is already underway with the general fund budget positioned for final deliberations and passage in the senate appears imminent.

Of the 90 bills which have been passed by the house of origin, 13 are local bills, 24 are sunset bills and the remaining are bills of general application.

Alabama Accountability Act of 2013

The bill that has garnered the most attention thus far in the session is the "Alabama Accountability Act of 2013." This education-focused act has three major components: first, it provides a mechanism whereby local school systems can opt out of certain statewide requirements; second, it provides a mechanism whereby parents who transfer students from failing schools can receive a tax credit for expenses associated with moving to an out-of-district non-failing school or a private school; and third, it provides tax deductions for contributions to scholarship-granting entities that help students move from failing schools.

A number of the bill's key provisions are triggered by the school's being a failing school. A failing school is defined as "persistently low-performing" on the state's School Improvement Grant application, is in the bottom 10 percent on statewide reading and math assessment scores, has earned three consecutive D's or one F on the school grading report card or is designated by the Department of Education as failing.

The flexibility portion of the bill provides safeguards for teachers' pay and rights. In addition, in order to be granted a waiver on any requirement, the local school system must have public hearings and the school superintendent and school board must request the change. Once a change is requested, the state superintendent reviews the petition and makes a recommendation to the state school board which then must approve the waiver.

The tax credit portion of the bill allows a parent to transfer a student from a failing school. The parent is given three options: transfer to a non-failing school in the same district; transfer to a non-failing school outside of the district; or enroll in a private school. The bill is written so that no other school is required to grant acceptance to any student not zoned for that school. The maximum tax credit available is 80 percent of the average annual state cost of attendance for a public K-12 student during the applicable tax year.

The final aspect of the bill allows for the establishment of scholarship-granting organizations. Businesses who donate to these organizations will get an income tax credit equal to 50 percent of their donation, up to 50 percent of their tax liability. Individuals will get an income tax credit equal to 100 percent of their donation, up to 50 percent of their tax liability. The aggregate limit of these credits is \$25 million annually. In order to qualify, an organization must expend at least 95 percent of its funds on scholarships with at least 75 percent of the funds used for scholarships for students who were enrolled in a public school. The organization must also allocate a substantial portion of its funds for income-eligible students.

Alabama Trust Fund Repayment

In September 2012, the voters of Alabama approved the transfer of \$437 million from the Alabama Trust Fund to the State General Fund. This transfer will take place over three fiscal years, beginning with the 2013 fiscal year.

This bill provides for a repayment structure that would repay the transfers over 10 fiscal years, ending September 30, 2026.

Beginning in Fiscal Year 2014, and continuing until Fiscal Year 2026, the legislature would be required to meet annual repayment minimums.

The Alabama Informed Voter Act

This act creates a 15-member Fair Ballot Commission consisting of the governor, the lieutenant governor, the speaker of the house, the attorney general, the secretary of state, five citizens, and five attorneys licensed in Alabama.

At least 60 days prior to an election the commission shall post on the legislature's website a "Ballot Statement" consisting of (a) the text of the statewide ballot measure and the text of the question that will appear on the statewide ballot, (b) the text of and a summary of any associated enabling legislation, (c) the placement of the statewide ballot measure

on the ballot, and (d) a plain-language summary of the statewide ballot measure.

State Government Efficiencies

Over the past several sessions, the legislature has pursued a number of avenues to streamline the functions of state government and contain costs. Thus far, during the 2013 session, the legislature has advanced bills to consolidate law enforcement functions, streamline IT functions and reorganize the legislative branch.

The IT consolidation bills would create a cabinet-level position for an information technology officer to advise the governor on all technology functions of state agencies and work to improve efficiencies.

If passed, the law enforcement efficiency legislation will result in a more streamlined and coordinated state law enforcement effort by reorganizing public safety services under the Alabama State Law Enforcement Agency. The agency will be led by a cabinet-level secretary and consist of two units, the Department of Public Safety and the State Bureau of Investigations.

The reorganized Department of Public Safety will include portions of the existing Department of Public Safety, Marine Police Division of the Alabama Department of Conservation and Natural Resources, law enforcement functions of the Public Service Commission and revenue enforcement officers.

