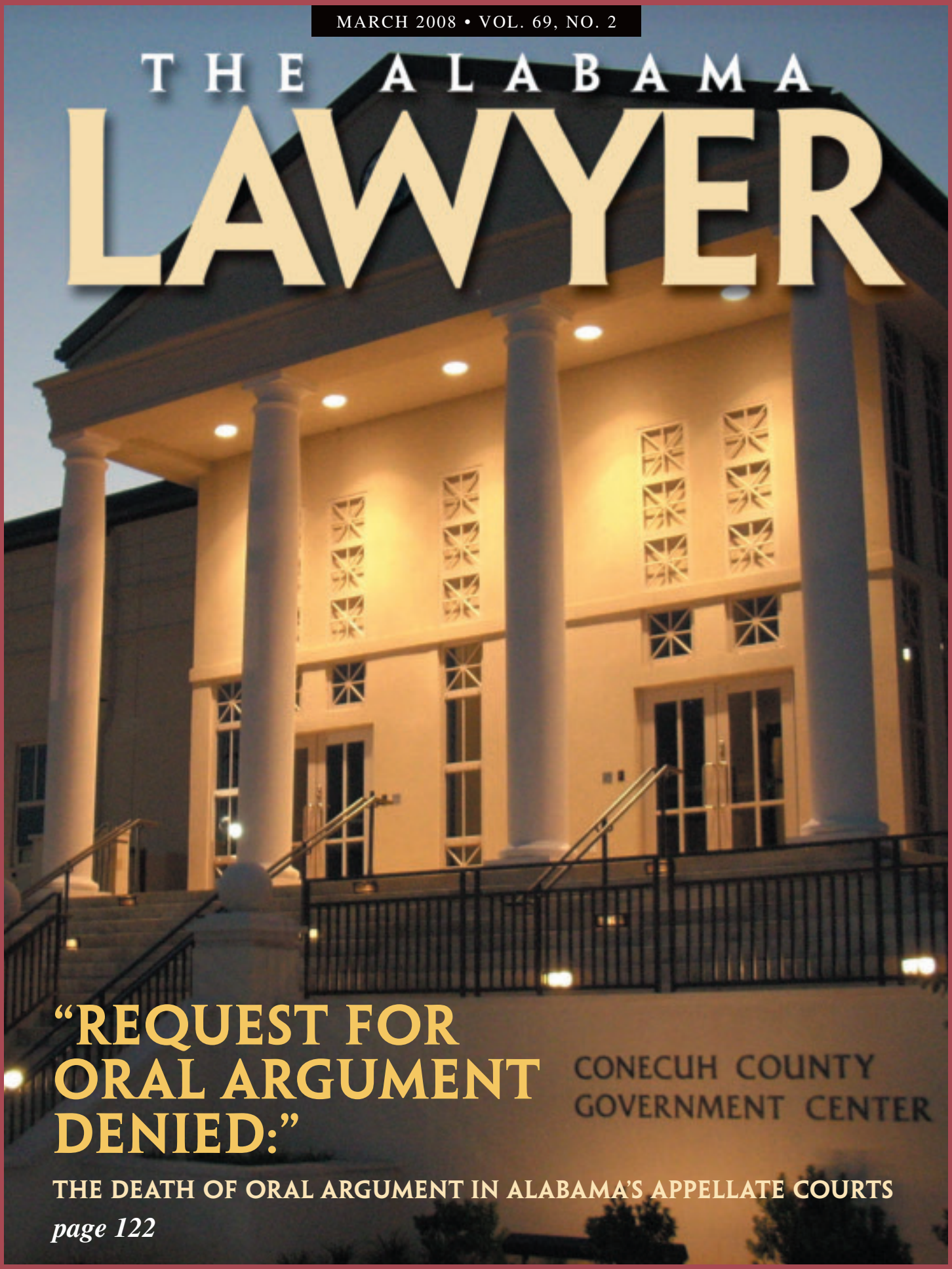
MARCH 2008 • VOL. 69, NO. 2

THE ALABAMA LAWYER



"REQUEST FOR ORAL ARGUMENT DENIED:"

THE DEATH OF ORAL ARGUMENT IN ALABAMA'S APPELLATE COURTS

page 122

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Spring Calendar 2008

Guardian Ad Litem

Friday, April 11
The University of Alabama School of Law, Tuscaloosa

The Administrative Office of Courts and ABICLE are teaming up to provide 6 total hours of CLE for GALs. The AOC will present 2 hours of recertification for existing GALs and ABICLE will present an additional 4 hours of CLE geared especially toward GALs. (Note: This session is approved for 6 hours of CLE credit, which hours cannot be part of the 6-hour requirement for the **initial certification** of GALs. Please contact ABICLE about how to register for this seminar.

6 MCLE Credit Hours

Collections Law

Friday, April 18
The University of Alabama School of Law, Tuscaloosa

No matter whether you represent creditor's or debtor's interests, this seminar will have something for you. Topics include: FDCPA, practical litigation issues, and bankruptcy.

6 MCLE Credit Hours (1 hour ethics)

Divorce from A to Z

Friday, April 25
The University of Alabama School of Law, Tuscaloosa

Just like the title indicates, this seminar will teach attorneys how to handle a divorce case from beginning to end. Join us to learn from the experts on general divorce law, child custody, child support and spousal support!

6 MCLE Credit Hours (1 hour ethics)

To register for these seminars please call 1-800-627-6514 or register online at ABICLE.ORG!

Appellate Practice

Friday, May 2
The University of Alabama School of Law, Tuscaloosa

This program offers you a chance to meet and hear from several appellate judges and successful appellate practitioners. Topics include a view from the 11th Circuit bench, a brief writing session, mandamus and electronic discovery, preserving error, finality and rule 54 (b), and criminal issues. Cosponsored by the Appellate Practice Section of the Alabama State Bar.

6 MCLE Credit Hours (1 hour ethics)

City & County Government

Friday & Saturday, May 9-10
Perdido Beach Resort, Orange Beach, Alabama

Join us for one of our most popular beach seminars! Topics this year will include: economic development, employee leave issues, subdivision development, pre-clearance issues, voting and election law issues, environmental law issues and more. Make your room reservations early by calling the Perdido Beach Resort at 800-634-8001. This annual seminar is cosponsored by the Association of County Commissions of Alabama.

6 MCLE Credit Hours (1 hour ethics)

Intellectual Property

Friday, May 16
The University of Alabama School of Law, Tuscaloosa

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3 MCLE Credit Hours

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IN THIS ISSUE

ON THE COVER

Conecuh County Courthouse at dawn

Photo by Max Cassady

DEPARTMENTS

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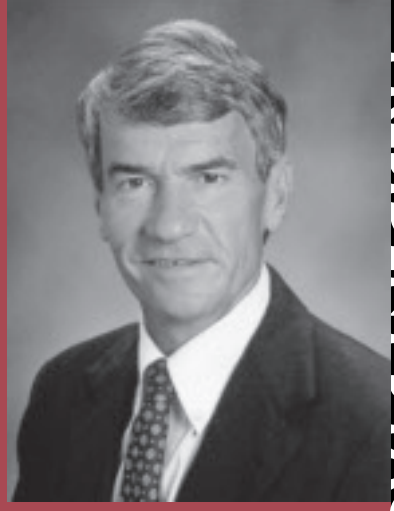
The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O.Box 4156, Montgomery,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



SAMUEL N. CROSBY

Speaking Truth to Power and Eliminating Kudzu in Our Profession's Garden

Speaking Truth to Power

Gamble

On July 13, 2006, at the Alabama State Bar annual meeting, Dean Charles Gamble gave an inspirational speech entitled *Speaking Truth to Power*. He exhorted each of us as Alabama lawyers to engage in a process called Parrhesia established in 400 BC in the constitution of Athens, Greece.

One element of Parrhesia, or speaking the truth to power, meant that the "speaker had a moral obligation" to publicly speak truth to others "instead of promoting his own self-interest through falsehood or silence."

I concur with Dean Gamble, and ABA President-Elect Tommy Wells, that we have an obligation to "exercise Parrhesia in speaking truth, rather than remaining silent," when, in Dean Gamble's words, "statements are being made and conceptions are being formed about the courts, lawyers and the legal system that are not true."

If we do not speak, no one else will when false attacks occur.

Like Bar Commissioner Tut Wynne and many of you, I am a musician. Several years ago Tut and I attended an organizational meeting of a group of men preparing to conduct a Kairos church retreat with inmates in Fountain prison in Atmore. Tut and I got to the meeting 30 minutes early so we could practice with the other musicians who comprised "the music team." While waiting for the other members of the music team to arrive, Tut and I came to a disturbing realization—we *were* the music team.

When it comes to speaking out against false attacks on the courts, lawyers, the judiciary, the legal system, and the Rule of Law, I hope lawyers will realize that we are the music team.

PRESIDENT'S PAGE

Continued from page 91

Kudzu in Our Profession's Garden

Ann and I built our first house next to a kudzu patch south of Bay Minette. We learned the hard way that too much kudzu can adversely affect its environment.

When I asked our builder, Mr. Eugene Chambless, how to control the growth of the kudzu, he grinned and said, "Crosby, the only way to control kudzu is to build a fence around it and move!"

Eugene Chambless (right) and his wife

At the February 2007 ABA Mid-Year Conference, I asked the presidents-elect from 22 states, "What is your state doing to address the issue of law student and young lawyer debt?" As I looked at the uncomfortable blank stares around the room, and no one answered the question, I thought to myself, "Maybe we are all thinking we can build a fence around this problem and pretend it's not there."

Bill Conger is a professor at Oklahoma State Law School who attended the meeting. At the meeting he passionately pointed out to all of us what a serious problem law student/young lawyer debt has become for our profession.

In 2005, a quality of life survey was taken by the Alabama State Bar. The survey reflected that 71 percent of those surveyed who had been practicing law for ten years or less agreed that "student loan debt was becoming a significant problem for beginning attorneys." Part of the 2005 Alabama State Bar long-range plan includes developing "programs for lawyer training on personal finances, law practice management and quality-of-life issues."

Keith Norman wrote an excellent article addressing the issue in Alabama in the May 2006 edition of *The Alabama Lawyer*. In February 2006, the average debt of law students with debt taking the bar exam was $71,000!

In addition to personal and professional issues, too much debt can also discourage young lawyers from going into public service. In 2003, the American Bar Association completed a report entitled *Law Student Debt as a Barrier to Public Service*. The report quoted a study which found that "law school debt prevented 66 percent of the student respondents from considering a public interest government job". The report further concluded that "the legal profession cannot honor its commitment to the principal of access to justice," and "significant numbers of law graduates are precluded from pursuing or remaining in public service jobs." Other findings include that "law school tuitions have skyrocketed" and that in 2002 almost 87 percent of law students borrowed to finance their legal education.

The report recommended measures to provide "more financial planning and guidance counseling to law students prior to matriculation, while enrolled and following graduation."

Now, some good news.

On June 1, 2008, Alabama will become the first state bar in the country to establish a referral program to help lawyers in their first five years of law practice with business planning and law firm management. This program will be administered by the Practice Management Assistance Program of the Alabama State Bar and should also help

young lawyers in private practice address professional and personal debt.

Through this referral program, the state bar will refer new lawyers to participating members of the Association of Legal Administrators (ALA) who will donate their time to help these new lawyers with business planning, firm management and technology issues.

A lawyer in his or her first five years of practice in Alabama may initiate a request for help in these areas by contacting Laura Calloway with the P-MAP office of the Alabama State Bar, at (800) 354-6154 or *laura.calloway@alabar.org*. The lawyer will be put in touch with an ALA member for law firm management assistance.

It's hopeful that this ALA referral program will be a model for other states in the country and will result in helping many new lawyers nationwide.

Additionally, on July 11, 2008, at the annual meeting in Sandestin, one of the speakers will be Howard Dayton. Mr. Dayton has a nationally broadcast daily radio show called *Money Matters* and he will speak on financial planning for lawyers.

Thank you

I am grateful for the leadership and services of each task force and committee member including, but not limited to, all of the following: Chief Justice Sue Bell Cobb, former Chief Justice Drayton Nabers and attorneys Jim Williams, Alicia Bennett, Billy Bedsole, Alyce Spruell, Phillip McCallum, Mark White, Boots Gale, Rick Davidson, Allison Ingram, Paul DeMarco, Roger Bedford, Sandy Speakman, Patrick Finnegan, Wanda Devereaux, Scotty Colson, Harold Stephens, Douglas McElvy, Rich Raleigh, Cooper Shattuck, Joe Fawal, Chris Conti, and Tom Ryan. ▲▼▲

ALABAMA STATE BAR
2008-2009 COMMITTEE PREFERENCE FORM

ALABAMA STATE BAR MISSION STATEMENT

THE ALABAMA STATE BAR IS DEDICATED TO PROMOTING THE PROFESSIONAL RESPONSIBILITY AND COMPETENCE OF ITS MEMBERS, IMPROVING THE ADMINISTRATION OF JUSTICE, AND INCREASING THE PUBLIC UNDERSTANDING OF AND RESPECT FOR THE LAW.

INVITATION FOR SERVICE FROM J. MARK WHITE
PRESIDENT-ELECT

We want very much in the upcoming year to broaden participation in bar activities.
If you would like to serve our profession in a volunteer capacity,
please choose a committee or task force in which you are interested.
The Alabama State Bar needs you and will try hard to
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APPOINTMENT REQUEST - Terms begin August 1, 2007 and expire July 2008. Indicate your top three preferences from the list by marking 1, 2 or 3 beside the preferred committee (c).

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Note: A complete description of the work of each committee can be found at *www.alabar/members.*

INSTRUCTIONS FOR SUBMISSION

Please return this form no later than May 5, 2008 to be considered for an appointment, by mail to Programs, P.O. Box 671, Montgomery, AL 36101-0671; by facsimile to 334-261-6310; or by email to *rita.gray@alabar.org.* Please remember that vacancies on existing committees are extremely limited as most committee appointments are filled on a three-year rotation basis. **If you are appointed to a committee, you will receive an appointment letter informing you in Aug. 2008.** You may also download this form from our Web site, *www.alabar/members*, and submit the completed form via email to *rita.gray@alabar.org.*

KEITH B. NORMAN

Architectural rendering of the new Retirement Systems of Alabama building

New Neighbors

Fifteen years ago, the former Judicial Building at 445 Dexter Avenue was vacated by the Alabama Supreme Court, the Court of Criminal Appeals and the State Law Library. As many will recall, the Court of Civil Appeals and the Administrative Office of Courts (AOC) had been located in alternate locations prior to joining the other two courts and the library in the new building at 300 Dexter Avenue. Since the opening of the New Judicial Building (NJB) in 1993, the Old Judicial Building (OJB) has sat empty, quietly deteriorating.

The origins of the OJB are interesting. The building was designed by Hyman Wallace Whitcover and built in 1926 as a Scottish Rite Temple. When the Great Depression struck a few years later, financial difficulties forced the Masons to abandon the building which the state later purchased in 1938 and remodeled for the Judicial Department. In addition to the law library and the appellate courts of Alabama, the Alabama Attorney General's Office was also located in the building when it reopened in 1940. The creation of separate intermediate appellate courts and the need for more space eventually resulted in the court of civil appeals and the attorney general relocating to offices away from the OJB.

Efforts to replace the judicial building began in the mid-1960s. By that time, the old building had already outlived its useful life. The building had numerous leaks, was full of asbestos and became difficult to heat and cool. It was impractical as an office building because it was never intended to serve that purpose. (I worked in the OJB from 1982-1984 as staff attorney for Justice Hugh Maddox. Based on the two years I spent there, I can say that the building was probably not worth salvaging.) After many years of cajoling and persuasion by Howell Heflin, Bo Torbert and others, a Judicial Building Authority was created by the legislature in 1986, securing the new building's construction.[1]

EXECUTIVE DIRECTOR'S REPORT

Continued from page 95

Because the OJB is next door to the state bar building, state bar officers have had an abiding interest in the building's fate. Since becoming vacant, many discussions by many groups have ensued about saving the building. I have participated in some of those discussions which at different times have included city and state officials, historical and preservation groups, architects, local foundations, and others. In one instance, obtaining a grant from the federal government to make the building the terminus of the historic Voting Rights Trail was discussed. The reoccurring problem in all these discussions and the single most important impediment to refurbishing the OJB has been securing a source or sources of funding and locating a rent-paying tenant or tenants to make the venture financially viable.

The state had concluded long ago that the building was not worth the significant cost (early estimates were in the $8 to $10 million range) to handle the asbestos abatement and to completely remodel the building. In fact, I had a conversation in the mid-1990s with Sage Lyons (now deceased) who was serving as finance director under then Governor Fob James about the future of the OJB. In that conversation, he told me that he thought the best thing to do was to raze the building and the abandoned former State Health Department Building behind the court building and use both spaces for a well-landscaped state parking lot. This past November, the health department building was finally torn down.

RSA Steps In

At some point in early 2007, city and state officials, as well as Dr. David Bronner, CEO of the Retirement Systems of Alabama (RSA), met to discuss possible RSA involvement in an effort to refurbish the OJB. For whatever reason, no agreement was reached on the building's fate. Last March, Alabama Public Television featured the OJB on a segment of *For the Record* which highlighted the deteriorating building and the call of preservationists to save and preserve the structure. Following the airing of that episode about the building, I received a number of telephone calls and e-mails from lawyers around the state who had seen the story and expressed their hope that the building could be saved. Not long after that was when I learned that the state would perform the limited repairs to "moth-ball" the OJB with the hope that something more permanent could be done with the building in the future.

Old Judicial Building - 445 Dexter Avenue

Late last spring, I happened to look out my office window, which overlooks the back of the OJB. I saw Dr. Bronner and other RSA representatives and state officials touring the building. I walked out and greeted Dr. Bronner and told him that I hoped that he would be our new neighbor. Not long after, the state and the RSA, with the city's blessings, struck a deal. In exchange for approximately 150 parking spaces in the RSA's Center for Commerce parking deck on Adams Street, the state conveyed the OJB to RSA along with the lot on which the former health department was located. The parking spaces will be used by the state primarily

for the Attorney General's Office and the state's Homeland Security Office that will relocate to the former Public Safety Department Building in the Capitol Complex after it is refurbished.

In November, Ron Blount, RSA's project manager for the OJB project, visited with me to share the preliminary sketches of the new building that will be erected next door. I found the design of the new building to be novel and elegant. The plans call for the building to be 12 stories and to preserve the OJB by encapsulating it. The space between the new building and the state bar building will be landscaped and have an area that will honor all the former chief justices and associate justices who served in the OJB. The new building entrance will have visitors entering at what was formerly the OJB's basement floor where the law library was located. Its second level will be the former lobby and old supreme courtroom. The courtroom will be preserved as a public function space. All in all, the new building will house a 400,000-square-foot office complex. The entire project is projected to cost $200 million.

Much has been written in the state's newspapers about the project since the RSA announced its plans. Locally, there have been several meetings called to discuss RSA's plans for the OJB. Concerns have been raised by some that the new 12-story building is too imposing for its proximity to the capitol. Critics of the project have called for redesigning the proposed building and decreasing its size. The RSA has pointed out that the financial viability of preserving the OJB on the current footprint requires that the building be large enough to allow RSA to recoup its investment.

