

MARCH 2010 • VOL. 71, NO. 2

THE ALABAMA LAWYER

MILESTONES AND MEMORIES OF JONES SCHOOL OF LAW:

From Reading Law to Accredited Law School

page 138



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Spring 2010
Calendar



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MARCH

26 Domestic Relations Practice *Birmingham*

APRIL

23 E-Discovery *Birmingham*

30 DUI & Criminal Defense Law *Birmingham*

MAY

7/8 City & County Government *Orange Beach*

21 Professionalism *Birmingham*



Teleconferences

MARCH

23 Bankruptcy Restructuring for Middle Market Businesses, Part 1

24 Bankruptcy Restructuring for Middle Market Businesses, Part 2

25 Compensation Issues in Non-Profits - Replay

30 Retaliation Claims in Employment Law

APRIL

1 Advanced Gift Tax Planning Strategies

13 Transfer Taxes in M&A/Business Transactions

20 Restructuring Trusts

22 Fundamentals of Exempt Taxation

27 Art of the Equity Deal for Start up and Growth Companies



Online Seminars

2009 Alabama Update: Criminal Defense Law

2009 Alabama Update: Ethics Update from the Alabama State Bar

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Bankruptcy Basics: Chapter 7 or 13?

Case Strategy – Developing a Game Plan

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**Faulkner University,
Thomas Goode Jones School of Law**
In December, Faulkner University, Thomas Goode Jones School of Law became the third law school in the state to be fully accredited by the American Bar Association. Housed in the beautiful Marjorie Y. Snook Building, which is designed in the neo-federal architectural style, the school is located in Montgomery, Alabama.

John H. Wilkerson, Jr., clerk of the Alabama Court of Civil Appeals, has written a colorful review of the history of Thomas Goode Jones School of Law (beginning on page 138 of this issue).

Photograph compliments of LWT – a marketing and interactive firm based in Montgomery

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CLE COURSE SEARCH

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



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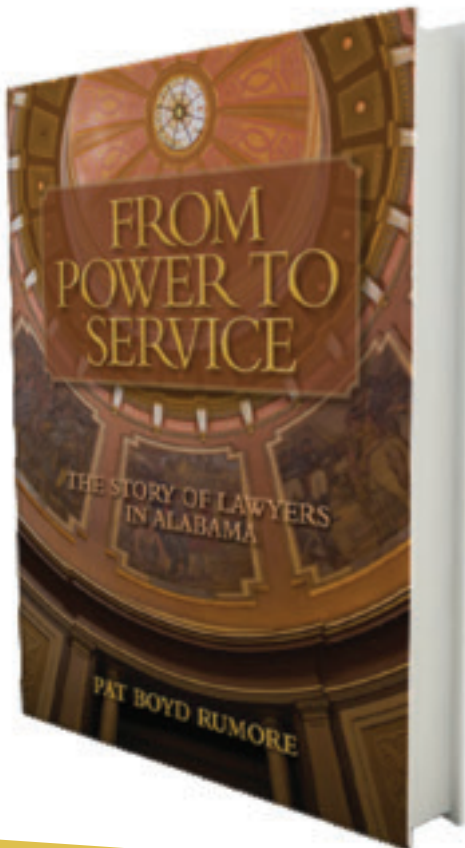
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**ALABAMA STATE BAR
2010-2011 COMMITTEE PREFERENCE FORM**

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We want very much in the upcoming year to broaden participation in bar activities.

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THOMAS J. METHVIN



“Thank You, Volunteer Lawyers!”

The Volunteer Lawyers Program (VLP) was created to provide free legal services to poor and disadvantaged Alabamians. Through its VLP, the Alabama State Bar (ASB) refers cases to volunteer private attorneys who agree to provide free legal assistance to low-income clients. There are four VLPs affiliated with the Alabama State Bar: those operated by the Birmingham, Mobile and Madison County Bar associations, and the ASB VLP. Currently, approximately 3,000 lawyers statewide participate in the VLP. Since we started our recruiting efforts in January 2009, 550 new attorneys have joined.

Alabama is last in funding for Access to Justice for the poor. Raising funds is even more difficult in today's economy. To ensure that all people receive the legal help they need, we are striving to be *first* in VLP. For every lawyer we add to this program, there are more people helped. We have made great progress so far, but there is a lot left to do.

There are many reasons attorneys choose to participate in the VLP. These may include a sense of obligation, a historical or family connection to pro bono work, a feeling of wanting to give back to the community or even a desire to learn. Participation in the VLP also allows us to fulfill our professional responsibility to make legal counsel available to indigents, consistent with a true sense of professionalism.

PRESIDENT'S PAGE Continued from page 105

To get a better picture of the reasons lawyers choose to donate their time to VLP service, we talked to some of them. Some of these folks have been lawyers, and a part of the VLP, for more than 20 years. Others are new to the VLP. Why did they join, and what do they get out of being a part of it?

Franklin Luke Coley, Jr., an attorney in Mobile, has been a part of the Mobile VLP for nearly 25 years. He was active in the development of the ASB VLP and the Mobile VLP.

"At the time I started, pro bono service in the state was haphazard. Everyone said they took pro bono cases, but it wasn't really an intentional thing; it was something most lawyers just fell into in the course of their practice," Coley recalls. "The first state VLP committee meeting I went to, the bar had commissioned

a polling firm to study the legal needs of the poor, and whether or not they were being met. When the results were presented, it revealed the abysmally haphazard level of any attempts to make anybody's life better through pro bono. That study was really a call to action to everyone who was in the room at the time. That's kind of how I got my fire lit."

Coley says one of his favorite experiences with pro bono work involved working with a young lawyer—who went on to become a circuit judge—who was assigned a pro bono case that he wasn't sure how to handle. Coley provided assistance and enjoyed watching the lawyer's confidence develop as he learned the ropes of that case. "I see that as multiplying our program's services. Now, not only do I have my knowledge and experience, but that person has gained experience," he says.

Quality Paralegal Education



■ Our Mission

The Faulkner University Legal Studies Department seeks to provide a program that supports its students during their academic and professional careers. Upon graduation, students will be well equipped to begin or continue an exciting career as a paralegal.

■ What are typical paralegal responsibilities?

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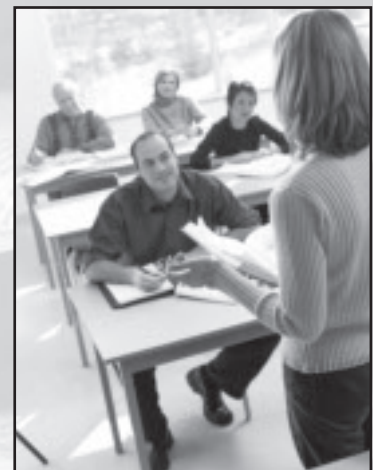
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VOLUNTEER LAWYER PROGRAM
Participation by Judicial Circuit

| Circuit | Regular Members in Circuit | Special Members in Circuit | VLP Members in Circuit | Percentage Regular Members | Percentage Total Members |
|---|-----------------------------------|-----------------------------------|-------------------------------|-----------------------------------|---------------------------------|
| 1 Choctaw, Clarke, Washington | 54 | 11 | 19 | 35% | 29% |
| 2 Butler, Crenshaw, Lowdes | 44 | 12 | 12 | 27% | 21% |
| 3 Barbour, Bullock | 44 | 7 | 18 | 41% | 35% |
| 4 Bibb, Dallas, Hale, Perry, Wilcox | 93 | 28 | 24 | 26% | 20% |
| 5 Chambers, Macon, Randolph, Tallapoosa | 108 | 23 | 29 | 27% | 22% |
| 6 Tuscaloosa | 447 | 109 | 148 | 33% | 27% |
| 7 Calhoun, Cleburn | 159 | 43 | 37 | 23% | 18% |
| 8 Morgan | 134 | 37 | 62 | 46% | 36% |
| 9 Cherokee, Dekalb | 57 | 12 | 15 | 26% | 22% |
| 10 Jefferson | 4536 | 603 | 740 | 16% | 14% |
| 11 Lauderdale | 158 | 22 | 36 | 23% | 20% |
| 12 Coffee, Pike | 96 | 16 | 14 | 15% | 13% |
| 13 Mobile | 1094 | 209 | 675 | 62% | 52% |
| 14 Walker | 116 | 23 | 20 | 17% | 14% |
| 15 Montgomery | 1054 | 602 | 264 | 25% | 16% |
| 16 Etowah | 136 | 27 | 34 | 25% | 21% |
| 17 Greene, Marengo, Sumter | 38 | 8 | 14 | 37% | 30% |
| 18 Shelby | 403 | 115 | 26 | 6% | 5% |
| 19 Autauga, Chilton, Elmore | 149 | 54 | 26 | 17% | 13% |
| 20 Henry, Houston | 216 | 32 | 71 | 33% | 29% |
| 21 Escambia | 43 | 9 | 8 | 19% | 15% |
| 22 Covington | 60 | 8 | 8 | 13% | 12% |
| 23 Madison | 680 | 132 | 175 | 26% | 22% |
| 24 Fayette, Lamar, Pickens | 27 | 16 | 7 | 26% | 16% |
| 25 Marion, Winston | 52 | 10 | 22 | 42% | 35% |
| 26 Russell | 53 | 11 | 8 | 15% | 13% |
| 27 Marshall | 98 | 15 | 31 | 32% | 27% |
| 28 Baldwin | 330 | 68 | 44 | 13% | 11% |
| 29 Talladega | 79 | 14 | 13 | 16% | 14% |
| 30 St. Clair | 76 | 17 | 13 | 17% | 14% |
| 31 Colbert | 68 | 8 | 15 | 22% | 20% |
| 32 Cullman | 75 | 13 | 12 | 16% | 14% |
| 33 Dale, Geneva | 50 | 17 | 22 | 44% | 33% |
| 34 Franklin | 14 | 7 | 1 | 7% | 5% |
| 35 Conecuh, Monroe | 31 | 8 | 11 | 35% | 28% |
| 36 Lawrence | 21 | 8 | 7 | 33% | 24% |
| 37 Lee | 179 | 30 | 56 | 31% | 27% |
| 38 Jackson | 34 | 12 | 10 | 29% | 22% |
| 39 Limestone | 43 | 14 | 14 | 33% | 25% |
| 40 Clay, Coosa | 14 | 7 | 1 | 7% | 5% |
| 41 Blount | 33 | 8 | 7 | 21% | 17% |