The reorganized State Bureau of Investigations will include functions performed by the Alabama Bureau of Investigations, in addition to the law enforcement unit of the Alabama Alcoholic Beverage Control Board and the investigative units of the Alabama Forestry Commission and the Department of Agriculture and Industries. The Alabama Criminal Justice Information Center will also be transferred to the State Bureau of Investigations.

In addition to coordinating law enforcement and investigative services, the secretary of the Alabama State Law Enforcement Agency will serve as the state's Homeland Security Advisor and functions of the Department of Homeland Security will be transferred to the secretary's office.

The legislative reorganization bill would result in a complete reorganization of the legislative branch of state government. The bill would consolidate the functions of more than a half-dozen legislative oversight committees into one legislative committee. The bill would also allow for the consolidation of certain purchasing, accounting and human resources functions across the legislature and its agencies. | [AL](#)



Please email announcements to Margaret Murphy, margaret.murphy@alabar.org.

About Members

James R. Esdale announces the opening of **The Esdale Law Firm LLC** at 3250 Independence Dr., Ste. 102, Birmingham 35209. Phone (205) 879-9595.

Robert E. Lusk, Jr. announces the opening of **Lusk Law Firm LLC** with offices in Fairhope and Montgomery. The mailing address is P.O. Box 1315, Fairhope 36533. Phone (251) 471-8017 and (334) 595-9101.

Among Firms

Adams & Reese announces that **Mindi Robinson** has been elected a partner. Robinson practices in the Birmingham office.

Adams, Umbach, Davidson & White LLP of Opelika announces the addition of two partners, **Paul A. Clark** and **Jason A. Forbus**.

Steven M. Brom and **Sen. Bryan M. Taylor** announce the formation of **Brom & Taylor LLC** at 4908 Cahaba River Rd., Ste. 204, Birmingham 35243. Phone (205) 970-6747.

Jack T. Carney and **Shannon H. Dye** announce the formation of **Carney Dye LLC** at 300 Office Park Dr., Ste. 160, Birmingham 35223. Phone (205) 802-0696.

Christian & Small LLP announces that **Jonathan Hooks** joined the firm as an associate.

Cleveland & Riddle LLC announces that **Caitlin Saunders** has joined as an associate.

Dominick Feld Hyde PC announces that **Ashley L. Neese** has been made shareholder.

Gordon, Dana, Knight & Gilmore LLC announces that **J. Brannon Maner** has joined as a partner and **James A. Stewart** has joined as an associate.

Donaldson & Guin LLC announces a name change to **Guin, Stokes & Evans LLC**.

Hatcher, Stubbs, Land, Hollis & Rothschild LLP announces that **D. Nicholas Stutzman** has become a partner.

Haygood, Cleveland, Pierce & Thompson LLP announces that **Deanna L. Forbush** has joined as an associate.

M. Adam Jones announces the opening of **M. Adam Jones & Associates LLC** at 206 N. Lena St., Dothan 36303. Phone (334) 699-5599. **Jordan Davis**, **C. Nicole Pierce** and **Christopher D. Williams** have joined as associates.

G. Stephen Wiggins and **Raley L. Wiggins** announce the opening of **Red Oak Legal PC** at 500 Towncenter Blvd., Ste. B, Tuscaloosa 35406. Phone (205) 764-1262.

Alyce Spruell announces that she has joined **Rosen Harwood PA**.

Schwartz & McClure announces that **Trey McClure** has joined the firm. | [AL](#)

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

About Members

This section announces the opening of new solo firms.

Among Firms

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

free•dom:

noun

**the power to determine
action without restraint.**

free•dom court re•porting:

proper noun

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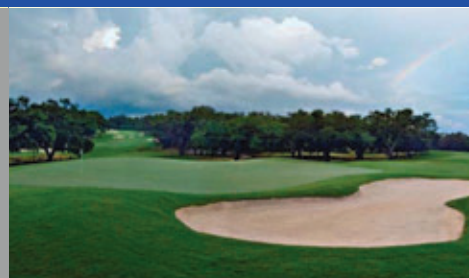




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July 17-20, 2013

Grand Hotel Marriott Resort, Golf Club & Spa, Point Clear, Alabama



Wednesday, July 17, 2013

Noon - 6:00 pm

Refreshments upon arrival

Noon - 7:00 pm

2013 Annual Meeting Registration Opens

2:00 pm - 4:00 pm

OPENING PLENARY SESSION

Trial & Appellate Practice: Things You Never Want to Hear a Judge Say

4:00 pm - 4:15 pm

Break

4:15 pm - 5:15 pm

Board of Bar Commissioners' Meeting

5:15 pm - 6:00 pm

Young Lawyers' Section Meeting

7:00 pm - 8:30 pm

Kick-Off Reception by the Pool

Thursday, July 18, 2013

7:00 am - 8:00 am

Friends of Bill W.