I am very excited that the fate of the OJB is a positive one. The plans for the new building are a welcomed change from the 15 years of deterioration and uncertainty about the building next door.

Endnotes

1. Retired Associate Justice Hugh Maddox prepared an in-depth article about the new Judicial Building, renamed the Heflin-Torbert Judicial Building in 2005, which appeared in the May 2006 issue of *The Alabama Lawyer*, pp. 202-207.

LETTER TO THE EDITOR

Dear Editor:

I was surprised to read the article, "Short-Changing Our Judges," in the January issue of *The Alabama Lawyer*. Alabama is fortunate to have the best judges in the United States, and they deserve to be compensated fairly for their important work. However, now is not the time for a judicial pay increase.

By some estimates, Alabama legislators are facing a $500 million shortfall in the Education Trust Fund and a $200 million shortfall in the General Fund.[1] In such an environment, state prisons are in danger of going without necessary staff, and thousands of poor Alabamians may find themselves tossed off the state's Medicaid rolls.

The median annual salary of an Alabama lawyer is $64,656,[2] and the median household income in Alabama is $38,783.[3] Tough choices are the order of the day in Montgomery; and no legislator could justify sacrificing pressing state needs to raise comfortable, six-figure judicial salaries to an amount that would eclipse both the income of everyday Alabamians and that of Alabama lawyers.

–Adam Bourne, Chickasaw,
adamlbourne@gmail.com, (205) 246-9290

Endnotes

1. Budget pinch underscores need for tax reform, *The Tuscaloosa News,* January 18, 2008, *www.tuscaloosanews.com/article/20080118/NEWS/801180301/1012/TL05,* copy of article on file with the author.
2. Salary Survey Report for Bar Association: Alabama Bar Association, PayScale.com, January 10, 2008, *www.payscale.com/research/US/Bar_Association=Alabama_Bar_Association/Salary,* copy of article on file with the author.
3. Alabama Census Data, Election 2006, *washingtonpost.com, http://projects.washingtonpost.com/elections/keyraces/census/al/,* copy of article on file with the author.

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ABICLE is pleased to announce that a new edition of Gamble's McElroy's Alabama Evidence will be available for order in Summer 2008. Please contact ABICLE for more information.

Margaret Scholten Childers

It is with deep sadness and regret that we acknowledge the passing of Margaret Scholten Childers. She was a highly respected member of Alabama's legal community since her graduation, *cum laude*, from Harvard Law School in 1978. Her concerns for her community led her to a distinguished career in public service beginning with her work representing economically disadvantaged clients at Legal Services Corporation of Alabama. Among the first attorneys hired in 1978, Margaret began as a staff attorney and contributed to the early success of the Legal Services program. She was soon promoted to senior staff attorney. At Legal Services, Margaret was much admired by her colleagues for her rigorous work ethic and scholarly knowledge of the law. She was much appreciated by her clients for the compassionate, dedicated service she rendered in every case. Margaret displayed these characteristics throughout the remainder of her career.

Margaret continued public service as an assistant attorney general for the State of Alabama. From 1988 through 1998 she worked first as legal counsel to the State Health Planning and Development Agency and then as an appellate attorney for the state in criminal legal matters. She argued numerous cases before the Alabama Court of Criminal Appeals, the Supreme Court of Alabama and the United States Court of appeals for the Eleventh Circuit. Because of her exceptional legal skills, Mrs. Childers often argued those cases involving the most complex legal issues. During this time, she also served as a mentor to younger, less experienced lawyers, teaching skilled appellate advocacy and leading by example.

While working with the attorney general, Margaret became counsel for the Alabama Judicial Inquiry Commission. Impressed with her counsel, scholarly wisdom and exemplary work ethic, the Judicial Inquiry Commission hired Mrs. Childers in 1998 as the first attorney executive director for the commission. Margaret served with dedication and distinction until her retirement in April 2007.

Margaret was a member of the Alabama State Bar, the Montgomery County Bar Association and the American Association of Judicial Disciplinary Counsel where she served as an officer and member of the board of directors. She was a nationally recognized expert, highly respected among her peers, on matters of judicial ethics and judicial disciplinary law. She served on the faculty for the American Judicature Society and the Alabama Judicial College, making numerous presentations on issues in judicial ethics.

During her tenure with the Judicial Inquiry Commission, Margaret published the quarterly *Judicial Conduct Newsletter* distributed to all the Alabama judges. She also authored a manual on judicial conduct and ethics for use by judges.

In her spare time, Margaret became an expert on administrative law. She served as chair of the Administrative Law Section of the Alabama State Bar from 1991–1992.

MEMORIALS Continued from page 99

Margaret's call to public service is also reflected in her community activities. She was a member of Friendship Force, Amnesty International and the Zonta Club of Montgomery and Zonta International, a classified service organization working toward a common goal of advancing the status of women worldwide. With Zonta, Margaret served as first vice-president and membership committee chair, and as a member of the local board of directors.

Margaret explored the world with the same intense curiosity and enthusiasm that she applied to the legal profession. Her membership in Friendship Force was an extension of this interest and an outlet for her passion for learning about, experiencing and embracing other cultures. She and her husband, Larry, traveled extensively. Margaret shared her experiences with family and friends, hosting theme parties in her home celebrating a specific country, culture or holiday. Through these gatherings, many friends experienced Margaret's love for the diversity of peoples and nations.

To those of us who had the privilege of knowing and working with Margaret, she was a fount of energy, optimism and knowledge. Like a shooting star she brightened everything she touched and made the path of life a little clearer and much smoother. She has gone all too soon. She will be missed.

—Bill Bowen,
White Arnold Andrews & Dowd PC, Birmingham

Joe L. Payne

Joe L. Payne—family man, war hero, lawyer and gentleman—died September 20, 2007. He was 87 years old.

At age 16, Joe graduated from Huntsville High School as valedictorian and class president. While attending the University of Alabama, Joe was a member of Omicron Delta Kappa, Druids, Jasons, Quadrangle, Philomathic Literary Society, and Phi Eta Sigma. He served as president of Pi Kappa Alpha fraternity. He had completed one year of law school when he was called to serve in World War II and served with distinction in the Pacific theater rising to the rank of major.

Joe was awarded numerous medals for his heroic service during World War II, including the Distinguished Service Cross and the Air Medal. He joined the Air National Guard, retiring as a lieutenant colonel in 1962 after 21 years of service.

Joe completed his law degree at the University of Alabama, where he was a member of Phi Delta Phi and the Farrah Order of Jurisprudence. He was licensed to practice law February 11, 1948. His career spanned 50 years—41 as senior partner with the firm now known as Lanier Ford Shaver & Payne. His expertise in property law remains legendary in the Huntsville-Madison County Bar Association.

An active member of numerous civic and professional organizations, Joe served as president of the Huntsville-Madison County Bar Association, the Kiwanis Club, the Huntsville-Madison County Chamber of Commerce and the Huntsville Hospital Foundation Board, in addition to serving as chairman of the United Way and on the Red Cross Board of Directors.

Joe was a devoted husband to Jean Harper Payne and loving father of Joe L. Payne, Jr., Kelly C. Payne, James H. Payne, Robert Payne, and Elizabeth Payne Tucker. He was the grandfather of five.

Joe always strived for excellence and the highest standards in his private life and his profession. Considered to be a "lawyers' lawyer," he was a genuine, admired and respected man.

Mylan R. Engel

Mylan R. Engel, a distinguished senior member of the Mobile Bar Association, died July 28, 2007 at the age of 84.

Mr. Engel was born in Summerdale July 14, 1923. After attending high school there, he went to work on his father's farm. From there, in 1944, he entered the United States Army and served with the 70th

Infantry Division in the Rhineland and Central European campaigns. He was discharged in Vienna, Austria and remained there for a while, working for the U.S. War Department. After that, he entered the University of Alabama from which he received his bachelor of science degree. He then entered the University of Alabama School of Law and graduated in January 1953.

Mr. Engel started his law practice in Mobile with Alan Weissinger, as a partner. He later practiced in the firm of Diamond, Engel & Lattof, and then with the firm of Engel, Walsh & Zoghby.

He was elected to the Alabama house of representatives in 1961, where he served for four years. After that, he was elected to the Alabama senate in which he served until 1970. While in the legislature, he was a floor leader under three governors, George Wallace, Lurleen Wallace and Albert Brewer. During his service in the house, he was chairman of the Mobile County Legislative Delegation. Under his outstanding leadership, legislation was drafted and passed which created the University of South Alabama, the USS ALABAMA Battleship Commission, the Alabama Historical Commission and the six historic districts of the City of Mobile.

He also served for 45 years as the attorney for the Mobile County Personnel Board. He was a charter member of the Board of Trustees of the University of South Alabama, and served on that board for 12 years, after which he was appointed to the University of South Alabama Foundation.

Mr. Engel was an outstanding member of the Mobile Bar Association, serving as its president and as the chair of several committees. He also served on the Alabama State Bar Board of Bar Commissioners.

Mr. Engel's true avocation was farming. He started his career working on his father's farm in Summerdale and kept up that interest all his life. He gave away most of his crops, which included corn, beans, potatoes and watermelon.

He was a lifetime Lutheran and for over 50 years was a member of Grace Lutheran Church of Mobile.

He is survived by his wife, Rositha Engel; six children, Mylan R. Engel, Jr., Mark Engel, Daniel Engel, Tommy Whitman, Carla Myers, and Bonita E. Amoneth; nine grandchildren; a brother; two sisters; and numerous nieces and nephews.

—M. Kathleen Miller, president, Mobile Bar Association

Margaret Ellen Thompson Turner

Margaret Ellen Thompson Turner, a member of the Mobile Bar Association, died March 31, 2007.

She was born in Mobile and was a lifelong resident of the city. She graduated from the University of South Alabama in 1987, *magna cum laude*, and received her law degree from the University of Alabama School of Law in 1990. In 1987, she was awarded the Johnstone, Adams, Bailey, Gordon & Harris scholarship for academic excellence.

Mrs. Turner practiced law with the capable assistance of her six children and her husband. Her law practice focused on domestic and family law and she represented her clients well. She accommodated her clients in ways great and small and truly her efforts were above and beyond the call of duty. She had the ability to find the good in all people and her law practice demonstrated that belief.

She was a devout Catholic and lived the ideals and tenets of the Catholic Church in all aspects of her daily life. At the time of her death, she was a member of St. Joseph's Catholic Church.

Mrs. Turner is survived by her husband of 35 years, Stanley Turner; four daughters, Virginia Miller, Anne Turner, Angela Turner and Mary Turner; and two sons, Robert Turner and William Turner. She was well known to all as a loving mother and wife, passing on to her family her kind and humorous disposition.

—M. Kathleen Miller, president, Mobile Bar Association

MEMORIALS Continued from page 101

Aaron, Charles Oliver
Lanett
Admitted: 1957
Died: April 15, 2007

Carr, Jack Durward
Montgomery
Admitted: 1948
Died: November 30, 2007

Crow, Warren Baker III
Birmingham
Admitted: 1955
Died: December 12, 2007

Crowe, Rae Maurice
Mobile
Admitted: 1954
Died: November 24, 2007

Dorrough, Richard Henry, Hon.
Montgomery
Admitted: 1970
Died: December 19, 2007

Engel, Mylan Robert, Sr.
Mobile
Admitted: 1953
Died: July 28, 2007

Fancher, Derrell Otis
Clanton
Admitted: 1993
Died: November 28, 2007

Fernandez-Casablanca, Manuel
Odenville
Admitted: 2002
Died: October, 2007

Ferrell, Kathryn Dananne
Foley
Admitted: 1987
Died: November 30, 2007

Gardner, William Fenwick
Birmingham
Admitted: 1959
Died: May 15, 2007

Grenier, John Edward
Birmingham
Admitted: 1959
Died: November 6, 2007

Ingrum, Charles Mack
Opelika
Admitted: 1967
Died: December 22, 2007

Jackson, William Arthur, Hon.
Birmingham
Admitted: 1961
Died: June 19, 2007

Langdon, Olive Bailey
Birmingham
Admitted: 1950
Died: January 24, 2007

Najjar, Charles Joseph, Hon.
Birmingham
Admitted: 1958
Died: September 30, 2007

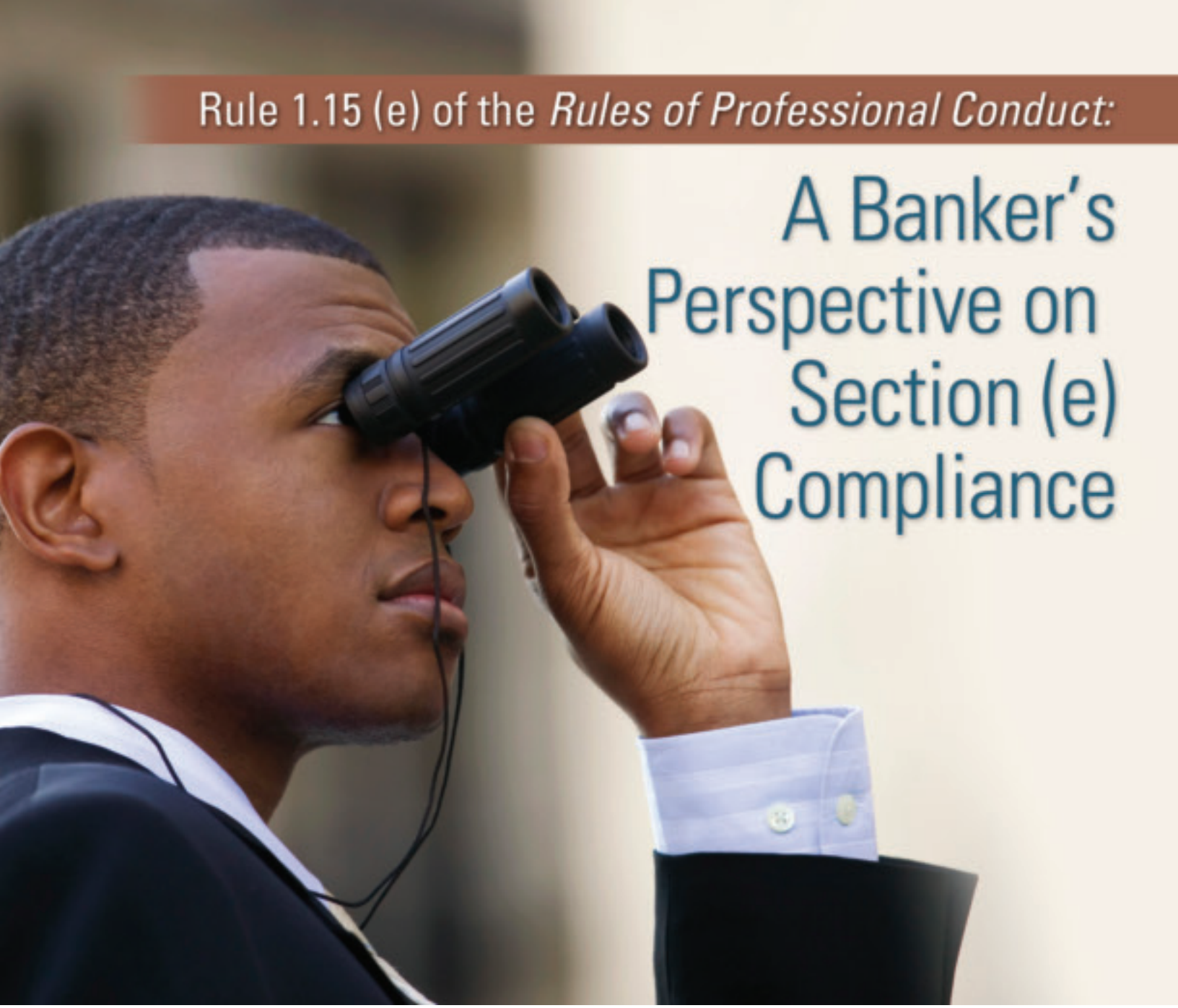
Norris, Palmer Whitten
Gardendale
Admitted: 1963
Died: October 24, 2007

Wylie, David Royce
Greenville, SC
Admitted: 1977
Died: April 10, 2007

NOTICE – Missing Will

Herbert H. McClellan of 11325 Chicamauga Trail SE, Huntsville 35803 died September 22, 2007. If anyone has knowledge of a will he had drawn after the date of January 14, 2000, please contact his son, Mark McClellan, at the address below.

1124 Berwick Road
Birmingham, Alabama 35242-7120
(205) 991-1852

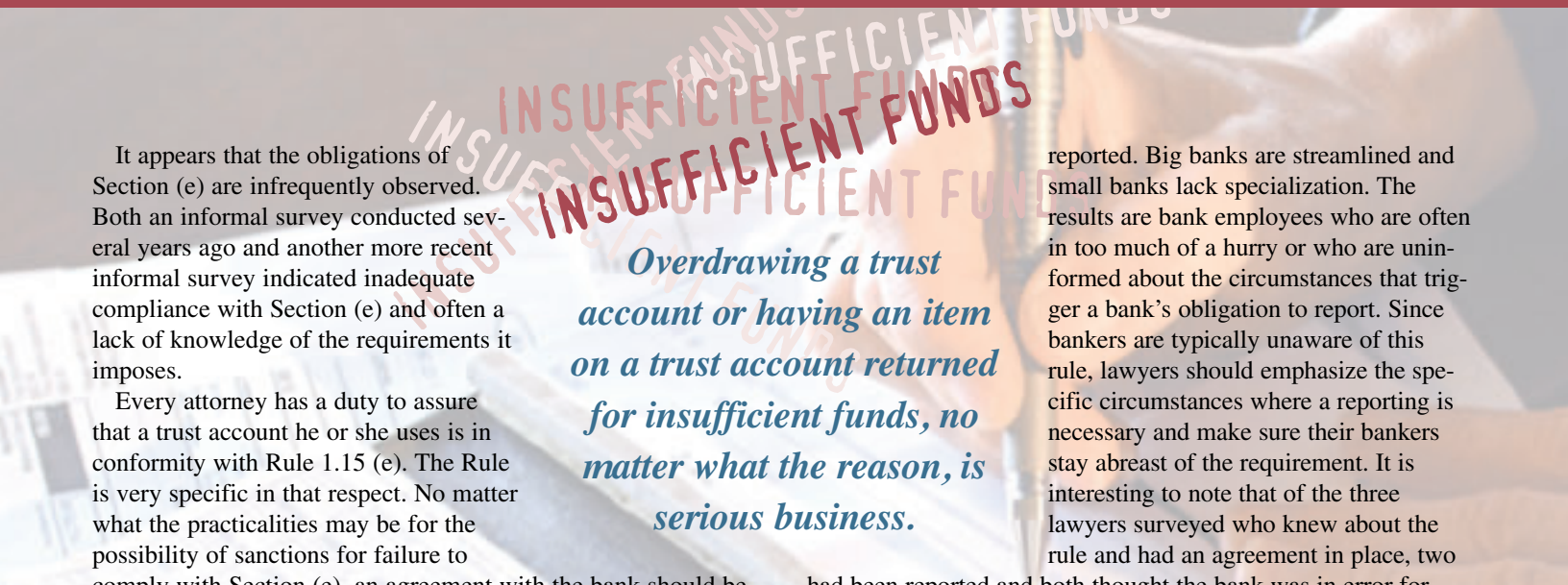


Rule 1.15 (e) of the *Rules of Professional Conduct:* A Banker's Perspective on Section (e) Compliance

by Timothy P. McMahon

The entire text of Rule 1.15 of the *Rules of Professional Conduct* was published in the November 2007 issue of *The Alabama Lawyer*. Changes in that rule have recently taken place, as most are aware. However, a part of the rule has been in effect since July 1, 1997 and apparently requires the attention of the bar.