PRESIDENT'S PAGE Continued from page 106

Gabrielle N. Helix, an attorney in private practice in Huntsville, has been a lawyer for “about two years and 30 days . . . not that I’m counting!” She became a lawyer as a second career, after many successful years as a television journalist. She estimates she’s been doing pro bono work from “about day one.” Her first case was pro bono, on behalf of a young woman who had visited four other lawyers but couldn’t afford to pay for legal services.

“I had just started practicing,” Helix recalls. “Nobody would take her case because she didn’t have money. I had no experience and I told her this. It was my first case and we had a great outcome.”

Helix now handles a lot of pro bono cases, both independently and through the Madison County VLP. She says she’s grateful to be able to do so much volunteer lawyer work. One of her most recent cases involved an adoption, where great-grandparents adopted a child whose mother and father had drug problems. Although they don’t have much money, the child is now in a home full of love.

“I think the court should be open to anyone. I don’t think you should be stopped from adopting a child, or stopped from getting a divorce from an abusive spouse, because you just don’t have any money,” Helix said. “I think people should have access to legal resources, rights or remedies even if they don’t have money. I think when you volunteer, you get back in touch with what this profession was really designed to do.”


Tim Gallagher, with Sasser, Sefton, Tipton & Davis PC in Montgomery, says, “They aren’t going to give you something you’re not comfortable with.” A lawyer since 2007, he only recently became a part of the Volunteer Lawyers Program in Montgomery. Since joining, he regularly donates his time to the Montgomery County Bar Association’s new monthly

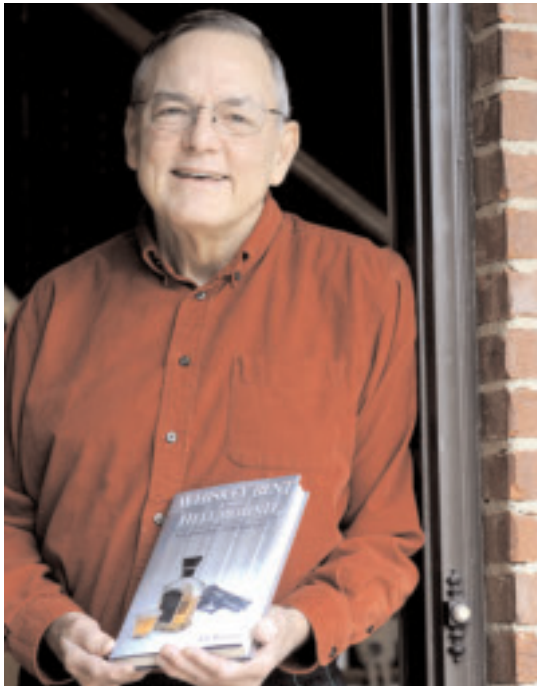
free legal services clinics, and plans to continue in that program as well as taking referrals from the VLP. “If you don’t feel comfortable, you can ask for something different, or ask for help. I think if attorneys realize that, they’ll be more likely to sign up. Also, if you’re part of a firm where there are more experienced attorneys, I’ve found they are almost always willing to help out and give you some guidance.

“I personally find it interesting to learn an area of law, to branch out,” Gallagher says. “You might find out it’s something you end up being interested in, and can grow your practice. If you’re a little adventurous and want to expand your horizons, it’s a great opportunity to do that.”

The VLP addresses a variety of concerns or objections a lawyer might have:

- **“It takes too much time.”** Actually, lawyers spend about five hours, on average, per case they accept through the VLP.
- **“I might get sued.”** Each VLP provides malpractice coverage for cases accepted through its programs.
- **“I don’t understand the area of law for the case I’m assigned.”** The VLP provides mentors who can help guide you through a case, or you can simply decline the case.
- **“I’m just not a joiner.”** We aren’t really asking you to “join” something, but to make a commitment to fulfill one of the core values of our profession—service to the public.

I challenge you to go beyond obligation and find out what volunteer lawyer service can mean to you. If you are not already a member of the VLP, please join. For more information, or to join the VLP online, go to www.alabar.org. 



*Bob McGregor with a copy of his first book, **Whiskey Bent and Hell Bound: No Holiday for Justice**. Photo courtesy of *The Birmingham News**

A Life Well Lived

On a cold rainy night this past January, several hundred people gathered in Birmingham for the wake of a dear friend. Lawyers, federal judges, state judges and others from across Alabama and from other states came to pay their respects. A wake is generally a watch over the body of a deceased before burial. For some, this custom is a festive occasion. On that dreary night in January, we were not morosely holding watch over the body of a deceased friend, but we were attending a lively festival with our not-yet-dearly-departed friend Bob McGregor. Although Bob was alive, he had nevertheless been told by his doctors several months before that he has only a short time to live.

I first met Bob at law school in 1978. We were in the same class and section at Alabama. Bob was considered the old man of the class. He had already been married to his dear wife, Molly, for 10 years, had worked in Charlotte as a teacher for four years, and had served as an assistant swimming coach at Alabama and as head coach for the University Aquatic Club for several more years. Those of us who had come straight to law school from undergraduate school admired Bob's unflappable demeanor and incredible wit. Bob had navigated the real world before many of us and we appreciated his ability to keep the rigors of law school in perspective. I



KEITH B. NORMAN

EXECUTIVE DIRECTOR'S REPORT

Continued from page 109

don't know of a single member of our law class who didn't like and respect Bob. I must confess that I liked Bob in spite of the fact that he attended the University of North Carolina and I attended Duke.

Since law school, and until his recent retirement from practice, Bob has been a career prosecutor. He has served as an Assistant United States Attorney and as an assistant district attorney. He has plied his highly regarded prosecutorial skills in the Northern District of Alabama, Mobile County, Jefferson County and Shelby County. During his very active legal career, Bob and Molly have reared two sons. John is a graduate of Sewanee and served a stint with the Marines in Afghanistan. He is currently working in Charlotte. Patrick was an all-state distance runner at Hoover High and is now attending the University of Kentucky on an athletic scholarship. Not content to sit idly by waiting for the grim reaper, Bob has recently authored a book, *Whiskey Bent and Hell Bound: No Holiday for Justice*, which recounts some very interesting stories from his days as a state prosecutor. The good Lord willing, it is hoped that Bob will write a sequel about his experiences as a federal prosecutor.

This has not been a time for tribulation and self pity for Bob. When I learned about his terminal illness, I called Bob and found him to be positive and upbeat. He did admit that when the doctor gave him the bad news he was somewhat annoyed, but he has otherwise accepted his fate. He is spiritually content and has all his affairs in order. Bob has not let this death sentence get in the way of living and enjoying his remaining mortality. As he told me, he decided that he wanted to hold a wake with plenty of good food and beverage before he died so that he could enjoy seeing his many friends one last time.

As I conclude this column, I pray that Bob gets the chance to complete his second book and that his remaining days are peaceful. Bob was a role model in law school and continues to be. This time he has shown us not how to die, but how to live in spite of dying. For sure, we will all die. We just don't know when our time will come. In this regard, the noted French writer and existentialist Albert Camus said that it is death that gives meaning to life. I disagree with Camus. As Bob has shown, living, not death, is what gives meaning to life. Thanks, Bob, for your example of a life well lived. ▲▼▲

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Notice of Election and Electronic Balloting

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

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

- | | |
|--------------------------------|--------------------------------|
| 1st Judicial Circuit | 15th Judicial Circuit, Place 1 |
| 3rd Judicial Circuit | 15th Judicial Circuit, Place 3 |
| 5th Judicial Circuit | 15th Judicial Circuit, Place 4 |
| 6th Judicial Circuit, Place 1 | 23rd Judicial Circuit, Place 3 |
| 7th Judicial Circuit | 25th Judicial Circuit |
| 10th Judicial Circuit, Place 3 | 26th Judicial Circuit |
| 10th Judicial Circuit, Place 6 | 28th Judicial Circuit, Place 1 |
| 13th Judicial Circuit, Place 3 | 32nd Judicial Circuit |
| 13th Judicial Circuit, Place 4 | 37th Judicial Circuit |
| 14th Judicial Circuit | |

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, 2010 and vacancies certified by the secretary no later than March 15, 2010.