7:30 am - 5:00 pm

Registration

7:30 am - 8:30 am

Senior Lawyers' Breakfast

7:30 am - 10:30 am

Coffee Bar

8:00 am - 5:00 pm

Legal Expo 2013

8:30 am - 9:30 am

SECOND PLENARY SESSION

Funding Justice: Are We?

A Panel Discussion on Court Costs and Court Funding

9:00 am - 10:00 am

Zumba

9:45 am - 10:45 am

Business Torts and Antitrust: Hot Topics in Commercial Litigation

Intellectual Property, Sports and Entertainment: Right of Publicity

International Rivals and Global Flash Points: Dealing With North Korea, Iran and Jihadist Threats

9:45 am - 11:45 am

Litigation Section: A Peek behind the Door... What Do Jurors Really Think?

11:00 am - Noon

Diversity in the Courtroom: Why Do We Need to Talk About It?

Federal Court Practice: The State of the Alabama Federal Districts

Construction Law Update

11:30 am - 11:45 am

Visit the Legal Expo

Noon - 12:30 pm

Bloody Mary and Mimosa Reception Honoring 2013 ASB Award Winners

12:30 pm - 1:30 pm

Annual Bench & Bar Luncheon and Awards Program

1:30 pm - 2:00 pm

Visit the Legal Expo

2:00 pm - 3:00 pm

Young Lawyers' Section/Leadership Forum Section: Top Seven Strategies to Improve Your Firm's Profitability Today... and Tomorrow

Immigration Law Update

Criminal Justice Section: Current Issues in White-Collar Crime

Appellate Practice Update: How Trial Counsel Can Win (or Lose) Your Appeal

2:00 pm - 4:00 pm

Innovations in ADR

Cooking Demonstration

Olympics for Kids - Preliminary Rounds and Practice for Beach Olympics

3:15 pm - 4:15 pm

International Law: Foreign Corrupt Practices Act

Unlocking the Secrets of the American Health Care System and the Impact of PPACA

Criminal Defense Law Update

5:00 pm - 6:00 pm

The Alabama Lawyer Editorial Board Meeting

5:00 pm - 6:30 pm

17th Annual Alabama State Bar Volunteer Lawyers Program Reception

5:30 pm - 6:30 pm

ABOTA Reception

6:00 pm - 7:30 pm

Cumberland School of Law Alumni Reception

6:00 pm - 8:30 pm

Pajama Party with "Madagascar" Friends

7:30 pm - 8:30 pm

Jones School of Law Dessert Reception for Alumni and Friends

8:00 pm - Until

Celebrating the Diversity of Our Profession Reception

Friday, July 19, 2013**7:00 am - 8:00 am**

Friends of Bill W.

7:30 am - 8:30 am

Early Morning Breakfasts

- Past Presidents' Breakfast
- Inns of Court Coffee

7:30 am - 10:30 am

Coffee Bar

7:30 am - Noon

Registration

8:00 am - Noon

Legal Expo 2013

8:30 am - 9:30 am

U.S. Airways v. McCutchen and ERISA Reimbursement/Subrogation Issues

FEATURED WORKSHOP: Legislative Update

Addiction and Mental Illness

Bankruptcy Law for the Everyday Practitioner

Freedom Court Reporting Technology Workshop: iPad in Law - Apps that Streamline Your Workflow

9:00 am - 10:00 am

Aqua Zumba

9:45 am - 10:45 am

FEATURED WORKSHOP: Today's Best Marketing Practice? Ask Your Clients

Workers' Compensation Law Section: Case Law Update

Alabama's Evolving Election Laws

Panning for Gold: Debt-Collection Abuse

11:00 am - Noon

Employment Law and Current Legal Developments:
Rapid Fire Legal Update from the Plaintiffs' and Defendants' Perspective