Rule 1.15 (e) requires a lawyer to enter into an agreement with a bank, where the lawyer maintains a trust account, that provides for the bank to report certain overdraft activity on the trust account to the Office of the General Counsel of the Alabama State Bar. Pursuant to the agreement, the rule requires reporting when an item is presented against a trust account with insufficient funds, and the item is returned for insufficient funds or the item is paid, but the overdrawn account is not covered within three business days of the date the bank sends notification of the overdraft to the lawyer.



It appears that the obligations of Section (e) are infrequently observed. Both an informal survey conducted several years ago and another more recent informal survey indicated inadequate compliance with Section (e) and often a lack of knowledge of the requirements it imposes.

Every attorney has a duty to assure that a trust account he or she uses is in conformity with Rule 1.15 (e). The Rule is very specific in that respect. No matter what the practicalities may be for the possibility of sanctions for failure to comply with Section (e), an agreement with the bank should be put in place by each lawyer who has a trust account.

Overdrawing a trust account or having an item on a trust account returned for insufficient funds, no matter what the reason, is serious business.

No lawyer should be lulled into a sense of complacency by the notion that the bank will make sure that the agreement is put in place. Again, the Rule is very specific. ***The duty rests with the lawyer and not the bank***. Also, bank officers and employees were questioned as part of the previously mentioned surveys. Typically, bankers know less about the requirements of the Rule than lawyers.

It is also suggested that lawyers reach an agreement with their bank that is very specific about the circumstances that have to be reported. Big banks are streamlined and small banks lack specialization. The results are bank employees who are often in too much of a hurry or who are uninformed about the circumstances that trigger a bank's obligation to report. Since bankers are typically unaware of this rule, lawyers should emphasize the specific circumstances where a reporting is necessary and make sure their bankers stay abreast of the requirement. It is interesting to note that of the three lawyers surveyed who knew about the rule and had an agreement in place, two had been reported and both thought the bank was in error for reporting the circumstance. Both emphasized the time-consuming nature of the inquiry for both the Office of the General Counsel and the lawyer.

While it is beneficial to make sure that the bank employees know the circumstances that trigger reporting, a mistake of "over-reporting" should not give rise to a cause of action in favor of the lawyer who has been erroneously reported. Rule 15 of the *Rules of Disciplinary Procedure* provides immunity from suit for a bank, acting in the course of its official duties in com-

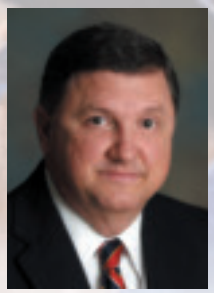
plying with Section (e). The language of Rule 15 does present some doubt whether the veil of immunity applies in the situation of an erroneous reporting.

The requirements of Section (e) should not be confused with the requirements of Rule 1.15(d) relating to disbursement of uncollected funds from a trust account that holds the funds of more than one client. However, section (e) could come into play if uncollected funds were disbursed but not collected as expected. A subsequent attempt to disburse another client's funds could create an item drawn on insufficient funds if the earlier funds are not collected. Section (d) affords a lawyer five business days at most from the date of notice of non-collection of funds to replace the uncollected funds that have been disbursed.

Section (d) provides a measure of latitude for the lawyer who is inclined to disburse uncollected funds from a trust account. If the lawyer has a reasonable and prudent belief that a deposited item will be collected, the uncollected funds may be disbursed. Analysis of whether a lawyer has complied with this subjective standard will depend on the facts. If the deposited item is not collected the lawyer must cover the funds as soon as practical, but in no event more than five working days after notice of non-collection.

Overdrawing a trust account or having an item on a trust account returned for insufficient funds, no matter what the reason, is serious business. While few examples of reportable conduct under Section (e) come to mind, instances that should be reported do in fact occur. Such conduct, no matter what the amount, does not encourage the public to hold lawyers in high regard, calls the lawyer's professional reputation into question and subjects the lawyer to possible financial catastrophe and sanctions by the bar.

Proper handling of a trust account is extremely important. Section (e) is a component of responsible and professional operation of a trust account. The section is an aid to the bar in addressing situations where some overdrafts on attorney trust accounts take place. Though the section is not a cure-all, it is an important tool for the bar. Compliance is not optional, it is mandatory.



Timothy P. McMahon is a 1980 graduate of Cumberland School of Law. He is vice president of Bay Bank in Mobile.

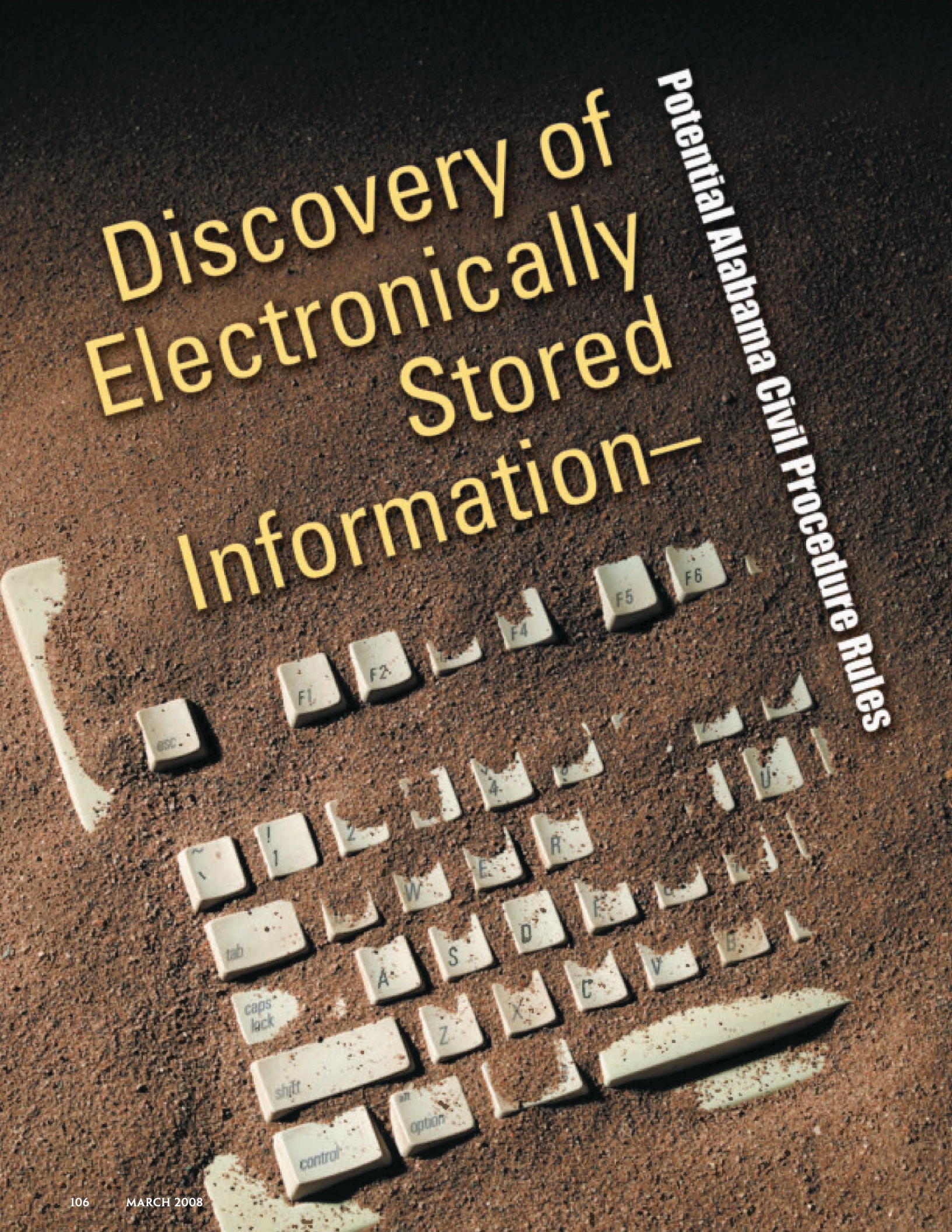
Go ahead and mark your calendars!

The Alabama State Bar 2008 Annual Meeting will be held at the Hilton Sandestin Beach Golf Resort & Spa in Sandestin, Florida on July 9-12, 2008.

See you there!

Discovery of Electronically Stored Information—

Potential Alabama Civil Procedure Rules



By George M. Dent, III

The Federal Rules of Civil Procedure were amended in 2006 to address discovery of electronically stored information ("ESI").[1] The Standing Committee on the *Alabama Rules of Civil Procedure* is considering whether to propose similar amendments to the Supreme Court of Alabama for adoption into the *Alabama Rules of Civil Procedure*. The committee would be pleased to receive comments from Alabama lawyers regarding the desirability, form and substance of any such proposed amendments.

Judge John L. Carroll, dean and Ethel P. Malugen Professor of Law at Cumberland School of Law, served as the reporter to the Drafting Committee of the National Conference of Commissioners of Uniform State Laws which drafted Uniform Rules Relating to the Discovery of Electronically Stored Information (the "URRDESI") for use by the states. The Conference approved the URRDESI in July 2007. Those rules can be found on the NCCUSL Web site.[2] The question before the Alabama Civil Rules Committee, therefore, appears to be whether to propose amendments similar to the amendments to the federal rules, amendments along the lines of the URRDESI or something else.

The Supreme Court of Alabama, in an opinion by Chief Justice Cobb, has noted that "neither the courts of this state nor the legislature has developed standards for [discovery of] information available on electronic media." *Ex parte Cooper Tire & Rubber Co*.[3] In the *Cooper* opinion, the court granted a mandamus petition in part and provided guidance for the circuit court regarding its consideration as to "whether the discovery of ESI is unduly burdensome."[4] This guidance should similarly inform the Civil Rules Committee and any Alabama attorneys who wish to submit comments regarding potential amendments to the *Alabama Rules of Civil Procedure*.

The significant provisions in the federal rules include:

- Rule 26(b)(2)(B), regarding an assertion that ESI is "not reasonably accessible;"
- Rule 26(b)(5)(B), the "clawback" provision that allows a producing party to raise a claim of privilege even after having produced the material (*not* just ESI);

- Rule 26(f), the "discovery conference" that is mandatory under the federal rules;
- Rule 33(d), which allows an interrogatory answer "to specify the [ESI] records from which the answer may be derived;"
- Rule 34(a)(1), which now provides that a party may request "to inspect, copy, test, or sample" documents or ESI;
- Rule 34(b), which allows a party requesting production of ESI to "specify the form or forms in which [ESI] is to be produced," and allows the responding parties to object and "state the form or forms it intends to use;"
- Rule 37(f), which reads: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system;"
- Rule 45(a) regarding subpoenas to non-parties for production of ESI;
- Rule 45(c)(2), which adds references to "testing or sampling" of matters to be produced in addition to simply allowing "inspection [or] copying;"
- Rule 45(d)(2)(B), a "clawback" provision for non-parties;
- Form 35, the federal "Report of Parties' Planning Meeting," which requires the parties to specify how disclosure or discovery of ESI "should be handled."

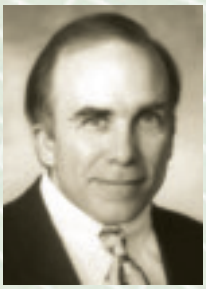
The URRDESI include most of these provisions. The URRDESI are set up to exist as a freestanding set of discovery rules that "displac[e]" the adopting state's civil procedure rules to the extent of providing for discovery of ESI. Rule 2, URRDESI. Application of the URRDESI is conditional; they apply only "[i]f discovery of [ESI] is reasonably likely to be sought." Rule 3(a), URRDESI. Rule 3(a) requires the parties to confer on this question within 21 days "after each responding party first appears in a civil proceeding," and discuss specified matters regarding such discovery. *Ibid*. In such case "the parties shall ... develop a proposed plan relating to discovery of the information" and submit a report to the trial court within 14 days. Rule 3(b), URRDESI. Rule 4 provides that a court "may issue an order governing the discovery of" ESI. Rule 5 has a limitation on sanctions identical to Rule 37(f), *Fed.R.Civ.P.* Rule 6 pertains to requests for production. Rule 7 pertains to the form of production. Rule 8 provides limitations on discovery. Rule 9 provides for a claim of privilege or protection after production. Rule 10 provides for subpoenas for production of ESI.

In many respects, these provisions for discovery of ESI constitute substantial changes from current discovery practice. The colloquial phrase "don't make a federal case out of it" seems apt. The URRDESI at least contemplate that ESI discovery will not occur in every civil action in Alabama courts, but even those rules would always require the parties to confer on the matter within 21 days after a defendant files its initial response, and to do so again after each new defendant appears. Both the federal rules and the URRDESI stress the importance of early attention to ESI discovery matters, because of the potential for loss of data through routine operation of computer systems. The rules and the caselaw contemplate "litigation holds" on ESI to prevent loss of discoverable information. For these and many other reasons, the adoption of ESI discovery rules is a significant undertaking, and the Civil Rules Committee would very much appreciate input from practicing lawyers, especially those who have already had experience with ESI discovery matters.

Please send comments in writing to:

Alabama Civil Rules Committee
c/o George M. Dent, III
P. O. Box 66705
Mobile, Alabama 36660

Please submit any comments by March 31, 2008.



George M. Dent, III practices law with Cunningham, Bounds, Crowder, Brown & Breedlove LLC in Mobile. He is chair of the Alabama Supreme Court Standing Committee on the Alabama Rules of Civil Procedure.

Endnotes

1. *Fed.R.Civ.P. Rules* 16,26,33,34,37, and 45 and Form 35, as amended effective December 1, 2006.
2. *www.nccusl.org/update/committeesearchresults.aspx?committee=248,* or go to the nccusl home site and click links for Drafting Committees and Electronic Discovery.
3. ___ So.2d ___, ___ [Ms. 1050638, Oct. 26, 2007, at 32], 2007 WL 3121813, at *13 (Ala. 2007).
4. *Id.*, Ms. At 32-37, WL at 13-15.

A Survey of Recent and Pending Alabama Tax Cases Involving the Commerce Clause

By Bruce P. Ely, Christopher R. Grissom and Ashley G. White

This article summarizes the major cases that have recently come before, or are currently pending before, the Alabama appellate courts addressing the constitutionality of certain Alabama state and local taxes. More specifically, this article will focus on those cases addressing state and local tax levies or exemptions as they relate to the Commerce Clause of the U.S. Constitution. Some of the cases have been finally decided, while others are in varying stages of litigation. They are noteworthy because they represent a clear shift by the Alabama courts toward adopting relatively recent U.S. Supreme Court guidelines involving state taxing schemes and the Commerce Clause.

There are three underlying themes that can be gleaned from the following cases: (1) the Alabama courts, like most courts, prefer to decide tax cases on non-constitutional grounds; (2) the Alabama courts are following U.S. Supreme Court precedent that in recent years has found several state taxing schemes to be facially discriminatory under the Commerce Clause, including shifting the burden of proving the tax scheme to be constitutional to the taxing authorities once the taxpayer has proved facial discrimination[1]; but (3) the Alabama courts are not yet in agreement as to the appropriate remedy for those plaintiffs, and other similarly-situated taxpayers, wronged by an unconstitutional tax scheme.

State Department of Revenue v. Hoover, Inc.

In a case involving the constitutionality of *Alabama Code* section 40-23-4(a)(11), Alabama's sales/use tax[2] exemption for purchases by the State of Alabama and its counties and municipalities, the trial court initially ruled in favor of the Alabama Department of Revenue (the "Department"). The taxpayer, Hoover, Inc., appealed to the Alabama Court of Civil Appeals, which affirmed the trial court's decision (*Hoover I*).[3] The Alabama Supreme Court reversed, finding the Alabama "governments-only" exemption constituted facial discrimination in violation of the Commerce Clause, and remanded the case to the trial court, giving the Department an opportunity to present its justification defense for the discriminatory exemption. On remand, after a full evidentiary hearing to explore possible justifications for the discriminatory exemption, the circuit court ruled in favor of the taxpayer. The Department appealed to the court of civil appeals, which eventually reversed the trial court in favor of the Department. In *Hoover II*[4], the case once again came before the Alabama Supreme Court on appeal from the decision of the court of civil appeals, and the Alabama Supreme Court again held the statute violated the Commerce Clause.

In reaching its decision in *Hoover II*, the court examined the Department's evidentiary justification for the discriminatory impact created by the sales tax exemption. The sole justification offered by the Department on remand from *Hoover I* was "administrative convenience," i.e., that the tax exemption afforded Alabama local governments "mitigates the administrative costs of an Alabama governmental entity having to pay sales tax to the state, and then having the state refund and disburse a portion, if any, of the tax right back to the Alabama entity to fund various governmental functions."[5] The court held that the Department's mere discussion of the "administrative convenience" justification was not sufficient to satisfy the Department's heavy burden under the "virtually per se invalidity" standard for facially discriminatory tax schemes. As then Chief Justice Drayton Nabers emphasized, at no point in the appeals process did the Department offer any evidence of how its purported justification advances a legitimate local purpose that could not be adequately served by reasonable non-discriminatory alternatives–as is required by U.S. Supreme Court precedent. The court held that the Department simply failed to carry this burden from an evidentiary standpoint. The court added, however, that even if the administrative convenience justification had been properly supported, that alone was insufficient to save a facially discriminatory tax.

The closest the Department came to making such an argument, according to the court, was the last sentence of its appellate brief

in which the Department argued that if the court "reversed the judgment of the court of civil appeals, the loss of sales tax revenues will increase the financial strain on a state already in crisis."[6] Nonetheless, the court held this "bare allegation alone" was not sufficient in light of the "heavy burden" when attempting to justify a facially discriminatory tax and remanded the case to the lower courts.[7]

The court of civil appeals construed the remand order, in light of the taxpayer's arguments, that it was to affirm the trial court's 2003 ruling from *Hoover I* and ordered a full refund, which the taxpayer received last year.

Also last year, in *Hoover III*[8], the court of civil appeals affirmed a circuit court ruling in favor of the taxpayer based on the doctrine of collateral estoppel. The appeal involved the Department's subsequent tax assessment against Hoover, covering the period May 2000 through April 2003, on the very same issue. After the final adjudication of *Hoover II* (covering the period July 1996 through June 1999), the taxpayer filed for summary judgment in *Hoover III* contending, among other things, that the doctrine of collateral estoppel barred the subsequent assessment. The Department argued that collateral estoppel did not apply because the case at hand involved different tax years and different tax assessments (in amount).

Additionally, the Department argued that section 40-23-4(a)(11) does not facially discriminate against interstate commerce based on the recent U.S. Supreme Court decision in *United Haulers Ass'n, Inc., v. Oneida-Herkimer Solid Waste Mgmt. Auth.*[9] *United Haulers* held that flow-control ordinances requiring private trash haulers to deliver solid waste to a government-operated waste processing facility did not discriminate against interstate commerce. The Court refused to apply the Department's expanded rationale because of distinguishable characteristics between the *United Haulers* flow control ordinance and the tax exemption at issue. Moreover, the Court stated that, "in the absence of a directly contrary United States Supreme Court decision, [Alabama state courts] are bound by the decisions of the Alabama Supreme Court . . . ."[10] In the instant appeal, the court was bound by *Hoover II*.