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. PDF or fax versions may be sent electronically to the secretary, keith.norman@alabar.org. Either paper or electronic nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 30, 2010).

As soon as practical after May 1, 2010, members will be notified by e-mail with a link to the Alabama State Bar Web site that includes an electronic ballot. **Members who do not have Internet access should notify the secretary in writing before May 1 requesting a paper ballot.** A single written request will be sufficient for all elections, including run-offs and contested president-elect races. Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the last Friday in May (May 28, 2010). Election rules and petitions are available at www.alabar.org.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8.

IMPORTANT NOTICES

Continued from page 111

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, 2010. 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 bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2010 Annual Meeting, July 17 at the Village at Baytowne Wharf, Sandestin Golf & Beach Resort, in Destin.

Local bars 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 enhancement to the bar's image in the community.

To be considered for this award, local bars must complete and submit an award application by June 1, 2010. Applications may be obtained by downloading from the state bar's Web site at www.alabar.org or by contacting Rita Gray at (334) 269-1515, ext. 2162. ▲▼▲



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JOHN BINGHAM

CHARLES ROGERS CROWDER

John Bingham

It is with sadness and renewed inspiration that Balch & Bingham marks the passing of its friend, colleague, and, indeed, half of its namesake—John “Jack” Bingham. Jack passed December 7, 2009, leaving a hole in his family, his circle of friends and his partnership.



We mark Jack’s passing with sadness because, for so many of us, Jack was more than simply a colleague. Jack was a gentleman and a friend.

A native of Birmingham and a graduate of Ramsey High School, Jack returned to his hometown in 1948 after graduating from Harvard Law School. For the next six decades, Jack made a point of serving his community beyond the confines of his law office. He served as a trustee of the Birmingham Bar Association’s Legal Aid Society, as the chair of the Board of Management of the DowntownYMCA and as the president of the APCO Employees Credit Union. A devoted parish member of the Cathedral Church of the Advent, Jack served as a lay reader and on the vestry. Such service included duty as the vestry’s senior warden. Jack was also a trustee of the St. Martin’s-in-the-Pines Retirement and Nursing Home and served as president of the Episcopal Foundation of Jefferson County.

At home, Jack’s devotion to his first wife Jean, his widow Claire and his children and grandchildren requires no elaboration here. It has been said—rightly so—that his love and sense of family extended well beyond the boundaries of blood relatives.

Jack was a patriot. As an Army officer during the Second World War, Jack served in an anti-aircraft artillery regiment and saw combat in North Africa, Sicily and Italy. In one of the seven campaigns in which he participated, Jack’s attempt to single-handedly rescue two of his men from a burning ammunition truck earned him the Bronze Star. “His devotion to duty and unselfish willingness to risk his own life to save his comrades were in keeping with the highest traditions of the military service,” his commanding general declared. After the war, Jack remained in the Army Reserves, ultimately retiring at the rank of lieutenant colonel.

Jack was a devoted fan of his beloved Crimson Tide. A 1942 graduate of the University of Alabama (where he earned his Phi Beta Kappa key and was a member of the SAE fraternity), Jack’s loyalty for his alma mater’s athletic endeavors never faltered. Indeed, his enthusiasm far exceeded his

MEMORIALS Continued from page 113

physical stature and, if there was ever a time when his renowned civility seemed at risk of succumbing to the passion of the moment, it was in Bryant-Denny Stadium or Coleman Coliseum, where he attended games.

As sad as this time is, we nevertheless mark Jack's passing with a renewed sense of inspiration. Jack's tenure at this law firm not only reminds us of the firm's storied past but also of how far we have come—and how far we can go if we continue to look to colleagues like Jack for inspiration.

Jack followed his father's footsteps to our firm in 1948, when he joined what was then called Martin, Turner & McWhorter. At the time, the firm, still led by Judge William Logan Martin, numbered a dozen attorneys. Jack became a partner of the firm (by then called Martin & Blakey) in 1953. In 1959, the firm changed its name to Martin, Vogtle, Balch & Bingham; by 1985, the firm had evolved to Balch & Bingham. At the end of 1990, Jack retired, although he remained of counsel with the firm until his passing.

Jack's accomplishments were legion. His areas of practice involved condemnation cases and mortgage indenture and securities sales of first mortgage bonds and preferred stock. It was a point of pride that Jack participated in every plant certification proceeding that Alabama Power Company had before the Alabama Public Service Commission from 1950 until his retirement. Furthermore, Jack not only helped organize Harbert Construction Corporation in 1949 but also served more than 30 years as a director and assistant secretary to the company.

Jack was a long-time, active member of the Legal Committee of the Edison Electric Institute and of the Public Utility, Communication & Transportation Section of the American Bar Association.

Despite impressive accomplishments, Jack's greatest contribution to the law firm was more intangible. According to Eason Balch, Sr., his longtime law partner and friend, "his greatest contribution was his devotion, attention and understanding he's given to the administration of our law firm." "Jack would always try to come

in and make sense out of the administration of the law firm and keep it on an even keel," Eason said.

In the wake of Jack's passing, it is appropriate to reflect on his life and his accomplishments—both within and without this law firm. It is no overstatement to say that his life touched everyone here and that each of us are better for the time that he spent with us and with the firm.

Charles Rogers Crowder

Charles Rogers Crowder, retired Jefferson County Circuit Judge and a founding shareholder of Cory Watson Crowder & DeGaris, died January 15, 2010 at the age of 72.



Judge Crowder's legal career spanned 48 years. He first served as law clerk to the Honorable Walter Gewin, U.S. Court of Appeals, Fifth Circuit. He then returned to Birmingham where he was engaged in the private practice of law until his appointment by Gov. George Wallace in 1973 to the Tenth Judicial Circuit in Jefferson County. He was a circuit court judge in the criminal courts until 1984, when he made the rare move to the civil courts. He was elected presiding Judge for the circuit in 1991 and served until his retirement in 1992. He was slated to serve as the next president of the Alabama Circuit Judges Association at the time of his judicial retirement.

In 1992, he joined the firm of Johnson & Cory, and in 1995, was one of the founding shareholders of Cory, Watson, Crowder & DeGaris. He loved jury trials, and returned to the courtroom as a lawyer and advocate. His greatest achievements in the law were not the famous cases he presided on as a judge, or any large verdicts he won as a lawyer, but the service he gave to the citizens and his clients, and the hundreds of young lawyers he mentored who are practicing law today.

He was a scholar and avid reader. He had an amazing memory and often quoted lengthy passages from the Bible, Shakespeare and historical documents accurately

and always appropriately. He had an extensive vocabulary and knew the most wonderfully descriptive words and phrases. He was a convincing and emotional speaker, and relished an opportunity to pontificate. His wit and emotions were irrepressible.

A graduate of Phillips High School in Birmingham, he earned a bachelor of science in engineering from Auburn University in 1959 and was a member of Sigma Phi Epsilon Fraternity. He received his law degree from the University of Alabama School of Law in 1962. His law school honors included membership in the Bench and Bar Legal Honor Society and the *Alabama Law Review* and serving as president of the Sigma Delta

Kappa Law Fraternity, and his zeal for Auburn football is legendary.

Judge Crowder is survived by his wife of 34 years, five children and four grandchildren. He was a member of the Alabama State Bar, the Birmingham Bar Association, the American Trial Lawyers Association and the American Association for Justice. He was a longtime member of Canterbury United Methodist Church and was a past potentate of Zamora Shrine Temple in Birmingham.

The Charles R. Crowder Memorial Fund has been established in his honor at the Birmingham Bar Association.