Alabama Real Estate, Probate, Trust Law Update

Family Law Update

Internet and Social Media Marketing for Lawyers

Noon - 12:30 pm

Women's Section Reception

12:30 pm - 1:30 pm

11th Annual Maud McLure Kelly Award Luncheon

1:00 pm - 5:00 pm

Lawyers in Pursuit of Birdies at Lakewood (LIPOBAL)

Family Tennis Tournament

1:30 pm - 3:30 pm

Mock Reinstatement: Redemption of an Impaired Lawyer

2:00 pm - 3:00 pm

Women's Section Business Meeting

2:00 pm - 3:30 pm

Access to Justice Meeting

2:00 pm - 4:00 pm

Build-A-Bear Special Event - Children's Party

Dancing with the Bar

Ballroom dance instructors will teach us how to dance like the stars!

3:30 pm - 5:00 pm

VLP Long-Term Planning Task Force Meeting

6:00 pm - 8:30 pm

Women's Section Silent Auction Fundraiser

7:00 pm - 9:00 pm

President's Closing Night Family Celebration

9:00 pm - Until

Young Lawyers' Section/Leadership Forum Section
Beach Party

Saturday, July 20, 2013**7:00 am - 8:00 am**

Freedom Legal Run-Around 5K Run and 1-Mile Fun Run/Walk

7:30 am - 8:45 am

Christian Legal Society Breakfast

7:30 am - 9:30 am

Coffee Bar

8:30 am - 9:15 am

Silent Auction Wrap-Up

9:15 am - 11:15 am

Grand Convocation

11:15 am

Board of Bar Commissioners' Meeting

11:30 am - 1:30 pm

Presidential Reception Honoring Anthony Aaron Joseph of Birmingham, 137th president of the Alabama State Bar

Registration for this year's meeting is being handled online. Go to: www.alabar.org/register

ISI ALABAMA

Grand Prize Giveaway

2013 ALABAMA STATE BAR ANNUAL MEETING



HILTON GRAND VACATION IN MYRTLE BEACH

Escape to beautiful Myrtle Beach, with a getaway to the **Hilton Grand Vacations Club at Anderson Ocean Club** located in the heart of the Grand Strand. Your four night stay will include dinner for two at Bistro 217.

This fabulous prize is provided compliments of ISI ALABAMA, a division of Insurance Specialists, Inc.



HOTEL RESERVATION FORM

Room reservations **MUST BE MADE DIRECTLY WITH THE ALABAMA STATE BAR**
To ensure your accommodations, reservations should be received
NO LATER THAN FRIDAY, June 14, 2013

Please reserve _____ room(s) for _____ person(s)

Name _____

Bar ID: _____

Company or Firm _____

Address _____

City, State _____ Zip _____

Phone _____

Email Address _____

All reservations are accepted on a guaranteed-basis only. A credit card guarantee of your first night's room charge is required to confirm this reservation. Reservations received after **June 14, 2013** will be subject to space and rate availability. **CHECK-IN TIME IS 4:00 P.M. CHECK-OUT TIME IS 11:00 AM.** All rates are subject to 15% resort fee and 6% sales tax. Resort fee is not a tax, and is not subject to exemption.

ARRIVAL:

Date: _____ Time: _____

DEPARTURE:

Date: _____ Time: _____

Room Rates

Regular Rooms \$268.00 per night plus tax (single and double occupancy)

Bay View Rooms \$288.00 plus tax per night (single and double occupancy)

Note: BAY VIEW ROOMS AVAILABILITY IS LIMITED TO A FIRST-REQUEST, FIRST-HONORED BASIS***

Room Type Request: KING _____ DOUBLE/DOUBLE _____ Special Requests: _____

Check Enclosed _____ **Checks should be made payable to Marriott Grand Hotel.**

Circle type of credit card: American Express MasterCard Visa Discover

Name _____

Credit Card Number _____

Expiration Date _____ Signature _____

ROOM GUARANTEE/CANCELLATION POLICY: Reservations guaranteed with a credit card only must be cancelled 5 days prior to arrival to avoid credit card being charged first nights' room and tax. Any reservations or no shows (includes arrivals after midnight) will be released for general sale, and will be reinstated based on availability of rooms.

Please mail to: Alabama State Bar 2013 Convention, P. O. Box 671, Montgomery, AL 36101