Among other challenges raised, VFJ's primary constitutional argument was that the add-back statute, on its face, discriminates against those businesses choosing to locate in low or no tax jurisdictions, such as Delaware or Nevada.

The court held that "the doctrine of collateral estoppel can apply to tax cases involving different tax years if the same issues were actually presented and determined in the first action, and the controlling facts and applicable legal rules remain unchanged." In a unanimous opinion, the court held that all the elements of collateral estoppel were present and "that collateral estoppel bars the Department from re-litigating against Hoover the issue whether a sufficient justification exists for a tax scheme that the Alabama Supreme Court has held to be 'facially discriminatory' against interstate commerce, and hence, whether a tax assessment can be assessed against Hoover."[11]

The Alabama Supreme Court recently granted *certiorari* in *Hoover III* regarding the potential applicability of *United Haulers* and also requested that the parties brief the Department's previously rejected argument that a number of other states have similar sales tax exemption schemes—that favor in-state local governments while affording no exemption to out-of-state local governments. The parties are now awaiting the court's ruling.

VFJ Ventures, Inc. v. Surtees

In *VFJ Ventures, Inc. v. Surtees*,[12] a case challenging, among other issues, the constitutionality of Alabama's so-called "add-back statute," the Montgomery County Circuit Court ruled in favor of VFJ Ventures, Inc. in what is believed to be the first reported case challenging the validity of an add-back statute. The Montgomery County Circuit Court did not rule on the constitutionality of the statute, however, but instead held on much narrower grounds that the taxpayer could deduct its royalty payments made to two related intangibles management companies ("IMCOs") headquartered in Delaware because, under the statute, it was "unreasonable" to require the disallowance of those payments as deductions. In so holding, the Montgomery County Circuit Court determined that VFJ's royalty payments were not abusive and disallowing the deductions would have caused distortion of VFJ's Alabama income. The ruling was dependent upon the strong facts supporting the business purpose and economic substance of the IMCOs and the court's acceptance of VFJ's distortion argument.

Alabama's add-back statute, enacted in 2001, was retroactively effective for tax years beginning after December 31, 2000 and requires taxpayers to "add-back" otherwise deductible interest expenses and intangible expenses (related to intangibles such as trademarks or patents) directly or indirectly paid to a related entity. The payments may be exempted from the statute if the taxpayer-payor can prove any of the following: (i) the corresponding item of income was in the same taxable year subject to a tax, in the United States or by a foreign nation which has in force an income tax treaty with the United States, based on or measured by the

payee-related member's net income, and not offset or eliminated in a combined or consolidated return which includes the payor; (ii) adding back (disallowing) the expense is "unreasonable;" or (iii) the payee-related member is not "primarily engaged" in the prohibited activities of managing, acquiring or maintaining intangible property or related party financing *and* the principal purpose of the transaction was not avoidance of Alabama income tax.

Among other challenges raised, VFJ's primary constitutional argument was that the add-back statute, on its face, discriminates against those businesses choosing to locate in low- or no-tax jurisdictions, such as Delaware or Nevada. The practical effect of this discrimination, VFJ argued, is to coerce businesses to locate their activities in either Alabama or, at a minimum, in another separate return state (as opposed to a combined or consolidated reporting state) to avoid the disallowance of valid interest or royalty expenses. Under the subject-to-tax exception as interpreted by the Department, a royalty payment will be "subject to a tax" only when it is included on a separate income tax return by the recipient, but not when it is "offset or eliminated in a combined or consolidated return which includes the payor." If the payor and the recipient IMCO are both located in a particular state and pay tax to that state by filing separate tax returns, the subject-to-tax exception allows the payor to avoid add-back in Alabama.

If that state were, however, a combined reporting state, the payor and IMCO likely would file a combined return on which the transactions between the payor and the related IMCO would be netted against each other or eliminated (i.e., ignored). The two entities would pay income tax to the combined reporting state based on the *same* total income—but the subject-to-tax exception would *not* apply. Thus, VFJ argued, the add-back statute discriminates, on its face, against combined reporting and consolidated return states and impedes the free flow of interstate commerce by giving Alabama taxpayers an incentive to locate IMCOs in separate return states, including Alabama. A tax scheme that operates to favor intra-state business over inter-state business or that imposes negative tax consequences based on whether a business's activities are interstate versus intra-state discriminates against interstate commerce in violation of the Commerce Clause—and is "virtually per se invalid" according to U.S. Supreme Court precedent.

The Department appealed the trial court's decision to the court of civil appeals. The parties have completed briefing and are now awaiting a ruling. Both the Alabama Education Association and the Multistate Tax Commission filed *amicus* briefs in favor of the Department.

AT&T Corp. v. Surtees

In *AT&T Corp. v. Surtees*,[13] the court of civil appeals held that the deductions from the net worth base for the Alabama business privilege tax ("BPT") and corporate shares tax ("CST"),[14] that were limited to only those investments in entities *doing business in Alabama*, were a facially discriminatory violation of the Commerce Clause. Furthermore, the court held once again that

when facial discrimination was proven, the burden of proof for justifying the deduction scheme shifts to the Department.

Alabama Code section 40-14A-33(b)(2) (now repealed) allowed corporations paying the CST to deduct from their tax base the book value of an investment by the taxpayer in the equity of other *corporations doing business in Alabama*, while section 40-14A-23(g)(1) allowed a corporation or other entity to deduct from its BPT base the book value of an investment in the equity of *any other taxpayer doing business in Alabama*.[15] The court held that the deductions from Alabama's BPT and CST deduction schemes are based on whether the entity in which the taxpaying corporation invested does business in state or out of state. Accordingly, the court held "[t]his differential treatment encourages, to an extent, domestic corporations subject to the BPT and the CST to invest in entities that do business in Alabama, at the expense of entities that do not do business in Alabama. On their face, the statutes at issue impose a heavier tax burden if the entity, in which the taxpaying corporation has invested, does not do business in Alabama."[16] Thus, the court held that the BPT and CST deduction schemes were facially discriminatory and the burden of justification fell on the Department.

In its original opinion, the court evaluated the Department's proffered justification for the discriminatory deduction schemes—preventing double taxation of in-state investments. The Department's defense was found insufficient, and the court ordered full refunds for AT&T. However, on application for rehearing filed by the Department, the court issued a substituted opinion which concluded, after again classifying the deduction schemes as facially discriminatory and clarifying that the Department has the burden of demonstrating the validity of the schemes, that the case should be remanded to the trial court for consideration of whether the Department had met its burden of proof.

Lanzi v. State Dep't of Revenue

In *Lanzi v. State Dep't of Revenue*,[17] the court of civil appeals held that the Due Process Clause of the U.S. Constitution prohibits Alabama from taxing nonresident limited partners of Alabama investment partnerships on their allocable share of partnership income if they have no other connection with Alabama. The court pointed out, however, that the years in question pre-dated the nonresident partner/member income tax withholding statute enacted by the Alabama Legislature in 2001.[18]

Mr. Lanzi resided in Atlanta, Georgia during the years in question. He owned a limited partnership interest in a family investment limited partnership, organized under the Alabama Limited Partnership Act, which had an office at Lanzi's parents' residence in Birmingham. Lanzi paid Georgia income tax on his distributive share of the partnership's income from its portfolio of marketable securities. Nonetheless, the Department assessed Lanzi for failing to pay income tax to Alabama on that income. Of importance is the fact that three Alabama courts found that Lanzi owned no property, conducted no business and had no economic ties to Alabama other than his limited partnership interest. Initially, the Department's Chief Administrative Law Judge, in a comprehensive 20-page opinion, agreed with the taxpayer and *amici*, the Alabama Society of CPAs, that Lanzi was not subject to Alabama income tax.

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The Department appealed that ruling to the Montgomery County Circuit Court, which reversed the Administrative Law Division and upheld the Department's assessment, without addressing either the Commerce Clause or Due Process Clause issues.

On Lanzi's appeal, the court of civil appeals reversed, noting that under the Due Process Clause, in order for a state to exercise jurisdiction over a nonresident taxpayer, that taxpayer must have sufficient minimum contacts with the taxing state. Although the physical presence of the taxpayer in the taxing state is not required under the Due Process Clause, according to the court, the income that a taxpayer receives from intangible personal property is generally taxable in the taxpayer's state of residence (here, Georgia). The court compared a nonresident's interest in a limited partnership to a nonresident's ownership of stock in a corporation, which, without more, does not subject the nonresident limited partner to the state's taxing jurisdiction. Thus, the court held that the mere ownership of a limited partnership interest does not provide sufficient minimum contacts with the forum state for the state to exercise jurisdiction. The court did not address the taxpayer's alternative argument that the Commerce Clause was also implicated. The Alabama Supreme Court recently denied the Department's petition for a writ of *certiorari* and the Department did not petition the U.S. Supreme Court for review.

It is likely that compromise legislation will be introduced during the 2008 regular session to codify and perhaps somewhat limit the scope of *Lanzi* to so-called "qualified investment partnerships."

Vulcan Lands, Inc. v. Surtees

In *Vulcan Lands, Inc. v. Surtees*,[19] a case concerning what remedy, if any, is due a foreign corporation that remitted franchise tax payments pursuant to Alabama's now-defunct corporate franchise tax scheme, the Alabama Court of Civil Appeals reversed the Montgomery County Circuit Court in part by holding that Vulcan Lands, Inc. ("VLI") was not required to establish that it had any in-state domestic competitors in order to be entitled to a refund. However, the court also held that there was a genuine issue of material fact as to whether VLI was entitled to a refund due to the so-called "reliance and hardship" defense argued by the state. The court remanded the case to the circuit court to make that determination.

Prior to 1999, Alabama employed different methods to calculate the franchise tax liability of domestic and foreign corporations: domestic corporations (i.e., those incorporated in Alabama) were required to pay a franchise tax based on the par value of their capital stock while foreign corporations were required to pay a franchise tax based on the actual capital that they employed in the state. The U.S. Supreme Court in *South Central Bell Telephone Co. v. Alabama*[20] unanimously held that the Alabama franchise tax scheme was unconstitutional and facially discriminated against interstate commerce because foreign and domestic corporations were taxed differently based solely on their state of incorporation.

After the supreme court rendered its decision in *South Central Bell*, VLI, a New Jersey corporation, petitioned for a refund of its 1999 foreign franchise tax payment. VLI maintained that the only

way Alabama could comply with its obligation to provide meaningful backward-looking relief was by awarding refunds to previously disfavored foreign corporations like itself.

The Department conceded that Alabama's previous franchise tax scheme was unconstitutionally discriminatory inasmuch as it resulted in foreign corporations generally paying more in franchise taxes than their domestic counterparts. Nonetheless, the Department argued, and the circuit court agreed, that Alabama was not required to refund *any* portion of the franchise tax payment remitted by VLI because VLI did not prove that it had any in-state domestic corporation competitors, which meant that VLI had not established that it was discriminated against or injured by Alabama's unconstitutional franchise tax scheme.[21]

On appeal, however, the court of civil appeals held that the cases relied upon by the circuit court in requiring proof of a domestic competitor were distinguishable. The court of civil appeals held that "because the holding of the United States Supreme Court in *South Central Bell Telephone Co. v. Alabama* established, as a matter of law, that Alabama's franchise-tax scheme discriminated against VLI, VLI was not required to prove that it had a domestic competitor who was favored by Alabama's franchise-tax scheme in order to establish its right to a refund."[22] To rule otherwise would mean each taxpayer must re-litigate the discriminatory tax scheme to pursue its refund claim.

The court next addressed the appropriate remedy due to VLI. The court noted that the Alabama Supreme Court in *South Central Bell*, on remand from the U.S. Supreme Court, opined that a state may meet the requirements of due process resulting from an unconstitutional state tax scheme by one of five means: (1) refunding the tax; (2) collecting back taxes from the favored class; (3) a combination of (1) and (2); (4) refusing a refund to a taxpayer that did not follow the state's procedural law with respect to refunds; or (5) "refusing to give a remedy in the rare case in which the state relied on now overturned precedent and the state now faces an extreme hardship if it must give a remedy."[23] In this case, the Department elected not to collect back taxes from the favored class and VLI had followed Alabama procedural requirements with regard to refund claims. As such, the Department is required to either give VLI a refund or prove that it relied on overturned precedent and that the state would face an extreme hardship if it must give VLI a refund.

> ***…a state may meet the requirements of due process resulting from an unconstitutional state tax scheme by one of five means:***
>
> ***1. refunding the tax;***
> ***2. collecting back taxes from the favored class;***
> ***3. a combination of (1) and (2);***
> ***4. refusing a refund to a taxpayer that did not follow the state's procedural law with respect to refunds; or***
> ***5. "refusing to give a remedy in the rare case in which the state relied on now overturned precedent and the state now faces an extreme hardship if it must give a remedy."***

The Department argued that it had relied on overturned precedent that Alabama's franchise-tax scheme was not unconstitutional and that the state would incur an extreme hardship if it is required to refund the franchise taxes paid by all foreign taxpayers who had requested refunds. As a result, the court held that the state had established the existence of a genuine issue of material fact as to VLI's right to a refund and remanded the case to the trial court for further proceedings.

In the interim, both the Department and VLI have filed petitions for writ of *certiorari* with the Alabama Supreme Court.

State Dep't of Revenue v. Union Tank Car Co.

In *State Dep't of Revenue v. Union Tank Car Co.*,[24] the court of civil appeals ruled that an Illinois-based corporation leasing railroad cars to lessees using the cars in Alabama did not have the requisite nexus with Alabama and thus was not subject to Alabama corporate income tax.

Union Tank Car Company ("UTCC") was headquartered in Chicago, Illinois. It manufactured and leased specialty railcars to customers throughout the United States, including one lessee based in Alabama. UTCC had manufacturing facilities, sales offices and repair and service offices throughout the country, but none were located in Alabama. All lease agreements were executed in Illinois.

The terms of UTCC's standard lease did not specify where the railcars would be used and required the lessees to arrange to pick up the railcars from UTCC's manufacturing facility. UTCC had no employees and owned no property in Alabama during the tax years at issue. Some of its leased railcars were used to transport materials through Alabama and to destinations within Alabama, but none of the railcars were used strictly intrastate.

The Department assessed corporate income tax for the years at issue. In its appeal of the assessment, the taxpayer contended that it did not have the minimum contacts, or nexus, with Alabama sufficient to satisfy the Due Process and Commerce Clauses of the U.S. Constitution. The taxpayer successfully appealed the assessment to the Administrative Law Division, which dismissed the assessment on the grounds that Alabama's corporate income tax statutes did not require the taxpayer to pay Alabama corporate income tax because the taxpayer was not doing business in Alabama or deriving income from Alabama sources. The Administrative Law Division did not address the constitutional issues. On appeal, the Montgomery County Circuit Court affirmed Chief Administrative Law Judge Bill Thompson's ruling on statutory grounds and once again did not address the constitutional issues.

The Alabama Court of Civil Appeals affirmed the decision of the Montgomery County Circuit Court and also held for the taxpayer solely on statutory grounds without discussing constitutional nexus issues, stating that "[h]aving resolved the central issue of taxation in this manner, we need not address the various constitutional questions raised by the parties…."[25] The Department filed a petition for writ of *certiorari* with the Alabama Supreme Court, stressing that this decision involved a material question of first impression in Alabama and had potential ramifications far beyond just the taxpayer at issue. Their petition was denied without opinion on June 15, 2007.

Boyd Brothers Transportation, Inc. v. State Dep't of Revenue

In *Boyd Brothers Transportation, Inc. v. State Dep't of Revenue*,[26] the court of civil appeals ruled that the Department may not assess use tax on certain freight truck tractors and truck trailers used by an Alabama-based trucking company in interstate commerce.

Boyd Brothers is an interstate motor freight carrier headquartered in Clayton, Alabama that purchased hundreds of trucks and trailers during the years in question, which were shipped to Boyd Brothers' Ohio terminal. Boyd Brothers serviced the vehicles, titled and tagged them and registered them in Ohio. From the Ohio terminal the vehicles were placed in interstate service throughout the United States. After the trucks had been in use an average of 400 days, Boyd Brothers assigned many of them to drivers based in Alabama or used them to haul intra-state loads in Alabama. The trucks were still used in the interstate common carrier and contract carrier business.

Boyd Brothers did not pay sales or use tax to any state either on the purchase or on subsequent use of the trucks and trailers. The Department assessed use tax on the trucks that were assigned to Alabama-based drivers or used to haul intra-state loads in Alabama, without apportionment based on mileage within and outside Alabama. Both the Administrative Law Division and the Barbour County Circuit Court affirmed the assessment.

The court of civil appeals reversed, accepting all three of Boyd Brothers' arguments on appeal. First, Boyd Brothers argued that since *sales* tax would not have been charged on its purchase of the vehicles if the purchase had taken place in Alabama (due to the so-called "drive-out" exemption found at *Alabama Code* section 40-23-2(4)), then no *use* tax may be charged on a similar transaction taking place outside Alabama. Second, there was no evidence the company intended to use the trucks and trailers in Alabama when it purchased them, and thus an exemption was available to Boyd Brothers pursuant to a Department regulation which provides that "[w]here the owner of tangible personal property has purchased such property for use outside of Alabama and has, in fact, used it outside of Alabama, [then] no use tax will be due by the owner because of later storage, use or consumption… in Alabama."[27]

Last, Boyd Brothers argued that the imposition of the use tax here would violate the Commerce Clause because it cannot lawfully be imposed upon a transaction that bears no relationship to the taxpayer's presence in Alabama. The use tax at issue was in effect an unapportioned flat tax–two percent of either the sales price or the fair market value of the property when it is put to use in Alabama, whichever is less–without regard to the number of miles the taxpayer drives the subject vehicles in Alabama.

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The court concluded, even after finding for the taxpayer on both *non*-constitutional grounds, that the Commerce Clause was indeed violated. The court noted that the U.S. Supreme Court in *American Trucking Associations, Inc. v. Scheiner*[28] held that certain flat taxes on interstate common carriers contradicted the central purpose of the Commerce Clause by imposing "a much higher charge per mile traveled in the State" on out-of-state vehicles than on in-state vehicles, and "do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads."[29] The court pointed out that under the Department's theory, a Boyd Brothers truck would pay the same 2 percent tax if it drove one mile in Alabama vs. an intra-state carrier driving thousands of miles in Alabama annually.