— *Leila H. Watson, Cory Watson Crowder & DeGaris*

| | | | | |
|--|--|--|---|---|
| Allen, Troy Eugene Jr. Prattville Admitted: 1978 Died: December 20, 2009 | Bradbury, Ralph Victor, Jr. Charlotte Admitted: 1949 Died: December 26, 2008 | Dumas, Lawrence III Birmingham Admitted: 1971 Died: December 26, 2009 | Loeb, William Harry Indian Wells, CA Admitted: 1935 Died: July 10, 2008 | Rice, Charles Bell Prattville Admitted: 1940 Died: August 30, 2008 |
| Bank, Bert Tuscaloosa Admitted: 1940 Died: June 22, 2009 | Bressler, Ellen Birmingham Admitted: 1996 Died: May 9, 2009 | Epperson, Arthur Charles, Hon. Foley Admitted: 1949 Died: January 17, 2009 | Maloney, Herbert Franklin Montgomery Admitted: 1941 Died: October 15, 2008 | Sewell, Toxey Hannon, Jr. Pensacola Admitted: 1948 Died: January 10, 2009 |
| Barron, George Robert, Hon. Shalimar, FL Admitted: 1967 Died: December 3, 2008 | Calvert, George Washington Atlanta Admitted: 1950 Died: August 13, 2008 | Frawley, William Spencer Birmingham Admitted: 1986 Died: August 25, 2009 | Mather, Alexander McNair, Jr. Colorado Springs Admitted: 1970 Died: August 12, 2008 | Smith, Jack Wilmar Slocomb Admitted: 1953 Died: July 18, 2008 |
| Bealle, John Rufus, Jr. Tuscaloosa Admitted: 1942 Died: August 6, 2009 | Clary, John Carter Albuquerque Admitted: 1987 Died: October 11, 2009 | Glenn, John Smith T Opelika Admitted: 1949 Died: December 7, 2009 | Moore, Jon Holman Decatur Admitted: 1959 Died: July 20, 2009 | Thrower, John Snow, Jr. Opelika Admitted: 1982 Died: November 2, 2009 |
| Beckwith, William Arthur, Jr. Birmingham Admitted: 1950 Died: September 15, 2008 | Dearmon, James Durmont Fairhope Admitted: 1950 Died: July 18, 2008 | Godbold, John Cooper, Hon. Montgomery Admitted: 1948 Died: December 22, 2009 | Moraites, John Stephen Cincinnati Admitted: 1951 Died: September 28, 2008 | Utsey, William LaFayette Butler Admitted: 1965 Died: July 18, 2009 |
| Bingham, John Birmingham Admitted: 1948 Died: December 7, 2009 | Deason, Earnest Nute Birmingham Admitted: 1953 Died: March 10, 2008 | Kirksey, Robert Hugh, Hon. Carrollton Admitted: 1951 Died: July 4, 2009 | Palmer, George David, III Birmingham Admitted: 1952 Died: December 2, 2008 | Wadsworth, Alma Ruth Dallas Admitted: 1941 Died: July 29, 2008 |
| Bishop, Elizabeth Champlin Birmingham Admitted: 1984 Died: November 18, 2009 | Delony, Dexter Gainesville, FL Admitted: 1939 Died: October 16, 2008 | Laurie, Sammy Joe Chatom Admitted: 1971 Died: December 13, 2009 | Patterson, Lawrence William, Jr. Loganville, GA Admitted: 1959 Died: June 12, 2008 | Weeks, Arthur Andrew Birmingham Admitted: 1939 Died: August 22, 2009 |
| Bonner, Jack Gullage Elba Admitted: 1965 Died: October 24, 2008 | Dishuck, Jane Kimbrough Tuscaloosa Admitted: 1947 Died: August 20, 2009 | Lee, Robert Wyeth, Jr. Birmingham Admitted: 1978 Died: August 16, 2009 | Pitts, William Newton Sheffield Admitted: 1967 Died: December 14, 2009 | Williamson, Warren Jackson Greenville Admitted: 1945 Died: August 8, 2009 |
| Boyd, William James, Jr. Falls Church, VA Admitted: 1948 Died: August 23, 2008 | Duke, William Rodwell, Jr. Birmingham Admitted: 1984 Died: June 22, 2009 | Lockett, John Abner, Jr. Selma Admitted: 1967 Died: October 31, 2009 | Reynolds, Morgan Clanton Admitted: 1948 Died: June 21, 2009 | Williford, Doris Hubbard Birmingham Admitted: 1997 Died: December 4, 2009 |



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ROBERT N. BAILEY, II
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Spring Into Service!

As young lawyers, we all struggle with the demands of the clock. It is very difficult to make time for networking, client development and service to the bar, much less having a good time, when we are faced with demanding clients and deadlines on a daily basis. It can be a daunting task, trying to juggle the many balls a legal practice demands, and the Young Lawyers' Section is here to help.

First, from **May 12 through May 16, 2010**, our section will host its annual Sandestin seminar. As a long-time attendee of this event, both as a first-year lawyer and as an officer of the YLS, I can say that this seminar is a cost-effective way to make a lot of new contacts, sharpen your knowledge of the law and, perhaps most importantly, have a lot of fun with old classmates and new friends.

As always, we will have a fantastic assembly of speakers and the Sandestin Resort is second to none when it comes to great restaurants, great weather and relaxation. In one short weekend in paradise, you can make contacts that may serve as referral sources in the future, spend time on the sandy beaches with friends and family, get half your CLE credits needed for the year and recharge your batteries for the stretch run. For the price and the benefits received, you just can't beat it!

Second, our section provides a fantastic opportunity to volunteer in a program that has become our signature service event, the **Minority Pre-Law conferences**. These conferences, which won an Award of Achievement from the American Bar Association in 2008, will be held this year in Birmingham on **March 10, 2010** and in Montgomery on **April 21, 2010**. Our Minority Pre-Law subcommittee, led by **J.R. Gaines**, **Sancha Epiphane** and **Kitty Brown**, has done a great job in putting

YOUNG LAWYERS' SECTION

Continued from page 119

together this year's event and I encourage you to participate. These conferences introduce high school students to our justice system and the career choices available to them in the legal profession by allowing them to observe a mock trial put on by volunteer lawyers and presided over by a real judge. Then, they get to decide the case by deliberating as jurors. The conferences encourage diversity in our profession by promoting to high school students the various types of careers available in the legal profession and they allow you, as the lawyer volunteers, to give back to your profession by encouraging future lawyers to take up the baton.

While on the topic of service to the bar and the community, I also recognize the volunteer lawyers programs ("VLP") available to young lawyers in this state. Attorneys in Mobile, Huntsville and Birmingham all have these programs that need volunteers to provide access to justice to those individuals who cannot afford a lawyer. Also, if you do not live or practice in one of those areas, the state bar has its own VLP led by **Linda Lund**. In addition to serving clients who cannot afford justice, the volunteer lawyers programs provide young lawyers with great opportunities to gain experience and get in the

courtroom, which is difficult in a system where mediations and settlements have become the norm.

In Mobile, the director of VLP is **Blakely Davis**, and she can be reached at **(251) 438-1102** (the Mobile VLP's Web site is www.vlpmobile.org). In Huntsville, the director is **Angela Rawls** and she can be reached at **(256) 539-2275** (the Huntsville VLP Web site is www.vlpmadisoncounty.com). In Birmingham, the director is **Kelli Mauro**, and she can be reached at **(205) 250-5198** (the Birmingham VLP Web site is www.vlpbirmingham.org). Finally, Linda Lund, who does a fantastic job with the state program, can be reached at **(334) 269-1515** or by e-mail to linda.lund@alabar.org.

I encourage you to utilize the opportunities provided by your Young Lawyers' Section and the volunteer lawyers programs in Alabama to give back to those less fortunate, serve your bar and gain valuable experience. Also, don't forget to go to the beach! Book your calendar for the YLS Sandestin Seminar **May 12 through May 16, 2010**.

If you have any questions about the programs set out in this article, or anything else about your Young Lawyers' Section, please contact me at rnb@lanierford.com. ▲▼▲

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- **G. Edgar Downing, Jr.**, general counsel for Mobile Gas, has been named chair of the Legal Committee of the American Gas Associations (AGA). The AGA represents over 200 local energy companies that deliver natural gas throughout the United States.



Downing

- Sirote & Permutt shareholder **Robin Beardsley Mark** has been installed as president of the Young Lawyers' Committee of the Birmingham Bar Association for 2010.



Mark

- Bradley Arant Boult Cummings LLP announces that **Scott Burnett Smith, Hope Thai Cannon** and **Charles Stewart** have been appointed to the Defense Research Institute. Smith is a partner in the Huntsville office, Cannon is a partner in the Birmingham office and Stewart is a partner in the Montgomery office.



Smith



Cannon



Stewart

- **Jeffery A. Styres** was appointed by Chief Justice William L. Waller, Jr. of the Mississippi Supreme Court to a seat on the Mississippi Board of Bar Admissions. Styres serves as senior associate counsel for Southern Farm Bureau Life Insurance Company in Jackson.

- **Joseph E. Walden**, Alabaster's municipal judge, has received the 2009 Howell Heflin Award from the Alabama Court Referral Network. The award is given each year to a judge who displays exemplary service and commitment to the Alabama Court Referral Officers Programs which includes drug and alcohol education and treatment. Walden is the first municipal judge in the state to receive the award. ▲▼▲



Walden

- G. EDGAR DOWNING, JR.
- ROBIN BEARDSLEY MARK
- SCOTT BURNETT SMITH
- HOPE THAI CANNON
- CHARLES STEWART
- JEFFERY A. STYRES
- JOSEPH E. WALDEN

WILLIAM VERBON BLACK SCHOLARSHIP 2009 Recipient: Blake French Earley

The Alabama Law Foundation announces that **Blake French Earley** is the 2009 recipient of the William Verbon Black Scholarship. The scholarship recognizes Alabama law students who show the promise of continuing Mr. Black's legacy of a stellar law career combined with strong character, and specifically those students attending fulltime at the University of Alabama School of Law.



Earley

Blake French Earley began his studies at the University of Alabama School of Law in the fall of 2008. He graduated *summa cum laude* from the University of Alabama at Birmingham. Earley is a member of the Alpha Lambda Delta National Academic Honors Society and is listed in *Who's Who among Students in American Universities and Colleges*. In addition to his successful college career, Earley has served internships for the offices of United State senators Richard Shelby and Jeff Sessions and United States Representative Bud Cramer. ▲▼▲



Pictured above, left to right, are attorneys Greg White, Chad Moore, Rob Keller and Frank Russo. Seated is secretary Susan Hitt.

The Real Heroes of the Lawyer Referral Service Are Attorneys Just Like You!

By Renee Avery

Many people in our community who are dealing with the impact of the current economic crisis often wonder where they can turn for help. For many of them, the answer is the Lawyer Referral Service operated by our state bar.

Most of us are familiar with the traditional role that the Lawyer Referral Service plays with lawyers applying to serve on a panel, assisting people with questions regarding one aspect of the law. These panels, developed for people who are able to pay but do not know how to find a lawyer or what services they need, also serve as a way for our members to reach out to prospective clients.

While the Lawyer Referral Service helps those in our community, it also helps the attorneys who participate in the service. To our attorneys, we are an arm of their law office and a marketing plan. For only about \$8 a month, you have the opportunity to

have your next big case. We have attorneys who are solo practitioners or who practice in large firms. We have attorneys who are in their first year or two of practice and those who are much more experienced.

Currently, there are 300 members in the Lawyer Referral Service. A few members volunteered their thoughts about being part of the LRS.

Thomas J. Azar, Jr. has been a member of the LRS for the last two years, and has benefited from the service. He is an experienced drug defense lawyer who brings 18 years of law enforcement experience to the table and has been an attorney for the last 12 years. Azar's practice is in Montgomery, but he services Autauga, Elmore, Lowndes and Macon counties as well. His view of the LRS is, "You can't beat it, especially for the price."



Azar

Frank Russo, of Birmingham, has been practicing for 27 years. His practice also includes Blount, Shelby and St. Clair counties. He has three other lawyers in the firm, Greg White, Robert Keller and Chad Moore, and they all belong to the LRS. Russo explained, "Like all law firms, we periodically discuss new ways to generate business. Although we all knew about the Lawyer Referral Service, we had never applied to join it. We submitted an application for each lawyer and since then, we have had a tremendous number of referrals.

Although some of the referrals we receive never make contact with our firm, many do. And, we have had great success with those referrals. The Lawyer Referral Service has become an invaluable resource for growing our firm. It has also brought the legal profession closer to those who are in need of legal services when they have nowhere else to turn.

"For those not familiar with this service, the process is easy and straightforward. The bar receives a call from a prospective client regarding a particular issue. An e-mail is then sent to the specific attorney who has been selected to assist the prospective client. After speaking with the client, the attorney then reports the result of that consultation to the LRS. If the client retains the attorney, the attorney (or firm) pays the Alabama State Bar a nominal fee for the referral. We have found that this fee is extremely reasonable.

"From a selfish standpoint, we would like to keep the Lawyer Referral Service all to ourselves. We realize, though, that there are many, many people who call the bar, needing legal assistance (involving many areas of law), and I'm sure there's always a need for additional lawyers to assist. Our firm thanks the Lawyer Referral Service for all their hard work and dedication and we look forward to our continued relationship in 2010."

Brian Dasinger has been with the service since 2006 and has been in practice for nine years. He is from Daphne, and also handles cases in



Dasinger

Mobile and Escambia counties. He believes "the lawyer referral program has been a tremendous help to my practice. I tell other lawyers all the time how beneficial this program is to both economically-challenged people who need legal assistance and to my law practice. I have participated in the LRS for several years and I plan to continue being a part of it for as long as I practice law. The LRS provides a tremendous service to people who otherwise would have no idea where to turn for legal assistance."

The Lawyer Referral Service continues to need skilled and talented lawyers like Tom Azar, Frank Russo, Brian Dasinger and you, to meet the needs of all the people in our community who have legal concerns. If you are not yet a member of one of our panels, please contact us and find out how you can join. If you are interested in providing community support in an area we do not offer, please let us know that as well.

The Alabama State Bar Lawyer Referral Service offers a win-win situation. You can help people in your community and you can introduce yourself to prospective clients. Please call (334) 517-2140 or (800) 354-6154 or send an e-mail at lrs@alabar.org. ▲▼▲



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



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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.



Disharmony in Alabama's Conformity to the Federal Tax Classification of Business Entities

By James E. Long, Jr., James D. Bryce and Joe W. Garrett, Jr.

Joe, the owner of a successful plumbing business operating as a sole proprietorship, is concerned that an accident or other job-related calamity may subject his personal assets to liability claims. Joe talks to his accountant, who advises him to consider operating his business through a limited liability company ("LLC"). Joe complains that he does not want to file separate income tax returns for his business. Joe's accountant assures him, however, that because he will be the single owner of his LLC, the LLC will be a disregarded entity ("DRE") for federal income tax purposes. Joe's income tax return preparation will remain the same as when he was conducting his business as a sole proprietor. Satisfied with his accountant's advice, Joe now comes to you, his lawyer, to help him transfer his plumbing business to an LLC. After the appropriate documents are drafted and executed, Joe asks you whether he needs to file his Alabama and local sales and use tax returns in his name (as he did before as a sole proprietor), or in the name of his new LLC. Instinctively, you advise Joe that his LLC should now make all filings, including sales and use, payroll withholding, personal property tax returns and business licenses, in the name of the LLC. You, of course, caution Joe that in order for his liability shield to be effective, he

should observe all required formalities of conducting his business in the new LLC, such as preparing all non-income state and local tax filings in the name of the LLC.

Sound familiar? Many readers of this publication have undoubtedly counseled a Joe or Jane who needed guidance with respect to operating their business in an LLC, or perhaps a limited partnership or S corporation. Many will be surprised to learn, however, that for *most* (but not all) Alabama and local non-income tax purposes, your advice above was incorrect: a single-member LLC that is disregarded for federal income tax purposes is also generally disregarded for *all* Alabama and local tax purposes, including sales, use, payroll withholding and rental taxes.¹ Technically, Joe should complete his Alabama sales and use tax returns using his individual name and Social Security number because his LLC does not exist for Alabama sales and use tax purposes. In practice, however, many practitioners and taxpayers believe that a single-member LLC, or any other entity that is disregarded for federal tax purposes, is only treated as a DRE for Alabama *income* tax purposes. That understanding is indeed consistent with the general rule for most other states that impose a net income-based tax.²

While corporations are generally treated as separate entities for all federal and Alabama tax purposes,³ what about other business entities that may be DREs, such as qualified subchapter S subsidiaries (“Q Subs”), which are wholly-owned subsidiaries of S corporations? How are these entities classified for Alabama tax purposes? Does it depend on the tax? This article summarizes the various classification rules applicable to pass-through business entities with respect to Alabama taxes, including income, sales and use, rental, property, payroll withholding, and business license taxes. This article also provides recommendations on legislative changes that would conform the classification rules to common practice and the general rule prevailing in other states, while preserving certain exemptions that exist under Alabama’s current classification regime.

The central question in evaluating Alabama’s classification regime is to determine which entities should be treated as separate taxpayers for purposes of the various Alabama taxes. This question arises primarily because the Internal Revenue Service (“IRS”) in 1997 simplified the classification rules for business entities. The IRS did so by promulgating the so-called “check-the-box” (“CTB”) regulations, which provide that for federal tax purposes, except in the case of *per se* corporations, an entity with two or more owners is classified as either a partnership or

The central question in evaluating Alabama’s classification regime is to determine which entities should be treated as separate taxpayers for purposes of the various Alabama taxes.

a corporation, and an entity with only one owner is taxed as either a DRE or a corporation.⁴ Many practitioners assume that treating a single-member LLC as a DRE applies just to Alabama income taxes—to conform Alabama income tax rules with their federal counterpart, but that the same “disregarded” treatment does not apply to other state and local taxes, such as sales and use taxes and property taxes, which do not exist at the federal level.

Alabama’s classification provisions are not centrally located—some provisions are included in Title 10 (provisions that create and govern various forms of business entities), while others are located in Title 40, the general state tax code. These provisions typically provide that an entity will

be treated the same way for Alabama tax purposes as federal tax purposes. This principle, probably intended to govern income tax consequences, presents problems as applied to other taxes where general legal principles would suggest that the entity, even though a DRE, is the taxpayer. While the table below should give readers an idea of the uncertainty in this area, additional explanation by entity type is warranted:

Brief History of LLC Conformity Provisions: As discussed above, for all Alabama taxes except the business privilege tax (“BPT”), an LLC “shall be treated as a partnership unless it is classified otherwise for federal income tax purposes, in which



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case it shall be classified in the same manner as it is for federal income tax purposes.”⁵ Alabama’s LLC conformity provision as originally enacted applied to all Alabama taxes.⁶ However, the conformity provision was amended in 2000 to provide an exception to the statute’s general rule of conforming to the federal entity classification rules for Alabama’s BPT.⁷ By negative implication, the amendment excluding the BPT from the scope of the LLC conformity provision made it clear that the application of this provision was not limited to Alabama’s income tax.