Somewhat surprisingly, the Department did not petition for rehearing or for *certiorari* so this case is now final. ▲▼▲

Endnotes

1. *See Service Corp. Int'l v. Fulmer*, 883 So. 2d 621, 629 n.8 (Ala. 2003) ("Alabama courts have no discretion to depart from the interpretations of the Commerce Clause set forth by the United States Supreme Court.").
2. A sales tax is an excise tax that is generally imposed on a retail transaction that occurs in-state, while a use tax is an excise tax that is generally imposed on the storage, use, or consumption of tangible personal property in a state. The use tax generally acts as a complement to the sales tax, since it is usually imposed on goods that are purchased out-of-state but used or consumed in the state. States usually allow a credit against their use tax for sales taxes required to be paid to other jurisdictions on the same goods.
3. *Hoover, Inc. v. State Department of Revenue*, 833 So. 2d 32 (Ala. 2002).
4. *Ex parte Hoover, Inc.*, 956 So. 2d 1149 (Ala. 2006).
5. *Id.* at 1155.
6. *Id.* at 1156.
7. *Id.*
8. Case No. 2060142, 2007 WL 2460086 (Ala. Civ. App. Aug. 31, 2007).
9. 127 S.Ct 1786 (2007).
10. 2007 WL 2460086, at *5.
11. *Id.* at *9.
12. CV-03-3172 (Jan. 24, 2007).
13. 953 So. 2d 1240 (Ala. Civ. App. 2006).
14. The BPT and CST were generally levied on certain corporations and limited liability entities organized under the laws of Alabama or doing business in Alabama (if organized under the laws of another state or country).
15. As stated above, the CST deduction was available for corporations making investments in other corporations doing business in Alabama, while the BPT deduction was available to corporations or other limited liability entities making investments in any other entity doing business in Alabama. The distinction was made because the CST was levied on corporations only, while the BPT was levied on all types of limited liability entities.
16. 953 So. 2d at 1245.
17. Case No. 2040298 (June 30, 2006), *cert. denied* (Apr. 13, 2007).
18. Pursuant to *Alabama Code* section 40-18-24.1, nonresident partners/members must file a consent to jurisdiction and to pay Alabama income tax on their distributions, or else the entity must pay the related tax and file a composite tax return on their behalf.
19. Case No. 2060607, 2007 WL 4215046 (Ala. Civ. App. Nov. 30, 2007).
20. 526 U.S. 160 (1999).
21. CV 2001-1106 (March 12, 2007).
22. 2007 WL 4215046, at *6.
23. *Id.* at *3 (quoting *South Central Bell*, 789 So. 2d at 149).
24. Case No. 2050652, 2007 WL 1098227 (Ala. Civ. App. Apr. 13, 2007), *cert. denied* (Jun. 15, 2007).
25. *Id.* at *8.
26. Case No. 2050675, 2007 WL 1793027 (Ala. Civ. App. June 22, 2007).
27. Ala. Admin. Code r. 810-6-5-.25(1).
28. 483 U.S. 266 (1987).
29. *Id.* at 290.

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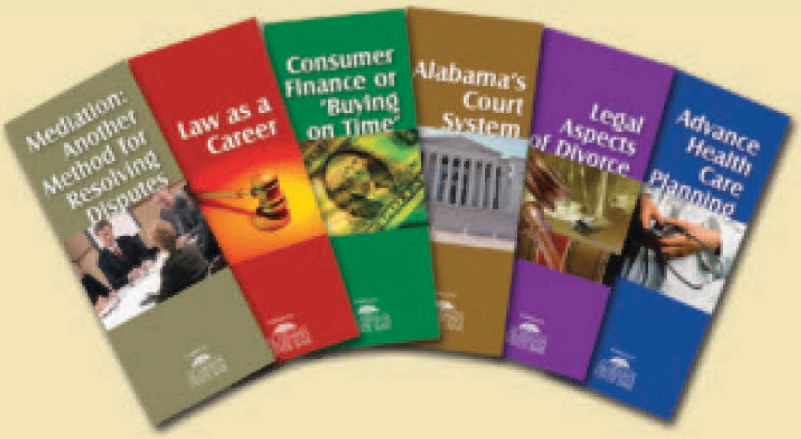

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"Request for Oral Argument Denied:"

The Death of Oral Argument in Alabama's Appellate Courts

By J. Mark White

If your work as a lawyer includes any type of appellate practice, ask yourself: When was the last time an Alabama appellate court granted your request for oral argument? A simple comparison of the total number of cases filed in the appellate courts with the number of cases in which the request for oral argument was granted reveals a significant gap. Ask your colleagues when they last argued before the appellate courts and the answer will reveal the same. I propose that the lack of oral argument in Alabama's appellate courts is denying our clients the full benefit of our judicial system, especially the appellate system.

During the last six years, an average of 2,100 cases were filed each term in the Supreme Court of Alabama.[1] However, during this same period, the average number of oral arguments were only 25 each year.[2] During this entire six-year period, the Alabama Court of Civil Appeals granted oral argument in only 12 cases, and there were two consecutive years where no oral argument was held.[3] Over the last seven years, the Alabama Court of Criminal Appeals has averaged only 22 oral arguments annually.[4] I strongly suspect that if death penalty cases were excluded, the average yearly number of cases in which the request for argument was granted in both the Alabama Supreme Court and the Court of Criminal Appeals would hover in the single digits.

When compared with appellate court activity in other jurisdictions, Alabama's numbers are drastically low. In 2006, appellate courts in both Louisiana and New Hampshire heard oral argument in 39 percent of the cases docketed for appeal.[5] The District of Columbia Court of Appeals heard oral argument in 31 percent of its cases.[6] Historically, approximately 98 percent of the cases before the Supreme Court of Kansas and approximately 60 percent of the cases before the Kansas Court of Appeals were allowed oral argument.[7] For the 2007 October term, the Supreme Court of the United

States set aside 28 days for oral argument and as of December 31, 2007, has already scheduled oral argument in 50 cases.[8]

Considering the total number of appellate cases that were argued in Alabama over the last six years, an Alabama litigant might be more likely to be struck by lightning than to have appellate oral argument granted. The declining trend in oral argument suggests that the appellate courts of Alabama are abandoning, or have in fact already abandoned, the practice of oral argument. As lawyers in Alabama, we should be asking the appellate courts why oral argument has declined so significantly and how is this affecting Alabama's judicial system. In a state where our appellate judges[9] are selected by popular vote, Alabama citizens are entitled to the answers to these questions.

Justice William J. Brennan observed:

> [O]ral argument is the absolutely indispensable ingredient of appellate advocacy . . . . [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument . . . . Often my idea of how a case shapes up is changed by oral argument . . . . Oral argument with us is a Socratic dialogue between Justices and counsel.[10]

Justice Antonin Scalia asserts that he uses oral argument "[t]o give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'"[11] Oral argument allows judges to probe the depth of counsel's arguments and positions, to test counsel's conviction and belief in his own assertions, and to satisfy the judge's own intellectual curiosity.[12] Oral argument provides the opportunity for the appellate judges to listen to the questions posed by their colleagues and gain insight as to how their brethren on the bench are thinking.[13] The mere preparation for oral argument can stimulate the members of the bench to fully explore the theoretical and practical consequences of a case's outcome. Conscientious preparation can instill a greater appreciation of the issues involved and the interests at stake. Scholars suggest that some appellate court members use information tactically mined during oral arguments to build consensus for majority opinions.[14]

Oral argument is also an opportunity for counsel to defend her theory of the case and engage the bench in a conversation about key legal and factual issues. Perhaps most importantly for the practitioner, recent studies have shown that a good oral argument can significantly increase the chances of winning on appeal.[15] As Judge Joel Dubina of the Eleventh Circuit Court of Appeals has noted, "I have seen cases where good oral argument compensated for a poor brief and saved the day for that litigant. I have also seen effective oral argument preserve the winning of a deserving case."[16]

As the third governmental branch of American democracy, the judiciary has a tremendous affect on the populace. But its role, while highly publicized, is arguably the least *public*. Oral arguments, which in Alabama are open to the public, are virtually the only time when a citizen can come into contact with an appellate judge while that judge is doing her job. "The Court's authority–possessed of neither the purse nor the sword–ultimately rests on sustained public confidence in its moral sanction."[17] The importance of appellate oral argument cannot be overestimated in its role of conveying a semblance of visibility and accountability[18] to an institution that can otherwise be perceived as closed to the very people who elect the members of its bodies.[19] Oral argument can and does provide and preserve the appearance of justice.[20]

Consistent denial of oral argument can, at a very minimum, create the perception that the courts are not interested in hearing what the parties and their counsel have to say. When the entire appellate decision-making process is conducted behind closed doors on the basis of written submissions alone, the people, the bar *and the courts* lose the humanizing "face" that oral argument provides. Oral argument gives both counsel and litigants the opportunity to experience and participate to some degree in the workings of the appellate court. Oral argument provides great institutional value to the appellate courts as the rule of law depends upon the peoples' belief in the institution of law and their acceptance of the judicial decisions.[21] As Justice Scalia noted, "[w]ise observers have long understood that the appearance of justice is as important as its reality."[22] Truly, "justice must satisfy the appearance of justice."[22] The impact that oral argument has on the perception of the parties as to the legitimacy of our legal system is compelling.[24]

While there may always be debate over the merits of appellate oral argument,[25] time and again prominent jurists have emphasized its value. In a recent lecture on oral advocacy delivered at Cornell University, retired Justice Sandra Day O'Connor made the following observation:

> Oral argument, now, is very different than it was in the early days of the court . . . . But one thing hasn't changed since the days when Chief Justice (John) Marshall favored (William) Pinkley with high praise. As Chief Justice Marshall recognized, a justice's best work requires the clear-headed guidance of a brilliant oral advocate . . . .[26]

Justice O'Connor's words are not merely lip-service to an old, outmoded tradition. Arguments should be valued by judges for the clarity and fresh perspectives they may provide to a case. Justice O'Connor has also noted that Chief Justice John Roberts has called oral argument "[a] time, at least for me, when ideas that have been percolating for some time begin to crystallize."[27]

Oral argument provides a court with the opportunity to engage in a structured dialogue with those who should be the most knowledgeable source of the facts and legal issues regarding a particular

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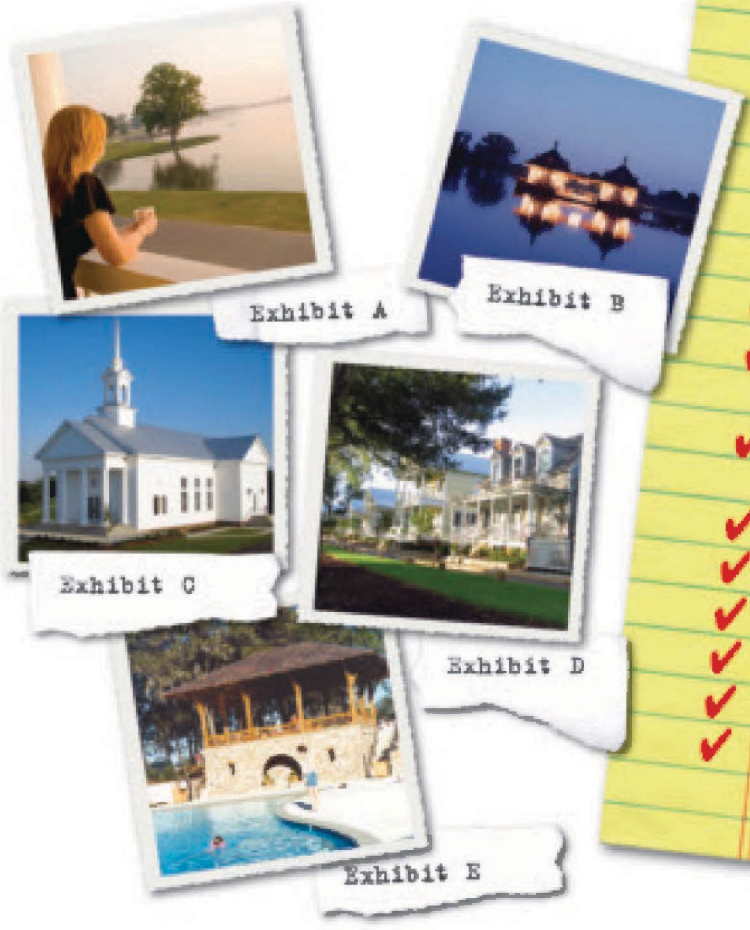

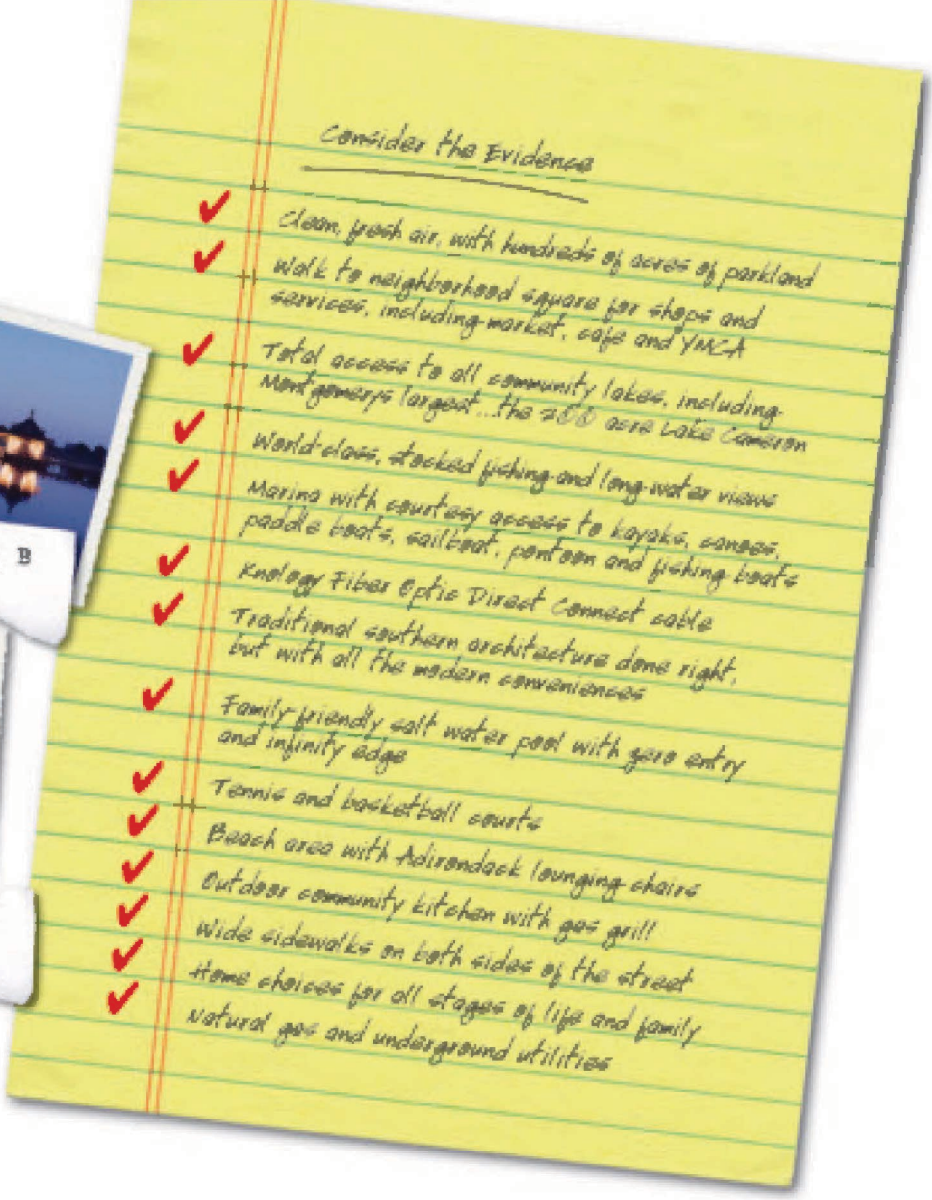

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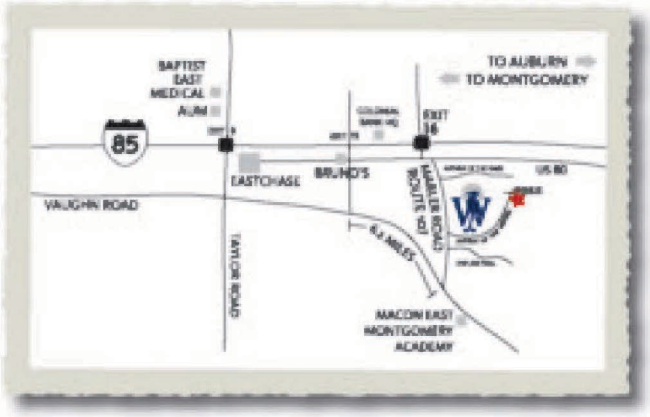

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case–appellate counsel. Through their questions, judges can use this time to explore the potential results and consequences a particular decision may have. Issues discovered during oral argument can be returned to counsel for further briefing, thereby allowing a more complete development of the issues and the impact a particular outcome will have, not on only the appellate litigants, but on society as a whole.[28]

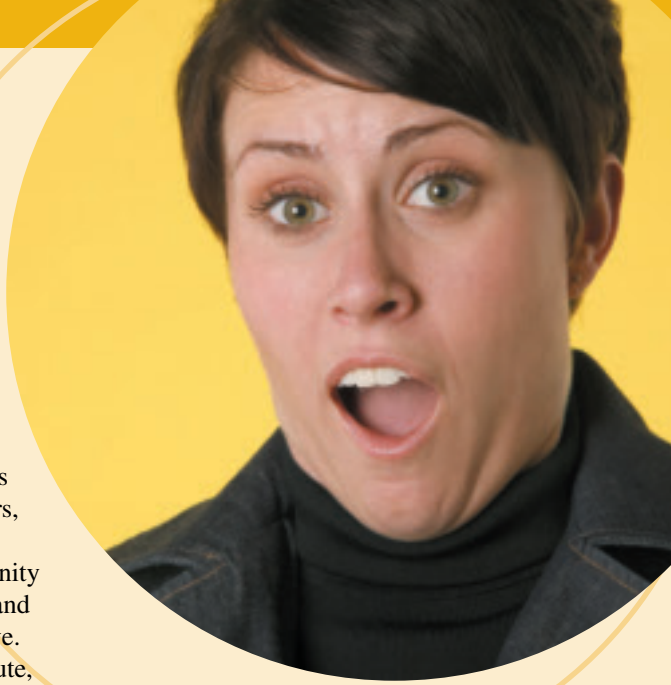
The appellate court may test the boundaries of a party's position through questions about hypothetical situations, or it may attempt to force concessions. This back-and-forth method of communication is unique to the process of appellate review in at least two respects. First and foremost, oral argument is often the only opportunity for the court to meet face-to-face with counsel prior to rendering a decision. Second, it also provides one of the few times that the members of a court will meet together as a group to address a particular case. Supreme Court Justice Byron R. White has characterized oral argument as a time when "all of the Justices are working on the case together, having read the briefs and anticipating that they will have to vote very soon, and attempting to clarify their own thinking and perhaps that of their colleagues."[29]

Important as this dialogue is for an appellate court, it also provides an advocate with his best and probably only chance to address those issues over which the judges seem to be most troubled. Oral argument gives counsel the opportunities to attempt to assuage any doubt and direct the bench toward the dispositive issues and facts of the case. In this way, the court's questions become not only a test but a tool for the advocate to use in tailoring an argument that creates a greater likelihood of a favorable ruling on appeal.[30]

Judge Myron H. Bright of the Eighth Circuit Court of Appeals is a staunch supporter of appellate oral argument and has written several articles on the topic. In his 1986 article, *"The Power of the Spoken Word: In Defense of Oral Argument*," Judge Bright outlines his views on the critical importance of appellate oral advocacy for both judges and lawyers.[31] Judge Bright notes that, in addition to providing a public face for the appellate courts and a dialogue between judges and lawyers, oral argument "[p]rovides the litigant with a better opportunity to inform the judges of the litigant's position and the impact that a particular decision will have on the individual parties . . . ."[32] Additionally, Judge Bright observes that oral argument is much more effective at communicating emotion than a written brief. Although appellate decisions should not be made on the basis of emotion, Judge Bright advises that "judges ought not to isolate themselves . . . from realities that may be better communicated in face-to-face confrontations."[33]

An attorney who is sure of her case and confident in her abilities should relish the opportunity to argue before the very judges who will ultimately decide the issues.[34] While oral argument can never replace the written brief, it serves the crucial role of providing one more opportunity to influence the court's opinion.[35] From the practical perspective of

Oral argument opens the courtroom to the litigants and the public and, by so doing, sheds light on the appellate decision-making process and thereby encourages respect for the rule of law.



an advocate, appellate oral argument simply *works*.[36] Judge Bright also conducted a study on the efficacy of oral arguments in his court. Using his notes from oral arguments, as well as those of colleagues Judge Richard S. Arnold and Judge George G. Fagg of the Eighth Circuit Court of Appeals, Judge Bright concluded that oral argument changed his tentative opinion in 31 percent of all cases argued. The opinions of Judge Arnold and Judge Fagg were likewise influenced in 17 percent and 13 percent respectively of all cases argued.[37]

Further bolstering Judge Bright's conclusions are those of a recent study using Justice Harry Blackmun's grading of oral arguments.[38] Legal scholars studied Justice Blackmun's grading presented in a random sample of 539 cases decided between 1970 and 1994, and concluded that the quality of oral argument correlated highly with a justice's final vote on the merits. This was true even after consideration of each justice's ideological inclination.[39] These concrete results should inspire any advocate to treat oral argument as a valuable weapon in his arsenal. Basically, a good oral argument gives an advocate a better chance of winning on appeal. However, the advocate must first be given the opportunity to make that argument.

In light of these facts and considerations, the declining trend of oral argument at the appellate level in Alabama is a cause for concern for all–judges, attorneys and the citizens of Alabama. The loss of a very critical part of our system of justice can only diminish the public's confidence in our court system. The blame for this substantial loss must be placed directly at the feet of those lawyers and judges who do nothing to mitigate the infrequency of oral argument. As Justice John M. Harlan noted:

> [T]he job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.[40]

Without a change of course by the Alabama appellate courts, everyone stands to lose. The appellate courts lose a valuable opportunity to gain information and maintain their collegial function, and possibly even their authority and credibility with the public. Members of the bar lose the opportunity to interact with the court and to provide a full and fair presentation of the arguments of their clients.[41] The public at large loses a component of its voice in the courts, as well as its only opportunity to see this branch of democracy in action.

Does Alabama have an elected judicial system that is open for public review and subject to legal debate, or do we have an elected judicial system that is closed out of fear of public skepticism, a system where legal debate would simply interfere with pre-determined conclusions? These questions must be addressed and answered by lawyers, judges and legal scholars, as well as by voters seeking to preserve what we know to be the best system of justice in the world.

The bottom line is that we live in a society that is becoming increasingly skeptical and distrustful of its elected leaders and of government, including the courts, individually and as institutions. Oral argument opens the courtroom to the litigants and the public and, by so doing, sheds light on the appellate decision-making process and thereby encourages respect for the rule of law. By this means, all of us–the litigants, their counsel, the bar, the individual judges, and the court as an institution–win. ▲▼▲

Endnotes

1. Statistics obtained from Alabama Clerks of Court.
2. *Id.*
3. *Id.*
4. *Id.*
5. Statistics obtained from the National Center for State Courts.
6. *Id.*
7. *Id.*
8. *www.supremecourtus.gov/oral_arguments/argument_calendars.html* (last visited December 27, 2007).
9. Although "judge" is the term used to describe members of Alabama's courts of civil and criminal appeals, and the term "justice" describes a member of Alabama's Supreme Court, for simplicity I use the term "judges" in this article to cover both appellate judges and justices.
10. Robert L. Stern, et al., Supreme Court Practice: For Practice in the Supreme Court of the United States 671 (2002) (quoting Harvard Law School Occasional Pamphlet No. 9, 22-23 (1967)).
11. Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 142 (2003) (quoting Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 LITIG. 33, 33 (spring 1989) (in turn citing *This Honorable Court* (WETA television broadcast 1988))).
12. Interestingly, recent research suggests that "by keeping track of the number of questions each Justice asks, and by evaluating the relative content of those questions, one can actually predict before the argument is over which way each Justice will vote." Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 272 (2004).

ASB Lawyer Referral Service

The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than $50 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

In addition to earning a fee for your service, the greater reward is that you will be helping your fellow citizens. Most referral clients have never contacted a lawyer before. Your counseling may be all that is needed, or you may offer further services. No matter what the outcome of the initial consultation, the next time they or their friends or family need an attorney, they will come to you.

For more information about the LRS, contact the state bar at (800) 354-6154, letting the receptionist know that you are an attorney interested in becoming a member of the Lawyer Referral Service. Annual fees are $100, and each member must provide proof of professional liability insurance.

13. As Senior Judge Frank Coffin of the First Circuit Court of Appeals noted, "[h]ow often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye." Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25, 27 (winter 1999) (internal citation omitted).
14. *See, e.g.,* Timothy R. Johnson, Oral Arguments and Decision Making on the United States Supreme Court (2004); Timothy R. Johnson, et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 Am. Pol. Sci. Rev. 99 (2006).
15. Johnson, *The Influence of Oral Arguments on the U.S. Supreme Court*, *supra* note 14.
16. Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, 20 Litig. 3, 3-4 (winter 1994).
17. *Bush v. Vera*, 517 U.S. 952, 1048 n.2 (1996) (quoting *Baker v. Carr,* 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting)).
18. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 36 (1986).
19. Addressing the significance of a downward trend in the percentage of appellate oral arguments heard in her home state, former Texas appellate Justice Susan Larsen made the following observations:

    > [J]udges serve the people. They are not direct representatives as are legislators, but it is their job to decide disputes among real people, not just theorize with briefs and transcripts and law books and computer research. Listening to the representatives of those people, even for fifty minutes, focuses the minds of the judges on the dispute. It gives the entire panel, not just the single judge writing the opinion, a period of time to contemplate that case alone; asking questions, mulling through logical consequences, and doing their job. It promotes discussion amongst the judges, highlights their differing outlooks, enhances critical thinking and results in better law. More than that, oral argument is the only opportunity the public has to observe the decision-making process at work; every other aspect of appellate opinion-making is secret.

    Susan Larsen, *Wanna Talk? No, Not Really*, The Texas Blue, Jan. 15, 2007, *www.thetexasblue.com/ wanna-talk-no-not-really* (last visited Jan. 2, 2008).
20. In his dissent in *Kleindienst v. Mandel,* 408 U.S. 753, 776 n.2 (1972), Justice Marshall observed:

    > [T]he availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work. Lengthy citations for this proposition, which the majority apparently concedes, are unnecessary. I simply note that in a letter to Henrik Lorenz, accepting an invitation to lecture at the University of Leiden and to discuss "the radiation problem," Albert Einstein observed that "(i)n these unfinished things, people understand one another with difficulty unless talking face to face."
21. In *Payne v. Tennessee,* the concurrence noted Justice Marshall's explanation:

    > that '"[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself."' *Flood v. Kuhn,* 407 U.S. 258, 293, n. 4, 92 S. Ct. 2099, 2117, n. 4, 32 L. Ed. 2d 728 (1972) (dissenting opinion) (quoting Szanton, *Stare Decisis; A Dissenting View*, 10 Hastings L.J. 394, 397 (1959)) (internal quotation marks omitted).

    501 U.S. 808, 834 (1991).
22. *J.E.B. v. Alabama ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).
23. *Levine v. United States,* 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)).
24. Justice Simeon R. Acoba, Jr., 11 Hawaii Bar Journal 4, 9-10 (May 2007).
25. An indication of the importance of oral argument is the fact that beginning in October 2006, the United States Supreme Court has made transcripts of oral arguments available free to the public at its Web site, *www.supremecourtus.gov,* on the same day that the argument is heard by the Court.

In explaining the disproportionately high percentage of cases argued orally in the Second Circuit Court of Appeals, one commentator noted:

> The Second Circuit might justify its preference in two ways. First, the court may view universal oral argument as a decision-enhancing mechanism. Even in cases that appear straightforward on the briefs, oral argument may alter the way the panel views the case. In some small body of cases, it may even result in a change in the direction or the terms of the court's ultimate decision. Alternatively, the court may view universal oral argument as a perception-enhancing mechanism. That is, even if the court feels that the oral argument provides no actual benefit in terms of the decisions it reaches, it may still prefer them because it is a low-cost way to attain the valuable benefit of an improved perception of fairness by litigants. This would be true if litigants view oral argument as an important symbol that the court is taking its case seriously and considering it carefully. In either case, the rule is in place precisely because the court expects that it will have some effect on outcome or perception of outcome. There is a final possibility that is independent of any such anticipated effect. The court may think that the time and resources necessary to identify cases that would be candidates for decisions without oral argument exceeds the savings in time and resources that are gained by deciding them in that manner. Given the relative ease of issuing an order to dispose of a case without oral argument, however, this explanation seems quite unlikely.

Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 B.Y.U. L. REV. 55, 73 n.65 (2007).

26. Tim Ashmore, *O'Connor Stresses Role of Oral Advocacy*, ITHACA JOURNAL, Oct. 24, 2007, *www.theithacajournal.com/apps/pbcs.dll/article?AID=/20071024/NEWS01/710240334/1002* (last visited Jan. 2, 2008).
27. *Id.*
28. Mosk, *supra* note 13.
29. Hatchett, *supra* note 11, at 142.
30. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 17-20 (1986).
31. Bright, *supra* note 18.
32. *Id.* at 37.
33. *Id.*
34. "[T]he parties stipulated to submit their controversy upon briefs. Whether decision to forego oral argument springs from supreme confidence in his case by each litigant or denotes complete lack of it, we are unable to determine . . . ." *Jacobson v. Coon,* 165 F.2d 565, 566 (6th Cir. 1948).
35. As Tom Johnson noted in his judicial profile of Hon. R. Lanier Anderson III of the Eleventh Circuit Court of Appeals:

> Judge Anderson is a firm believer in the importance of oral argument. Although he spends hours reading the briefings of cases in advance of his monthly sittings, he actively engages the litigants from the bench, testing the strength of their arguments. The oral argument may not always change or even sway a result, but it often aids the judges in reaching the just and proper result under the law.

Tom Johnson, *Judicial Profile: Hon. R. Lanier Anderson III U.S. Circuit Judge, Eleventh Circuit Court of Appeals*, 54 FED. LAW. 32, 33 (August 2007).

36. *See Cent. Distribs. of Beer, Inc. v. Conn,* 5 F.3d 181, 185 (6th Cir. 1993) (Wellford, J., dissenting):

> The importance of oral argument is emphasized by the fact that, in a majority of cases, the decision is ultimately reached in accordance with the impression that the judges have as they leave the bench. While it is quite true that the impression after oral argument derives from the reading of the briefs as well as from the argument, it is also true that the impression from reading the briefs may be changed or modified by the oral argument. Although the oral argument and brief complement each other, each serves a different purpose. The oral argument should be something in the nature of a tour de force designed to persuade the judges that fair play and precedent support the position of the advocate.

37. Bright, *supra* note 18, at 39 n.32, 40 n.33.
38. Johnson, *The Influence of Oral Arguments on the U.S. Supreme Court*, *supra* note 14.
39. *Id.* at 109.
40. John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 CORNELL L.Q. 6, 7 (1955).
41. *See Greene v. B.F. Goodrich Avionics Sys., Inc.,* 409 F.3d 784, 792 n. 7 (6th Cir. 2005):

> This case presents an important example of how the value of oral argument cannot be understated. Oral argument allowed us to further delve into issues of concern that were not adequately addressed by the parties in their briefs. "The intangible value of oral argument is, to my mind, considerable . . . . [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel . . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs." William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1021 (1984).

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The author thanks Katherine R. Brown and Christopher J. Nicholson for their assistance in writing this article.

Want to Know Your Employees Better?

Log On to a Social Network

But, Be Warned, You May Not Like What You See

By Tari D. Williams and Abigail Lounsbury Morrow

It's a new day and age from when you were in law school, whether you graduated 40 years ago or a few months ago. The reason? Technology. It seems new innovations and new information are constantly available. The Internet has opened a portal for exchanging ideas in a way never before seen.

The effects of a digital revolution have already made their way into the daily practice of law–electronic filings, e-mail, new discovery rules–but a new trend has many legal employers exploring their potential and current employees' lives outside the office. In 2006, an ExecuNet survey of 100 executive recruiters revealed 77 percent of the recruiters used sites such as Google and Yahoo! to check a job seeker's background.[1] Of those using Internet resources to research a job candidate, 35 percent of the recruiters eliminated a candidate from consideration based on the online information.[2]

In addition to third-party information from Google and Yahoo!, job candidates are also likely to have their own Web page on social networking sites. Social networking sites (a.k.a. MySpace.com, Friendster.com, Facebook.com and Xanga.com, to name a few) have given employers full disclosure straight from the candidates' mouths.

As with every new technological territory comes new questions. Can employers use these sites to gain insight on their potential hires? To monitor the behavior of current employees? What are the issues to be considered? The answers are that some law firms, judges and corporations do factor in what a candidate posts about himself or herself into the job search. As the information is, after all, on the World Wide Web, there's not a strong argument for privacy, but areas and issues of concern do exist.

This article will briefly highlight the trends in Alabama that social networks are playing in employment decisions and offer tips and advice as to matters to be considered for employers and employees.

Social Networks: A Primer

Social networks are an open forum in which individuals post messages, thoughts and pictures about themselves and their lives in order to make friends with other people of similar interests. It's a visual track of the long-known phenomena of six degrees of separation. Once you have a page established, you can track visitors and add friends. You can post pictures of accomplishments as you define them–be it your law school graduation or the killer keg stand you recently completed at an after-game party. Social network pages can also reveal an individual's biases and sometimes just too much information.[3]

Here in lies the rub (apologies to Shakespeare)–should any of this information be considered as part of a job applicant's application package? Some Alabama firms and other legal employers are debating whether to take a gander at social networking pages as part of the employment process.

Social networks do give more information than would likely come out during a quick introductory interview. The qualms some employers have about relying on the information are that life outside of the office is just that–life outside of work. However, particularly in the legal field where reputation and appearance are held in high esteem, what the individual felt the need to post to the whole wide world could be viewed as an

indication of his or her maturity. As Joey Ritchey, a member of Sirote Permutt's hiring committee, noted, all attorneys at the firm are reminded that their reputation as a part of the firm travels within them–be it online or out on the town.

"We remind our associates that they carry the firm name with them wherever they go. Just as they are carrying the identity of being a lawyer, they are also being associated with our firm," Ritchey said.

Sirote Permutt seems to be among the majority of Alabama firms who are considering using social networks as an additional check of an interviewee, but have not done so to date. Ritchey said the firm is struggling with the question of how much weight the pages should have.

"Something posted that's silly or stupid should not be the only judge of a candidate's worth, but the decision to post it does reflect on the candidate's immaturity," he said.

Ritchey's sentiment is becoming more widely accepted by potential employers who are often stunned to read of their potential hire's big night on the town, complete with a drink-by-drink replay and full account of sexual exploits–all on the World Wide Web.[4]

The Employer's Exposure to Liability

Aside from the more obvious potential blunders a candidate can post on his or her site, there are other concerns for employers who decide to incorporate these pages into the candidate's hiring process. Since the sites were designed as social launching points, information that otherwise would likely not arise in a job interview can be known. Sites often inquire about participants' sexuality. Some participants post pictures of themselves. Some participants post their birthdates. Some participants post information about their religion. Employers, therefore, should consider the benefit of seeing a candidate in his or her natural environment, i.e. his or her Web page, against the potential of a discrimination claim based on knowledge by the employer of these protected statuses.[5] Of course, an argument exists that the candidate put this information into play by posting it on the Web site. As a shifting burden exists in employment discrimination cases, an employer's knowledge of these factors, or even an employer's decision to check, may be enough to create a problem.

George Lenard, a partner with Harris, Dowell, Fisher & Harris LC of St. Louis, Missouri, posted on his employment blog:

> It could be evidence of unlawful discrimination if an employer checks for such Internet information on only certain types of applicants or employees, for example, African-Americans and Hispanics. It may also be evidence of unlawful discrimination if although the employer searches for such information on all applicants or employees, discriminatory bias affects the employer's evaluation of the information obtained. For example, an employer may view more negatively photos of an African American male, beer in hand, hanging out at a bar with a hip-hop DJ than photos of a white boy, also with beer in hand, hanging out at a rock 'n' roll bar with a bunch of other white boys wearing frat T-shirts. Tell me, was it really the public evidence of drinking that disqualified the individual? How many current employees would be disqualified from employment if never getting publicly intoxicated–or even drinking in public–was a job requirement? These are the kinds of questions the EEOC would ask if discrimination was [sic] raised.[6]

Some Alabama legal employers have stated they would wait to review social networking sites until after the initial interview. Other employers have stated they intend to inform a candidate that his or her page will be viewed in the hiring process.

Another concern about social networking pages is that a potential candidate will feel violated if an employer has access to material the candidate believed was private or limited to a known network. This is a factor with such organizations such as Facebook.com. Facebook.com allows students to network within their collegiate community, thereby limiting access to individuals who have the same e-mail address (i.e., only others whose e-mail ends in law.ua.edu would be available to see my page set up under my law school e-mail address), who have been invited into the network by the individual participant or who have a bona fide connection to the institution (i.e., alumni, faculty or staff).

The social networks do require participants to abide by guidelines and regulations stating the information posted is correct and the information requested to generate an account is correct. If a firm were to create an account for the express purpose of reviewing candidate's pages, the firm would be in violation of the user agreement. However, if a University of Alabama School of Law graduate, who was a hiring partner at a firm, created an account within his network of the University of Alabama School of Law, his or her entrance into the network would be legitimate.

If entrance into the social network is found not to be legitimate, in some states, the potential job candidate may be able to support a claim of tortious interference with business expectancy. According to Lenard, a labor law attorney with over 20 years of experience, such a claim would be "iffy."[7]Interference by a third party is generally required for this type of claim. However, Lenard did state that "perhaps, such a claim against the individual who obtained the information improperly, not the company, would satisfy this requirement, but maybe not. [Plus], other elements of this type of claim might also be difficult to prove, such as whether the candidate had a reasonable expectancy of employment."[8]

Alabama law does not provide for a claim of tortuous interference with business expectancy. But, for years Alabama has recognized a cause of action for intentional interference with business or contractual relations. To recover under this cause of action, a plaintiff must prove the following elements: (1) The existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the plaintiff's contract or business relation; and (4) damage to the plaintiff as a result of the defendant's interference.[9] Additionally, plaintiffs must produce substantial evidence of fraud, force, or coercion on the defendant's part.[10] Recovery on this type of claim under Alabama law is highly unlikely.