LLC (multi-member): Unless it elects to be taxed as a corporation, an LLC with at least two members is classified as a partnership for federal tax purposes,⁸ and that treatment will be the same for all Alabama tax purposes (except for the BPT). One consequence of the LLC conformity provision is, at least according to the Alabama Department of Revenue, to transform an LLC into a *general* partnership for tax purposes, and thus subject the members to joint and several personal liability for the LLC’s tax debts, *e.g.*, sales and use taxes, despite the fact that members of an LLC are generally not liable for the entity’s debts.⁹ The proposed legislation discussed below would limit the application of Alabama’s conformity with the federal entity classification rules to Alabama’s income tax and

Under the default classification rule, a single-member LLC will be treated as a DRE for federal income, and therefore all state (except for BPT) and *most* local, tax purposes.

thereby eliminate the issue of whether members of an LLC are personally liable for the non-income taxes of the entity solely by virtue of the LLC’s classification as a partnership for tax purposes.

Single-member LLC: Under the default classification rule, a single-member LLC will be treated as a DRE for federal income, and therefore all state (except for BPT) and *most* local, tax purposes. Technically, the sales tax and property tax should be assessed against the owner, not the entity,¹⁰ although the Attorney General has reached a different conclusion with respect to property taxes.¹¹ As noted by the

chart, there may be a disconnect in the classification rules for employer taxes (wage withholding, FICA and unemployment) due to a recent amendment to the CTB regulations that changes the general rule and now treats the single-member LLC as a separate tax-paying entity, not a DRE, for federal employer taxes.¹² Now that the IRS treats the owner of the DRE as the income tax payer and the DRE as the employment taxpayer, Alabama’s tie to the federal income tax classification for all Alabama tax purposes creates a confusing situation for Alabama DREs: the DRE pays the federal employment taxes but the owner should pay the Alabama employment taxes! Ironically, Alabama’s conformity to federal income tax entity classification

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has now created nonconformity between the Alabama and federal employment taxes.

Of course, a single-member LLC may affirmatively elect to be taxed as a corporation (either C or S) for federal income tax purposes, and that classification automatically applies for all Alabama state tax (and most local tax) purposes and eliminates any DRE issues.

Limited Partnership (“LP”): Federal tax conformity for an LP and a limited liability limited partnership (“LLLP”) was recently clarified by the Alabama Uniform Limited Partnership Act of 2010, which limited Alabama’s conformity to the federal entity classifications to state income tax purposes.¹³ Because conformity is limited to income taxes, the Department of Revenue does not assert personal liability for non-income taxes of the entity against the partners of an LP or LLLP solely because of the conformity provision. A limited liability partnership (“LLP”) should likewise be taxed under the default rule, *i.e.*, as a partnership, for state income tax purpose and should also be recognized as a separate taxpayer for all other state and local taxes.¹⁴ In certain complex structures, the LP, LLP or LLLP could be treated as a DRE for federal and Alabama income tax purposes if all of the partners were also classified as DREs.

Q-Sub: A Q-Sub is an S corporation that is wholly-owned by another S corporation and affirmatively elects to be treated as a DRE for federal income tax purposes.¹⁵ Alabama conforms to the federal tax treatment for income tax purposes, and to some extent, for rental tax purposes.¹⁶ For other state and local taxes, the Q-Sub should be taxed as a separate entity and not disregarded.

Business Trust: A business trust is generally an arrangement where property is conveyed to trustees for the benefit of the beneficiaries, but the purpose of the trust is to operate a profit-making business. A business trust will be classified either as an association, a partnership or a corporation, depending on the number of beneficiaries and whether a classification election is made to change the default rule. Alabama has conformed its classification to the federal rules but, again, only for income tax purposes.¹⁷

The proposed legislation would harmonize the classification of various pass-through business entities for Alabama state and local tax purposes, and to some extent, conform the law to current practice.

Proposed Conformity Legislation: As evident from the preceding table, Alabama’s current “conformity” to the federal classification regime leaves open many questions regarding the treatment of an entity / taxpayer for purposes of state and local taxes other than income taxes. This creates several traps for the unwary practitioner when advising clients regarding the proper choice of entity and state taxes. A task force, consisting of members from the Alabama Department of Revenue, the Alabama State Bar Tax Section, the Alabama Society of CPAs, the Alabama League of Municipalities, and the Business Council of Alabama, was formed last year to study the current classification regime and determine whether clarifying legisla-

tion was necessary. After extensive study, the so-called Entity Harmonization Task Force recommended to its constituent members the following changes and clarifications:

- In line with the large majority of other states, limit conformity with the federal CTB rules to only Alabama income and financial institution excise taxes (the bank equivalent of the income tax);
- Provide that DREs are treated as separate taxpayers for all non-income taxes, including employer taxes (wage withholding and unemployment), except as provided below;
- Preserve the sales, use and rental tax exclusions that exist under the current classification regime for certain transactions (e.g., sales and leases) between DREs and their single-member-owners;
- Preserve the property tax, BPT and sales and use tax exemptions that exist under the current classification regime for charitable and other tax-exempt DREs; and
- Provide/clarify that members of a multi-member LLC are not personally liable for sales, use and other non-income taxes solely because their LLC is classified as a partnership for federal and Alabama tax purposes.

The proposed legislation would harmonize the classification of various pass-through business entities for Alabama state and local tax purposes, and to some extent, conform the law to current practice. The proposal would also eliminate the possibility that the owners of an LLC will receive an unexpected sales, use or rental tax assessment. The task force’s proposed legislation should be introduced this spring, and the authors hope that the revenue-neutral proposal will be enacted in the current session of the Alabama legislature. ▲▲▲

Does Alabama Treat the Entity As A Separate Taxpayer?

| Type of Alabama Tax | LLC | SMLLC (DRE) | LLP | LP/LLLP | Q-Sub | Business Trust |
|-------------------------------|----------|-------------|---------|----------|----------|----------------|
| Income | Yes | No | Yes | Yes | No | Yes |
| Sales & Use | Yes | No | Yes | Probably | Yes | Yes |
| Rental/ Lease | Yes | No | Yes | Probably | Exempted | Yes |
| Employers’ | Probably | Doubtful | Yes | Probably | Probably | Yes |
| Business Privilege | Yes | Yes | Yes | Yes | Yes | Yes |
| Ad Valorem Property | Yes | Unclear | Yes | Probably | Yes | Yes |
| Business License—State/County | Yes | No | Yes | Probably | Yes | Unclear |
| Business License—Municipal | Unclear | Unclear | Unclear | Unclear | Unclear | Unclear |

The opinions expressed herein are those of the authors, and not necessarily those of the organizations or entities which they represent. The authors thank Bruce Ely, chair of the Task Force and a senior partner with Bradley Arant Boult Cummings LLP in Birmingham, for his editorial comments. Ely, Garrett and Long are all former students of Professor Bryce, and he continues to learn from them.

Endnotes

1. *Ala. Code* § 40-12-8(b). One notable exception under current law is Alabama's business privilege tax, *Ala. Code* §40-14A-21 *et seq.*, where all business entities, including single-member LLCs that are DREs, are subject to the tax.
2. See ROBERT R. KEATINGE & ANNE E. CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY 459-60 (2009).
3. See Treas. Reg. § 301.7701-2(b); *Ala. Code* § 40-18-1(8). For federal and Alabama tax purposes, "the income of a C corporation is subject to double taxation (once at the corporate level and once at the shareholder level) while the income of partnerships and sole proprietorships is taxed only once (at the individual taxpayer level)." *Pierre v. Comm'r*, 133 T.C. No. 2 (2009); see also *Ala. Code* §§ 40-18-1(35); 40-18-24.
4. See Treas. Reg. § 301.7701-2(b). The default classification for an entity with only one owner is a DRE; the default classification for an entity with two owners that is not a corporation is a partnership. Treas. Reg. § 301.7701-2(c). The extent to which the CTB rules apply to various federal taxes is not always clear, as illustrated by a recent 9-to-6 decision of the U.S. Tax Court. See *Pierre*, 133 T.C. No. 2 (holding that transfers of membership interests in a single-member LLC, which was treated as a DRE, were valued for gift tax purposes as transfers of interests in the LLC (vs. the underlying assets) and thus subject to valuation discounts for lack of marketability and control). The majority in *Pierre* rejected the arguments by the IRS that the underlying property should be valued for gift tax purposes, instead of the membership interest, because the LLC was a DRE. The dissent argued that the majority "is either ignoring the plain language of the [CTB] regulation or silently invalidating it." *Id.* at 29-30.
5. *Ala. Code* § 10-12-8(b). Full conformity with federal law for LLCs was preserved by the *Alabama Business and Nonprofit Entities Code*, enacted by Acts of Ala. 2009-513, which becomes effective January 1, 2011. See also Ala. Rev. Proc. 98-001 (Mar. 16, 1998) (providing that for purposes of Title 40 taxes, LLCs "will be classified as they are classified for federal income tax purposes under the Internal Revenue Service's 'check-the-box' regulations").
6. 1993 Ala. Acts 724, § 8; 1997 1st Ex. Sess. Ala. Acts 920, § 1.
7. 2000 Ala. Acts 705, § 4.
8. Treas. Reg. § 301.7701-3(b)(1)(i).
9. Alabama law provides that "all [general] partners are liable jointly and severally for all obligations of the partnership," however, "a member of a [LLC] is not liable ... for a debt, obligation, or liability of the [LLC]." *Ala. Code* §§ 10-8A-306(a); 10-12-20(a). The Department of Revenue's position stems from the language "for purposes of taxation ... [an LLC] ... shall be treated as a partnership," which the Department interprets as transforming the LLC into a general partnership, thereby potentially subjecting the members to personal liability for tax debts of the LLC. See *Bayside Tire & Exhaust, LLC v. Alabama Dep't of Revenue*, Admin. Law Div. Dkt. No. W. 98-272 (Oct. 13, 1998). The Department of Revenue supports this argument by pointing out that if the classification of a multi-member LLC as a partnership for non-income tax purposes does not affect the liability of the members, then the classification would seemingly be without effect at all for those non-income taxes. To the contrary, it could be argued that the use of "partnership" in section 10-12-8(b) was not referring to a state law partnership, but rather a partnership in the context of the federal CTB regulations as one of the three possible entity classifications (corporation and DRE being the other two) for tax purposes. The Department of Revenue's Administrative Law Division temporarily overruled its earlier decision in *Bayside Tire*, holding that members of LLCs that are taxed as partnerships are still LLC members, and thus, pursuant to §10-12-20(a), are not personally liable for the tax obligations and other debts of the LLC. *Capitol Machine & Equip. Co., LLC v. Alabama Dep't of Revenue*, Admin. Law Div. Dkt. No. S. 08-619 (April 20, 2009) withdrawn (Final Order Dep't Appl. Reh'g June 9, 2009). However, that opinion was subsequently withdrawn by joint stipulation of the parties that the disputed assessment was voided due to the division's ruling in favor of the LLC on the substantive issue.
10. See, e.g., *First American Holding, LLC v. State Dep't of Revenue*, Admin. Law Div. Dkt. No. MISC. 07-773 (Final Order Dec. 20, 2007) (upholding an assessment of state/county business license tax against the single-member of the disregarded LLC because "[f]or Alabama purposes, a single-member LLC is automatically disregarded unless the LLC 'checks the box,' i.e., affirmatively elects for federal tax purposes to be recognized and taxed as a corporation").
11. See Ala. Op. Att'y Gen. No. 2008-049 (Jan. 31, 2008) (noting that "a limited liability company is a distinct and separate entity apart from its member or members for ad valorem tax purposes. Therefore, it is irrelevant whether the LLC is disregarded or whether it is single-member or multi-member.")
12. Treas. Reg. § 301.7701-2(c)(2)(iv), effective for wages paid on or after January 1, 2009.
13. *Ala. Code* § 10-9C-1208, enacted by Acts of Ala. 2009-621, effective January 1, 2010 (providing that "[f]or purposes of income taxation, other than under Chapter 14A of Title 40, a domestic or foreign limited partnership or limited liability limited partnership shall be treated as a partnership unless it is classified otherwise for federal income tax purposes, in which case it shall be classified in the same manner as it is for federal income tax purposes"); see also *Ala. Code* §§ 40-18-1(35).
14. See *Ala. Code* § 10-8A-1109 (providing that a LLP "shall be taxed as a partnership in accordance with Section 40-18-24 ... and shall for all other tax purposes be taxed as a partnership"). To the authors' knowledge, the Department of Revenue has not taken the same position with respect to LLCs being taxed as a general partnership in assessing partners of a LLP for non-income taxes.
15. I.R.C. § 1361(b)(3). The Q-Sub election should be made by the parent corporation by filing IRS Form 8869.
16. See *Ala. Code* § 40-18-160(d) (providing that "[w]ith respect to a qualified subchapter S subsidiary for which there is in effect an election under 26 U.S.C. § 1361(b)(3), all of its assets, liabilities, and items of income, deductions, and credit shall be treated as assets, liabilities, and such items, as the case may be, of the Alabama S corporation owning the stock of the qualified subchapter S subsidiary"). For rental tax purposes, transactions between a parent corporation and its Q-Sub, or transactions between two Q-Subs owned by the same parent, are exempt from Alabama rental tax. *Ala. Code* § 40-12-223(11).
17. See Treas. Reg. §§ 301.7701-2(a); 301.7701-4(b); *Ala. Code* § 40-18-25(i) (providing that "for purposes of the taxation of the income (or the net income) of a business trust under this title, a business trust shall be classified for tax purposes in the same manner as it is classified for federal income tax purposes").



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Corporate Governance and the HealthSouth Derivative Litigation

By Ken Randall and Hunter Hill

On June 18, 2009, Jefferson County Circuit Judge Allwin Horn entered a judgment of nearly \$3 billion against former HealthSouth CEO Richard Scrushy in the derivative action filed on the corporation's behalf. Scrushy used the company he founded, the industry leader in rehabilitative health care, to perpetuate a colossal fraud on the market. Scrushy and his CFOs overstated HealthSouth's net income by \$3.1 billion over seven years and traded HealthSouth's stock in order to take advantage of this fraud, harming not only HealthSouth and its shareholders but the market as a whole. Following extensive litigation, involving perhaps the most blatant breach of corporate governance by a homegrown Alabama company, Judge Horn conclusively gave Scrushy the title "CEO of the fraud." (*Tucker v. Scrushy*, No. CV-02-5212 at p. 25 (Jefferson County Cir. Ct., Ala. June 18, 2002) (memorandum opinion)).

The Structure of the Litigation

Three different trials compose the corpus of the HealthSouth fraud litigation. In 1998, a class of stockholders filed a direct securities fraud suit in federal court against HealthSouth and several insiders, including Scrushy, claiming that management materially misrepresented the effects of certain acquisitions and Medicare changes in 1997 on HealthSouth's financial position. In the wake of sharply declining earnings in the third quarter of 2002, several other securities fraud class actions were filed by various stockholder and bondholder groups. After the financial fraud at HealthSouth became public in March 2003, the old and new federal court securities fraud cases were consolidated into

a class-action dubbed *In re HealthSouth Corporation Securities Litigation*. While Scrusby refused to settle, HealthSouth and the other directors and officers settled the case for \$445,000,000, covered by stock issuance and insurance.

Secondly, the SEC brought criminal charges against Scrusby, filed in federal court, with claims providing the first real test for provisions in the Sarbanes-Oxley Act (“SOX”), which were intended to assist the prosecution of accounting fraud. The business and legal communities viewed this proceeding as a relative failure. HealthSouth settled for only \$100,000,000 in civil damages and was enjoined from further breaches of securities laws, while not admitting to any wrongdoing. As is well known by now, though five former HealthSouth CFOs, who had plead guilty, testified against the former CEO, Scrusby was acquitted on these securities fraud criminal charges.

Our focus, *Tucker v. Scrusby*, was a derivative action filed by shareholders on behalf of HealthSouth. The action began in August 2002, before the HealthSouth accounting fraud was made public, when a shareholder, Wade Tucker, filed suit

against Scrusby, then CEO, and various other officers and directors in the Circuit Court for Jefferson County, Alabama, for various breaches of fiduciary duty stemming primarily from self-dealing transactions.¹ After the accounting fraud was announced, Judge Horn found that demand would have been futile and appointed Wade Tucker as the derivative plaintiff, who had authority to assert the claims of HealthSouth resulting from the accounting fraud that was discovered in March 2003. Several other suits were consolidated under this name and were placed under the care of Judge Horn. After a bench trial in May 2009, the court found that the damages that should be awarded against Scrusby totaled \$3,115,103,000. After certain judgment credits related to previous recoveries on behalf of HealthSouth in this same derivative litigation, Judge Horn entered a judgment against Scrusby and in favor of Wade Tucker, derivatively for HealthSouth Corporation, in the sum of \$2,876,103,000 for fraud, insider trading, negligence and self-dealing.

As in the Bernie Madoff case, efforts are now underway to identify, find and liquidate Scrusby family assets, the fruits of corporate waste and unjust enrichment from massive breaches of fiduciary responsibilities. It is doubtful that full recovery ever will be made.

These three proceedings, combined, found HealthSouth, Scrusby, other officers and directors, auditors, and investment bankers liable for well over \$3 billion in damages and disgorgements.

anxious vigilance with which . . . partners . . . frequently watch over their own.” Functional capital markets require that investors turn over their capital to these managers, normally complete strangers. In fact, the U.S. Supreme Court held that the essence of a “security” is “whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.”² The security is the fundamental building block of our public markets, requiring investors to trust that other people will produce worthwhile financial returns. In other words, our very market economy is *defined* by trust.

Therefore, the law has imposed certain indispensable fiduciary duties on officers and directors to foster confidence that they will maximize the investors’ returns.³ Under standard corporate-governance nomenclature, fiduciary responsibility includes the “duty of care” and the “duty of loyalty.” A case involving a breach of *care* “is essentially a negligence cause of action,” according to Dr. Richard Thigpen’s renowned treatise, while a breach of *loyalty* “relates more to the law of fraud.”⁴


Scrusby’s behavior was a tremendous breach of both the duty of care and the duty of loyalty. Courts have utilized a spectrum of standards in defining the duty of care, but Scrusby violated that duty from one end of the spectrum to the other. Delaware law governed the derivative litigation. Even if under Delaware’s business judgment rule “director liability is predicated upon concepts of *gross* negligence,”⁵ Scrusby clearly violated that standard of care. Similarly, the derivative action demonstrates Scrusby’s complete disregard of his duty of loyalty to advance HealthSouth’s best interests, through his multiple acts of self-dealing.