Employers using social network sites should also be aware of possible federal law violations. Use of such sites may violate the Federal Computer Fraud and Abuse Act and the Fair Credit Reporting Act. There might be a federal cause of action under the Federal Computer Fraud and Abuse Act to the extent the recruiter/employer exceeded authorized access in obtaining data from the social network's computer system.[11] As for the Fair Credit Reporting Act (FCRA), despite its name, this law has broader application than credit inquiries. The FCRA requires employers to use reliable and verifiable methods and data

sources when screening job applicants.[12] It could be argued these sites are reliable and verifiable data sources because the information on the site is provided by and managed by the applicant.[13] However, for the FCRA to be applicable, the information gleaned from a social network site must have been obtained by a third party. And, the FCRA would not prohibit use of the information, but would require disclosure of the fact that such information was the basis for the decision.[14]

Even with clear and correct entrance into a social network, no guarantees exist that what you see is correct. An August 2006 survey by RapidResearch found almost one-third of social network participants admit to posting false information about themselves.[15] On top of that statistic, a growing trend exists of people creating false and disparaging Web pages for others. Most often seen among young users, a group will post a false page under another's identity without the victim's knowledge. Reports have been made of college graduates finding such pages about themselves after an interview that seemed to have gone well, but the employer made a hasty retreat.[16] Ritchey agrees that if his firm found something unsavory on a candidate's page, it could be a deal breaker. He also noted that he may not share the reason for the final decision.

What's an Employer to Do?

Look at the big picture. Do not base hiring decision solely on information gathered from social networks and other Internet sources. Keep in mind that the information discovered may be out of context, incomplete and/or inaccurate. Ask yourself how relevant the information creating the negative impression is to actual job performance.

The use of social networking sites in pre-employment screening is just starting to garner national attention. Therefore, the use of such sites in the hiring process is not clearly defined. Right now, the concern is how to appropriately use the data to supplement a job candidate's application profile. A recent post on EZBackgroundChecks.com included some noteworthy advice regarding the type of questions a prospective employer should ask when using data from a social network site to evaluate a job candidate:[17]

1. Does the candidate's background/profile information support the professional qualifications submitted with the application/resume?
2. Is the candidate well rounded? Shows a wide range of interest?
3. Do the candidate's posts demonstrate great communications skills?
4. Does the candidate's site convey a professional image?
5. Does the candidate's personality fit the organization?
6. Have others posted recommendations and positive appraisal of the candidate?

Warning signs include the following:

1. Is the candidate linked to criminal behavior?
2. Has the candidate posted negative comments about previous employers or co-workers?
3. Has the candidate posted information about drug and/or alcohol use?
4. Has the candidate posted confidential information from a previous employer?

Lastly, but definitely not least, protect yourself. If you are going to do Internet searches and use them as a basis for employment decisions, document them and do it consistently, without regard to any legally protected classifications, e.g. race, sex, age. Some research suggest that it is appropriate to have a non-decision-maker conduct the Internet search and filter out the legally protected information before passing along the rest of the information to the decision-maker.[18]

Job Candidates Are Becoming More Aware

A 2006 survey by CollegeGrad.com showed that 47 percent of college grad seekers who use social networking sites such as MySpace or Facebook have either already changed or plan to change the content of their pages as a result of their job search.

Complete survey results:[19]
Have you changed your content at MySpace or Facebook because of your job search?
No–39.9 percent
Yes–25.9 percent
No, but I plan to–9.4 percent
I don't use either MySpace or Facebook–24.8 percent

A large number of colleges now include advice to students about the proper use of social networks on their career services Web page and/or include such advice in student presentations and career counseling sessions. The University of Alabama Career Services Office routinely advises students to be cautious about the type of information they post about themselves and others on social network sites. The university's School of Law Career Services Office has a publication by Naymz entitled, *Not Just Your Space–The College Student's Guide to Managing Online Reputation*[20] readily available for students as a resource document.

Just as many employers and recruiters utilize social networks to weed out undesirable job candidates, they are also utilizing them to discover the good ones. For example, CareerBuilder.com has recently partnered with Facebook to offer their career matching applications on Facebook's platform[21] And, other career matching services and recruiters are taking note.

Richard Castellini, vice president of marketing for CareerBuilder.com, recommends the following to make your profile employer-friendly:[22]

1. **Promote yourself.** Employers often look at profiles to get a better sense of the candidate's talents and fit within the company culture. Use your profile to showcase your creativity and contributions. Highlight achievements and awards, post things you've written or designed, include community or volunteer activities or other pertinent information.
2. **Have no regrets.** Don't post anything on your profile or your friends' profiles you wouldn't want a prospective employer to see. Derogatory comments, risqué photos, foul language and lewd jokes all will be viewed as a reflection of your character.
3. **Be discreet.** If your network offers the option, consider setting your profile to "private," so that it is viewable only by friends of your choosing. And since you can't control what other people say on your site, you may want to use the "block comments" feature.

You should also regularly check your profile to see what comments have been posted by others. Talk to your friends and ask that they not post lewd photos or derogatory comments about you and others on your profile. One of the easiest steps to take is to use one of the search engines to look for online records of yourself to see what is out there about you. If you find any damaging information, request that it be removed. Keep in mind that everything on the internet is archived. So, just because it is removed, does not mean that it cannot resurface. Be prepared to answer questions and correct or clarify any false and/or misleading information.

Hiring Doesn't End the Issues

Once a hiring decision has been made, social networks continue to play a role in the workplace. Of course instructing new hires (and old) against posting inappropriate pictures and information is an easy fix, but many issues raised by social networks are not so obvious.

Many firms have now blocked access to popular sites such as Myspace.com after noticing employees were spending too much time during the workday visiting their Web pages.[23]

- 71 percent of office workers access social networking sites at least 'a few times a week.' One in three (39 percent) access them several times a day.
- 27 percent of office workers spend three or more hours a week using these sites when at work.
- 42 percent of office workers have discussed work-related issues on these sites. [24]

Although a recent study recommends against banning access to social networking pages,[25] businesses have concerns about what information employees may inadvertently be sharing about their companies.[26] This is a particular concern for law firms who have an added responsibility of confidentiality. Even co-workers have concerns about what each other are sharing and some employees are being held accountable.

> A poll by Sophos found that 66 percent of workers think their colleagues share too much information on Facebook. Forrester Research recently found that 14 percent of companies have disciplined employees and 5 percent fired them for offenses related to social networking.[27]
>
> The shared information could be about an employee's work or about another employee.
>
> Take the case of Dana Schaeffer of Burlington. When she started a new job a year ago, Schaeffer, now 42, required training from two co-workers who were in their 20s. At home one night about two weeks after she started the job, she was on her own MySpace page when, she recalls, she thought to herself: "Hmm, I wonder in anybody in my office has it. They seem like a pretty techno-savvy place." So she typed in the name of one co-worker, checked out his MySpace page, then typed in the name of another, and went to that page . . . and was stopped cold. There was a vituperative message about her, directed to a co-worker. She went to that person's page, and found an even more vicious reply to the original message. It was devastating for Schaeffer. "They went back and forth on how much they couldn't stand working with me," she says. "I was absolutely, absolutely horrified. It was very hurtful."[28]

In addition to morale issues, social networking pages can also reveal shortcomings in your best workers. Take, for example, the tale of a woman who adhered to all of the correct policies and guidelines for keeping her social networking page professional.[29] She did, however, reveal herself despite her best efforts, when she took a sick day to go hiking with friends.[30] Her employer found out because the photos posted on the employee's Web site were dated with the day of her deception.[31]

The Future Looks Bright

As with all things, the potential pitfalls of social networking are balanced by their potential benefits. Becoming an educated user of the systems at least keeps you in touch with the upcoming generation of attorneys and makes you aware of issues before they surprise you.

As students and employers continue to become more aware of these issues, solutions are also emerging. To capitalize on a new generation's comfort with exposure on the World Wide Web, companies, such as summerclerk.com and linkedin.com, are providing professional networking sites–instead of social ones. Potential job candidates are also increasingly using their social networking pages as places to post résumés and issue-based blogs.

Employers, too, are getting in on the benefits of the social networks by creating pages for their businesses. In doing so, employers have an opportunity to show the potential hires more of the business's culture, personality and indefinable traits, which are often the factors that make for a long-lasting relationship.

Who knows? The paper résumé and in-person interview may just be replaced by all this new-fangled technology. Or, maybe not. ▲▼▲

Endnotes

1. Trey Mayclim, Growing Number of Job Searches Disrupted by Digital Dirt (June 12, 2006), *www.execunet.com/m_releases_content.cfm?id=3349.*
2. *Id.*
3. Tamara Simpson, *My Space, Their Space*, Valley News Dispatch, Mar. 26, 2006, *available at* www.pittsburghlive.com/x/pittsburghtrib/s_437076.html.
4. Alan Finder, *For Some, Online Persona Undermines a Résumé*, N.Y. Times, June 11, 2006, *available at* www.nytimes.com/2006/06/11/us/11recruit.html.
5. See LaJean Humprhies, The Impact of Social Networking Tools and Guidelines to Use Them (Jan. 15, 2007), *www.llrx.com/features/goodgoogle.htm.*
6. George Lenard, Employers Using Facebook for Background Checking: Is It Legal? (Sept. 1, 2006), *www.collegerecruiter.com/weblog/archives/2006/09/employers_using.php.*
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8. *Id.*
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Tari D. Williams was admitted to the Alabama State Bar in 2004 and is the director of the University of Alabama School of Law of Public Interest Law Programs.

Abigail Lounsbury Morrow is a 2004 admittee to the Alabama State Bar and is a legal career counselor at the University of Alabama School of Law.

Judicial Award of Merit

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 15, 2008. Nominations should be mailed to:

Keith B. Norman, Secretary • Board of Bar Commissioners
P.O. Box 671 • Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

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 during the Alabama State Bar's 2008 Annual Meeting July 12 at the Hilton Sandestin Beach Golf Resort & Spa.

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, 2008. Applications may be downloaded from the state bar's Web site at *www.alabar.org*.

IMPORTANT ASB NOTICES

Continued from page 137

Notice of Election

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

President-Elect

The Alabama State Bar will elect a president-elect in 2008 to assume the presidency of the bar in July 2009. Any candidate must be a member in good standing on March 1, 2008. Petitions nominating a candidate must bear the signature of 25 members in good standing of the Alabama State Bar and be received by the secretary of the state bar on or before March 1, 2008. Any candidate for this office must also submit with the nominating petition a color photograph and biographical data to be published in the May 2008 *Alabama Lawyer.*

Ballots will be mailed between May 15 and June 1 and must be received at the state bar by 5 p.m. on the second Friday in June (June 13, 2008).

Elected Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits: 8th; 10th, place no. 4, place no. 7; Bessemer Cut-off; 11th; 13th, place no. 1, place no. 5; 15th, place no. 5; 17th; 18th; 19th; 21st; 22nd; 23rd, place no. 1; 28th, place no. 2; 30th; 31st; 33rd; 34th; 35th; 36th; 40th; and 41st.

Additional commissioners will be elected in these circuits for each 300 members of the state bar with principal offices herein. The new commissioner petitions will be determined by a census on March 1, 2008 and vacancies certified by the secretary no later than March 15, 2008.

All subsequent terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Either must be received by the secretary no later than 5 p.m. on the last Friday in April (April 25, 2008).

Ballots will be prepared and mailed to members between May 1 and May 15, 2008. Ballots must be voted and returned to the Alabama State Bar by 5 p.m. on the last Friday in May (May 30, 2008). Election rules and petitions are available at *www.alabar.org*.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. ▲▼▲

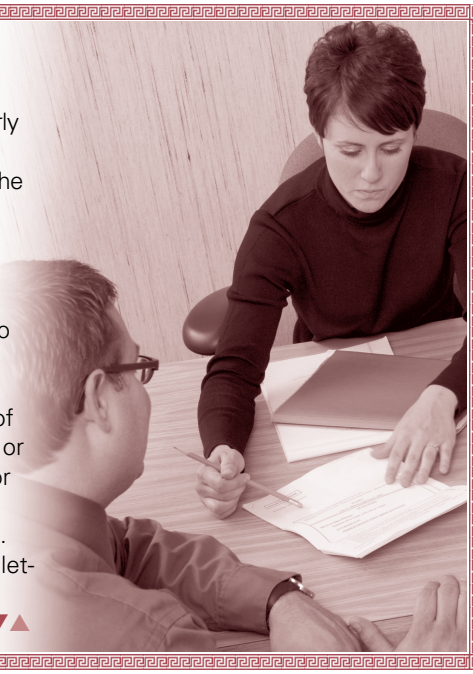
Pro Bono Award Nominations

The Alabama State Bar Committee on Volunteer Lawyer Programs (formerly the Committee on Access to Legal Services) is seeking nominations for the Alabama State Bar Pro Bono Award. Nomination forms can be obtained on the Alabama State Bar Web site, *www.alabar.org*, or by contacting:

Linda L. Lund, Director • Volunteer Lawyers Program • Alabama State Bar
P. O. Box 671 • Montgomery 36101 • (334) 269-1515

The Alabama State Bar Pro Bono Award recognizes the outstanding pro bono efforts of attorneys, mediators, law firms and law students in the state. The award criteria includes but is not limited to the following: the total number of pro bono hours or complexity of cases handled, impact of the pro bono work and benefit for the poor, particular expertise provided or the particular need satisfied, successful recruitment of other attorneys for pro bono representation, and proven commitment to delivery of quality legal services to the poor and to providing equal access to legal services.

Nominations must be postmarked by May 1, 2008 and include a completed Alabama State Bar Pro Bono Awards Program Nomination Form to be considered by the committee. ▲▼▲



Reinstatement

- The Supreme Court of Alabama entered an order based upon the decision of the Disciplinary Board, Panel IV, reinstating former Tuscaloosa attorney **Stephen Royce Mills** to the practice of law in the State of Alabama effective December 13, 2007. [Pet for Rein. No. 07-08]

Suspensions

- Effective August 15, 2007, attorney **Winfred Clinton Brown, Jr.** of Decatur has been suspended from the practice of law in the State of Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-05]
- Montgomery attorney **Rodney Newman Caffey** received a 91-day suspension to be held in abeyance by order of the Disciplinary Commission of the Alabama State Bar. Additionally, Caffey was placed on probation for a period of two years and will be required to file monthly accounting reports with the Office of General Counsel. The Disciplinary Commission further ordered that Caffey participate in the Alabama State Bar Practice Management Assistance Program. The Disciplinary Commission's order was based on Caffey's conditional guilty plea to violations of rules 1.15(a), 1.15(b), 1.15(e), 1.15(f), 1.15(g), 1.15(h), and 8.4(a), *Alabama Rules of Professional Conduct*. [ASB nos. 1.15(a), 1.15(b), 1.15(e), 1.15(f), 1.15(g), 1.15(h), and 8.4(a)]
- Effective August 15, 2007, attorney **Sarah A. Rutland Cook** of Montgomery has been suspended from the practice of law in the State of Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-07]
- Birmingham attorney **Stephen Willis Guthrie** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure,* by order of the Disciplinary Commission of the Alabama State Bar, dated August 6, 2007. The Disciplinary Commission found that Guthrie's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. On August 28, 2007, the Disciplinary Board, Panel III, denied Guthrie's petition to dissolve the suspension and entered an order sustaining the Disciplinary Commission's suspension order. [Rule 20(a); Pet. No. 07-14]
- Mobile attorney **Gregory Miles Hess** was suspended from the practice of law in the State of Alabama for a period of five years, retroactive to September 20, 1999, by order of the Supreme Court of Alabama. The supreme court entered its order in accord with the provisions of the October

DISCIPLINARY NOTICES Continued from page 139

26, 2007 order of the Disciplinary Commission of the Alabama State Bar accepting Hess's conditional guilty plea, wherein Hess pled guilty in two cases to violations of the *Alabama Rules of Professional Conduct*. In ASB No. 00-004, Hess pled guilty to violations of rules 1.5(a) and 8.4(g), *Ala. R. Prof. C.* In ASB No. 07-057(A), Hess pled guilty to violations of 3.4(c), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* The Disciplinary Commission further ordered that Hess appear for a public reprimand without general publication in ASB No. 98-135(A), a case in which Hess had previously failed to appear for the duly ordered and noticed reprimand. [ASB nos. 00-040 (a) and 07-057(a)]

- Russellville attorney **Benjamin Horace Richey** was suspended from the practice of law in the State of Alabama by order of the Supreme Court of Alabama for a period of two years to run concurrently with Richey's consent to interim suspension effective October 7, 2005, with credit for time served since that date. On September 14, 2007, the Disciplinary Commission of the Alabama State Bar accepted Richey's conditional guilty plea to violating rules 8.4(a) and (b), *Alabama Rules of Professional Conduct,* based upon his conviction of violating 18 U.S.C. §1001(a)(2) (false statement to a federal officer) in the United States District Court for the Northern District of Alabama. [ASB No. 05-35(a)]

- Effective October 26, 2007, attorney **Thomas Patrick Williams** of Robertsdale has been suspended from the practice of law in the State of Alabama for non-compliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 07-27]

Public Reprimand

- On November 30, 2007, Birmingham attorney **Robert Matthew Pears** received a public reprimand without general publication for violations of rules 1.3 and 1.4(b), *Ala. R. Prof. C.* Acceptance of this reprimand also resolved other pending disciplinary cases to include ASB nos. 02-222(A), 04-80(A) and 04-263(A). These cases involved conduct related to a 90-day suspension that was previously imposed in ASB No. 05-85(A). In the instant case, Pears was retained by a couple to represent them in a civil matter. Pears quoted the clients a fee of $2,500, plus a 35 percent contingency fee. In a letter to the clients, Pears informed them that the lawsuit had to be filed two years from the date of the incident and that he always docketed his calendar two years from that date. Pears also informed the clients that he intended to look into a lawsuit against the contractor and the insurance company. However, Pears did not file the lawsuit until November 15, 2004. Although service was obtained on the insurance company, Pears did not perfect service on the contractor. The insurance company filed a motion to dismiss and a motion for fees and costs under the Alabama Litigation Accountability Act, based on the statute of limitations having long since expired. The court allowed Pears's clients leave to amend their complaint, which Pears did on January 21, 2005. The insurance company renewed its motion to dismiss and request for fees and costs. On February 2, 2005, the court granted the motion to dismiss, with prejudice, and taxed costs to Pears's clients, based on the statute of limitations grounds. [ASB No. 06-146(a)] ▲▼▲

J. PATRICK DARBY

FOURNIER J. "BOOTS" GALE, III

JARRED O. TAYLOR, III

RUSSEL MYLES

JEFFREY C. ROBINSON

WALTER J. SEARS, III

LATANISHIA D. WATTERS

- **J. Patrick Darby,** a partner with Bradley Arant Rose & White LLP, has been elected a fellow with the American College of Bankruptcy, an honorary association of bankruptcy and insolvency professionals.

- The American College of Environmental Lawyers (ACOEL) announces that **Boots Gale, III** and **Jarred O. Taylor, II,** both shareholders at Maynard, Cooper & Gale PC in Birmingham, have been elected to the college's board of regents. The ACOEL is a professional association of lawyers dedicated to maintaining and improving the standards of the practice of environmental law, the administration of justice and the ethics of the profession and contributing to the development of environmental law.

Gale

Taylor

- **Russel Myles** recently was named national director of the 22,000-member Defense Research Institute, Inc., the nation's largest organization of defense attorneys. Myles is a partner in the Mobile firm McDowell Knight Roedder & Sledge LLC.

Myles

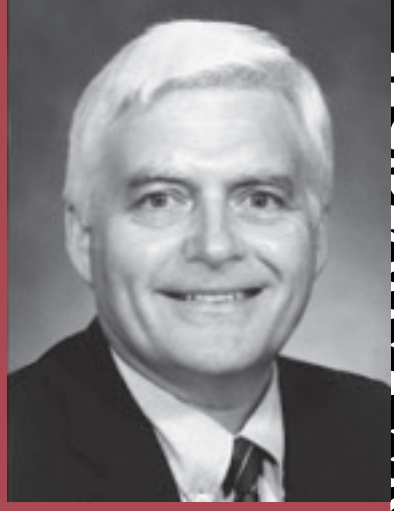
BAR BRIEFS Continued from page 141

- **Jeffrey C. Robinson** of Selma will serve as the 2008 Diversity Fellow for the General Practice, Solo and Small Firm Division of the American Bar Association. As one of the fastest growing components of the ABA, the division represents more than 30,000 members throughout the United States, most of whom are in private practice.

Robinson

- **Walter J. Sears III**, a partner with Bradley Arant Rose & White LLP, has been elected to the American College of Construction Lawyers. The college is comprised of the top one percent of the construction bar in the United States and also includes lawyers and judges from Canada, Britain and France.

- **Latanishia D. Watters**, who practices with Haskell Slaughter Young & Rediker LLC, was elected president for 2008 of the Magic City Bar Association, the professional association for African-American attorneys in the Birmingham area. The association was formed in 1984 to promote the professional advancement of African-American attorneys, to preserve the independence of the judiciary, to foster improvement of the economic condition and protect the civil and political rights of all citizens and to uphold the honor and integrity of the legal profession. ▲▼▲



ROBERT L. MCCURLEY, JR.

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

Legislative Process

In law school we have all been taught by the Socratic method of case analysis, except in a few courses such as taxation and the UCC. Legislation is no longer a required course and, in most law schools, is not even offered. As a lawyer, one is often called upon to be involved in the legislative process without having been trained in or having the knowledge of how it works.

In 1979, then Representative Joe McCorquodale, speaker of the house of representatives, asked the Law Institute to write a book about the legislative process since there was no text on state legislatures. In school, students are taught about Congress and the three branches of federal government with only an aside "… and states also have three branches of government."

Lawyers, more than any other group of citizens, often are involved in the legislative-drafting process. Alabama's failure to provide Home Rule not only requires knowledge of the legislative process for general laws that affect all 4.6 million Alabamians, but also knowledge of how local laws are enacted. Our smallest county, Greene County, with a population of 9,374 people, must submit their local bills to the entire legislature for scrutiny.

LEGISLATIVE WRAP-UP

Continued from page 143

The Alabama Law Institute is the State of Alabama's major law revision agency. In 2007, over 125 lawyers on eight Law Institute committees, drafted, or are in the process of drafting, major revisions of law for the Alabama legislature. The following major revisions are pending before the 2008 Regular Session of the legislature:

1. Redemption from Ad Valorem Taxes;
2. Uniform Revised Limited Partnership Act;
3. Uniform Prudent Management of Institutional Funds;
4. Uniform Anatomical Gift Act;
5. Uniform Parentage Act;
6. Uniform Satisfaction of Residential Mortgages; and
7. Alabama Business and Non-Profit Entities Code.

This is the first time in 152 "Legislative Updates" that we have delineated how these revisions become law and how the legislative process works in Alabama.

For a bill to become enacted into law it must go through the following process:

1. It must be introduced by a legislator in one house of the legislature and assigned to a committee. This is the bill's *first reading*.
2. It must be placed on the committee agenda on a succeeding Wednesday for consideration. Citizens have an opportunity to attend and be heard before the committee. At this committee hearing the bill may be amended. The approval by the committee and the committee report, when delivered back to the house, constitutes the *second reading*.
3. The next step is for the bill to be considered by the entire legislative body of one of the houses. Generally, 1,500 bills are being introduced at the same time. In order for a bill that has received its second reading to be considered before bills sent to the body earlier, the bill must be placed on a "special order" calendar. For uncontested local bills, the legislative rules provide they are to be considered before general bills each day. These are the bills affecting only one county that have been endorsed by all legislators who represent any part of the county. Once the bill is brought up for a vote, this constitutes a *third reading*.
4. After passage by the house of origin, the bill must follow the same process in the second house. The bill must be received by the second house and read by title for its *first reading*.
5. Next, it must be sent to the second house committee to be reviewed again as in the first house. Citizens again have the right to attend and be heard. The committee may further amend the bill. Once approved, the bill is referred back to the second house and this constitutes a *second reading*.
6. The second house must also place the bill on their calendar for consideration by the entire body. Generally, the bills originating in a particular house are considered before addressing the other house's bills. Typically, this is in the last two weeks of the session. When the bill is finally considered by the second house and is passed, it has received its *third reading*.
7. When both houses of the legislature have passed the same identical bill, it is sent to the governor for signing. It is not until after the governor has signed the bill that it *becomes law*.

Each of these steps occurs on a separate calendar day with only the possibility of steps three and four occurring within the same calendar day.

This year, and in 2009, the legislature begins on the first Tuesday in February. The legislature is generally in session on Tuesday and Thursday of each week. On Wednesday the legislative committees meet. This continues for 15 weeks, adjourning around the third Monday in May.

Lawyers and other citizens can have an influence on the passage or defeat of legislation by making their position known to their legislator. Each senator and representative has an office in Montgomery where they may also be visited during the session, Tuesday through Thursday, when the legislature is not meeting.

Legislators do not have individual staff. Two senators share a secretary, and approximately 15 house members must share the services of a secretary in the secretarial pool. Each of the 15 house committees has a committee clerk. The Law Institute supplies a lawyer and an intern to the committee during the session. The Senate Judiciary and Governmental Affairs committees have lawyers provided by the Law Institute during the session. Other senate committees have not requested lawyers, but two of them do have interns provided by the Institute.

The house of representatives has 11 lawyers out of 105 members. Of the 35 senators, 12 are lawyers.

The Alabama Law Institute, at the request of the speaker of the house of representatives, provides seven interns to assist house members to provide constituent services. Teresa Norman, intern coordinator and assistant director at the Law Institute, directs these interns and other interns assisting the house and the senate.

The biggest change to the legislative process in the past 25 years has been the proliferation of paid lobbyists. In particular, there has been a significant increase in contract lobbyists who may work for multiple clients or to affect a particular piece of legislation. In 2007, there were 659 lobbyists registered, representing 781 interest groups that are registered with the Alabama Ethics Commission. The state Ethics Commission has only 13 employees to keep track of these lobbyists and review the more than 30,000 annual filings of economic statements by public officials and state employees.

The legislative process is not a mystery. There is only one way to pass a bill and that is persistence and to see that each step, one through seven, is followed. The mystifying part is why good bills do not always pass. The answer is simple. There are hundreds of ways to defeat a bill by delaying, amending or carrying over the bill to a later date, or just failing to schedule the bill for consideration in any of steps two, three, five or six. In recent years, the bar, lawyers and citizens have expressed an interest in statewide issues such as constitutional reform, tax reform, court reform, judicial selection reform, and indigent defense. Talking personally with your legislator, knowing the legislative process and being goal-oriented with a sense of urgency is the best way to be involved and to affect legislation.

Alabama has some really fine legislators. Many of these are lawyer-legislators who have leadership roles.

In the senate the following lawyers are chair of these committees:

1. Senator Roger Bedford—Finance and Taxation General Fund
2. Senator Hank Sanders—Finance and Taxation Education Fund
3. Senator Zeb Little—Majority Leader
4. Senator Rodger Smitherman—Judiciary
5. Senator Ted Little—Fiscal Responsibility and Accountability
6. Senator Wendell Mitchell—Governmental Affairs
7. Senator Pat Lindsey—Constitution, Campaign, Finance, Ethics & Elections and a second committee on Economic Expansions & Trade
8. Senator Myron Penn—Confirmations
9. Senator Bobby Singleton—Tourism and Marketing

In the house of representatives these lawyers have taken leadership positions:

1. Representative Demetrius Newton occupies the number two spot as speaker pro tem.
2. Representative Ken Guin—chair of the Rules Committee and majority leader
3. Representative Cam Ward—vice chair of the Minority Caucus
4. Representative Marcel Black—Judiciary
5. Representative Marc Keahey—Contract Review

If you want to know about the legislative process in Alabama, the *Legislative Process, Handbook for Alabama Legislators*, 9th Edition and *Alabama Legislation*, 6th Edition are available from the Law Institute. ▲▼▲

Alabama, we love where we live.

For more than 125 years, LandAmerica has been working to serve the communities that make up our country. Today in Alabama, with resources and tools from title services to home warranty, our knowledgeable representatives will respond with foresight and innovation to your changing needs. Whether you're a homebuyer, lender, broker or attorney, you can count on LandAmerica to help you with any real estate transaction need anywhere in the state of Alabama.

We're glad to be in the neighborhood.

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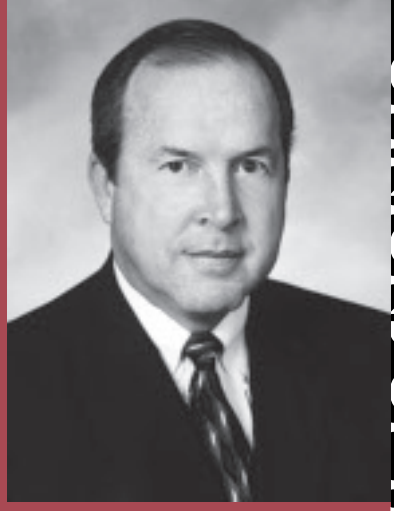

J. ANTHONY MCLAIN

Name "John Doe & Associates" May Be Used Only If Attorney Employs At Least One Associate

QUESTION:

"Assuming that an attorney is a sole practitioner, which of the following forms of name may he ethically use for his practice:

John Doe & Associates

John Doe Law Firm

John Doe Law Office

"Similarly, if the attorney has one associate (employed lawyer), which of those names may he use?

"The first of these names (John Doe & Associates) was approved for a firm with an undisclosed number of associates in RO-87-01. It is unclear from that opinion and Rule 7.1(a) whether the use of the term 'associates' means that the lawyer must have at least one associate or at least two associates in order not to be 'misleading.'

"Similarly, many solo practitioners use the 'John Doe Law Office' or 'Law Offices of John Doe' appellation. Does the term 'John Doe Law Firm' carry enough of a different connotation that 'Firm' would be misleading for a solo practitioner, while 'Office' would be allowable?"

ANSWER:

An attorney may designate his practice by the name "John Doe & Associates" only if he has at least one associated attorney in his employ. A sole practitioner may use the term "John Doe Law Firm," "John Doe Law Office" or "Law Offices of John Doe."

OPINIONS

Continued from page 147

DISCUSSION:

Firm names and letterhead are governed by the provisions of Rule 7.5 read in conjunction with Rule 7.1 of the *Rules of Professional Conduct* of the Alabama State Bar. In substance, these rules provide that a firm name or letterhead shall not be misleading to the public. The Disciplinary Commission is of the opinion that the firm name "John Doe & Associates" would lead the public to believe that John Doe has at least one other attorney associated with him in the practice of law. However, if the attorney has only one associate, the Disciplinary Commission is of the opinion that it is not necessary to restrict the name to the singular in order to avoid misleading the public. Whether a lawyer who does not presently employ other lawyers can claim that he normally employs one or more associates depends upon how long the firm has been without one or more associate attorneys and the firm's efforts to engage more associates.

The Disciplinary Commission is further of the opinion that the names "John Doe Law Firm" and "John Doe Law Office" may be used by a sole practitioner without misleading the public as to the size of the firm or the number of attorneys employed. [RO 93-11] ▲▼▲

THE ALABAMA LAWYER NO LONGER PUBLISHES ADDRESSES AND TELEPHONE NUMBERS UNLESS THE ANNOUNCEMENT RELATES TO THE OPENING OF A NEW FIRM OR SOLO PRACTICE.

About Members

David R. Clark announces the opening of his practice at 904 S. Memorial Dr., Prattville 36067. Phone (334) 361-7750.

Chip Cleveland announces the opening of **Chip Cleveland LLC** at 703 McQueen Smith Rd. South, Prattville 36066. Phone (334) 365-6266.

Jim Jeffries announces the opening of **Jeffries Family Law LLC** at 2053 Dauphin St., Mobile 36606. Phone (251) 445-5522.

Benjamin Jay Stuck announces the opening of his office at 1927 7th St., Tuscaloosa 35401. Phone (205) 345-9834.

Former **Talladega County Circuit Judge Chad Edward Woodruff** announces the opening of **Chad E. Woodruff** at 223 W. North St., Talladega 35160. Phone (256) 362-4949.

Among Firms

Glenn N. Baxter announces his association with the **Alabama Disabilities Advocacy Program.**

Grover E. Asmus and **P. Vincent Gaddy** announce the opening of **Asmus & Gaddy LLC** at 107 St. Francis St., Ste. 1500, Mobile 36602. Phone (251) 439-7600.

Brandon L. Blankenship, Gregory D. Harrelson and **Jason Wollitz** announce the formation of **Blankenship, Harrelson & Wollitz LLC** at 825 Park Place Tower, 2001 Park Place N., Birmingham 35203-2774. Phone (205) 912-8241.

Burke Harvey & Frankowski LLC announces that **Gregory J. McKay** and **Camille L. Edwards** have become associated with the firm.

George C. Day, Jr. PC announces that **Joseph M. Willoughby** has joined the firm as an associate.

Delashmet & Marchand PC announces that **Jennifer A. Doughty** and **David G. Kennedy** have become associated with the firm.

Dick, Riggs, Miller & Stem LLP of Huntsville announces a name change to **Dick Riggs Miller LLP.**

Jeffrey N. Windham announces his association with **Forensic/Strategic Solutions PC.**

ABOUT MEMBERS, AMONG FIRMS

Continued from page 149

The Gathings Law Firm announces that **Brian A. Kilgore** has joined the firm as an associate.

Gaines, Wolter & Kinney PC announces that **Andrew J. Moak** has become a partner and **Sara L. Williams, Stephen R. Shows** and **Brian T. Hoven** have joined the firm as associates.

Haskell Slaughter Young & Rediker LLC announces that **Amy Kirkland Myers** and **Sandra Payne Hagood** have joined the firm as counsel, and **Jay V. Shah, Jeremy S. Walker, Robert H. Adams** and **Kimberly B. Glass** have joined the firm as associates.

Holt, Mussleman, Holt & Morgan announces that **Charles J. Kelley** has joined the firm. The firm's name is now **Holt, Mussleman, Kelley & Morgan.**

Lynn Wilson Jinks, III, Christina Diane Crow and **Nathan Andrew Dickson, II** announce the opening of **Jinks, Crow & Dickson PC**, P.O. Box 350, Union Springs. Phone (334) 738-4225.

Johnstone Adams LLC announces that **Kimberly L. Bell** has joined the firm as an associate.

Pierce Ledyard PC announces that **Jeanna Chappell** has been named a shareholder in the firm.

Lloyd, Gray & Whitehead PC announces that **Taffi S. Stewart** has become a shareholder and **Randall W. Hall** has joined the firm as an associate.

Gregory S. Ritchey and **W. Scott Simpson** announce the opening of **Ritchey & Simpson PLLC** at 3288 Morgan Dr., Ste. 100, Birmingham 35216. Phone (205) 876-1600. The firm also announces that **Richard S. Walker** and **Austin Burdick** have joined as associates.

Scott W. Ford has been named clerk of the **United States Bankruptcy Court, Northern District of Alabama.** Ford had served the Court as chief deputy clerk.

Waddey & Patterson PC announces that **Andrew J. Thomson** has joined as an associate.

Wallace, Jordan, Ratliff & Brandt LLC announces that **Annemarie C. Axon** has joined the firm as counsel and **Phillip Dale Corley, Jr.** has been named managing member. ▲▼▲

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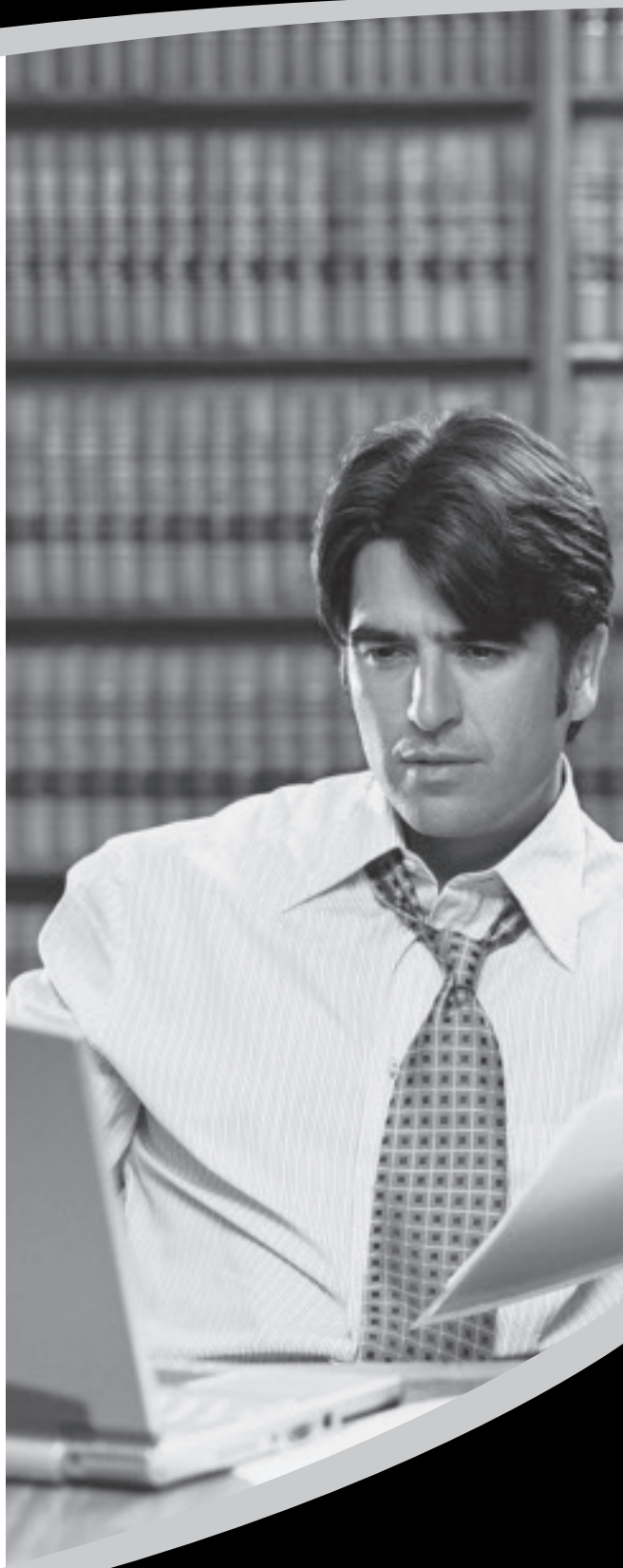

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