The Derivative Litigation: A Myriad of Fiduciary Violations

For publicly-traded corporations, the officers’ and directors’ ultimate responsibility is to the company’s owners, the shareholders. In *The Wealth of Nations*, Adam Smith wrote that “being managers rather of other people’s money than of their own, it cannot be well expected that they should watch over it with the same

Forecast Failures

There were at least two motivations for the fabrication of HealthSouth’s earnings. The first involved the company’s failure to meet its financial forecast, which would have dismayed Wall Street and greatly reduced the value of Scrusby’s own HealthSouth stock. While valuation methods typically involve discounting the *perpetual* cash flows to shareholders, a corporation’s cash flows are only as good as the last quarter. Failing to meet earnings



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reduces the expected future cash flows, naturally driving down the fundamental value of a company's publicly traded stock. As the largest shareholder of the company he founded, a great deal of Scrushy's wealth was tied to the share price.

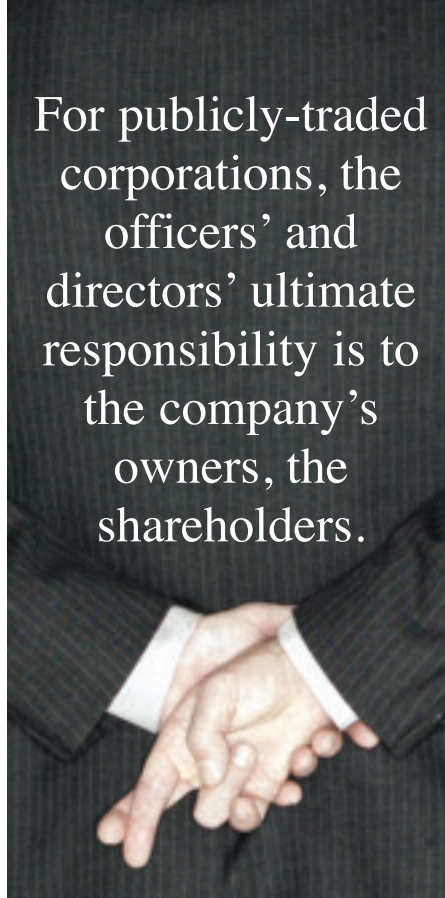
Following multiple acquisitions, the 10-Q HealthSouth filed with the SEC in the second quarter of 1996 tells the story of a vibrant company, operating 643 outpatient care centers as of June 1996, compared with only 382 outpatient care centers a year earlier. There was growth reported, though less pronounced, in the number of surgical and inpatient facilities. Quarterly earnings per share were reported at \$0.36, compared to just \$0.08 a year earlier. The reality was much bleaker. According to the Special Audit Committee Report of May 26, 2005, the financials overstated pre-tax income by \$7.9 million in Q2, \$10.79 million in Q3 and \$70.2 million in Q4. For FY1996, HealthSouth missed the board-budgeted net income by over 32 percent, but it reported that it beat the estimates.

It is difficult to imagine a more blatant violation of the duties of loyalty and care than Scrushy's actions. Granted, a higher stock price equally enhanced the value of every shareholder's stock during the period of the fraud, but the falsified financials imperiled the company's reputation and very existence. The fraud ultimately led to a great decline in the stock's value. At issue, of course, is not only the fabricated value of HealthSouth's stock, but a fundamental attack on the core of the public market: accurate and transparent pricing information. Choices to buy, hold or sell stock can be only as good as the data informing the decision.

Fraud is illegal in all business entities, but fiduciary duties must be contextualized. Federal and state laws distinguish between the application of regulations to privately and publicly held companies. In private (including closely held) corporations, operations often are informal, and often all shareholders are also directors. Delaware law even permits the behavior of LLC members to be governed by contract law, rather than by traditional fiduciary responsibilities.⁶

With a publicly traded company, however, stockholders have less direct board representation. Their knowledge base is framed by the company's earnings reports; few shareholders actually attend the company's annual meetings. It is said

For publicly-traded corporations, the officers' and directors' ultimate responsibility is to the company's owners, the shareholders.



that shareholders can "vote with their feet," by walking away from an underperforming company. But when company executives perpetuate a fraud on the marketplace for securities, they do more than keep the company's owners in the dark—they blindfold and handcuff stockholders.

Judge Horn found that, through the exercise of stock options and the sale of stock, Scrushy received about \$93 million from trades in 1997 and \$54 million

from trades in 2002—returns inflated by reporting.⁷ On the other hand, the inflated earnings actually cost HealthSouth \$614,146,000 in additional federal income tax on non-existent profit. Another overpayment of \$105,218,000 was made for state income taxes. HealthSouth also overpaid \$81,334,000 in taxation on fictitious personal property. Even though it eventually recovered the overpayment of federal and state income tax, HealthSouth lost use of money when it needed it; the "time value of money" exacerbated the damage from the overpayment.

With some irony, the bloated financials also hiked the price HealthSouth paid for the repurchase of its own publicly traded stock. Like any other shareholder, but at a larger scale, HealthSouth paid more than it should have for company stock. Though other courts have accepted expert testimony to evaluate the difference between the purchase price and a corrected fair market value of traded securities, Judge Horn found this calculation too speculative to award damages to the corporation. Besides, much of the class-action settlements centered on HealthSouth *benefiting* from the bloated pricing, which had enabled it to acquire other rehabilitative health care companies with a lower cost of capital.

When the fraud was exposed in 2003, HealthSouth experienced the most direct damage. The price of HealthSouth stock fell to less than \$0.50 per share from

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\$19.55 the day before the FBI raid in March 2003. As the share price fell, the cost of debt increased, and HealthSouth incurred \$1.5 billion in debt service and credit premiums. JP Morgan froze the \$1.25 billion credit line it had opened for the company just days before some \$300 million in debt principal was due. Fears raged that revelations of the fraud would force the company to file for bankruptcy, just as Enron and Worldcom had done. The New York Stock Exchange delisted HealthSouth shares. Just to reconstruct and restate the financials cost HealthSouth \$692 million in accountants' fees; the sum of \$622 million was included in the judgment for this expense.⁸

Bogus Bonus

A second motivation for falsifying HealthSouth's financials involved Scrushy's employment contract. Under his contract, Scrushy earned a bonus if HealthSouth's actual net income exceeded its budgeted net income. Similar bonuses often are used appropriately and effectively to incentivize C-suite performance and to create a metric for linking management compensation to corporate performance, thus reducing the so-called agency problem. Since stockholders have only a residual claim to earnings, greater earnings increase stock value and return. Tying compensation to performance incents the CEO to work more industriously.

In a setting of fraud, however, Scrushy's bonus incited him not to improve performance but to falsify earnings. Scrushy's FY1996 bonuses alone more than tripled the *total* amount that the average CEO of an S&P 500 portfolio company earned at the time⁹—and, of course, Scrushy did not actually meet the performance metric for his bonus. The court's judgment included \$22,880,000 related to Scrushy's having illegitimately earned his 1996 bonus. The court previously had awarded more than double that amount for bogus bonuses for 1997-2002.¹⁰

Law school business organization courses devote much time to the subject of the business judgment rule. Though the business judgment rule has multiple meanings, it can help evaluate whether officers or directors met their duty of care. Management's reasonable care is equated with its having made at least

A second motivation for falsifying HealthSouth's financials involved Scrushy's employment contract.

rational business decisions. When seeking to determine whether a director used reasonable care, the burden of proof is on the plaintiff to show that the director's *ex ante* decision was either uninformed or made for some reason other than to benefit the shareholders.¹¹ But where officers and directors *intentionally* deceive or harm the entity and its shareholders, a breach of the duty of care becomes an outright fraud, an intentional tort and a violation of the securities laws, rather than just a negligent and bungled judgment. The business judgment rule obviously does not insulate an officer or director for liability from fraud intended to falsify the satisfaction of bonus metrics. Management certainly cannot claim they acted in good faith in such a situation.

Of all the evidence of Scrushy's fraud at HealthSouth—overcoming any possible defense of him having simply made a bad judgment in trusting his CFOs—Judge Horn focused on Scrushy's receipt of weekly and monthly consolidated income/tracking statements. Those statements contained the *real* monthly financial data, so anyone seeing them would have been aware of HealthSouth's *true* earnings and the level of concoction needed to reach the targeted numbers subsequently reported to the market. Scrushy's handwriting was contained on several pages of the tracking documents. With this evidence, even if Scrushy had not actively perpetrated the fraud (which the court found he had), his claim of being unaware of others' ongoing fraud logically evaporated. The regular "spiking" of tracking figures in the *third month* of each quarter—which would have looked suspect to even a novice at reading financial statements—also suggests

knowledge of the fraud by the former HealthSouth CEO.

Yet Scrushy himself had signed the 10-Ks and 10-Qs, containing data that was different from the tracking statements he had seen. An obvious motivation for Scrushy's signing inaccurate filings was tied to his contractual bonuses. Reporting excess net income not only appeased Wall Street and enhanced Scrushy's own holdings, but also augmented his already sizable compensation.

Corroborating documentary evidence came from a notebook prepared by an unindicted former HealthSouth treasurer. Like the tracking statements, the notebook reported real earnings versus projected earnings, summarizing the level of fabrication needed to meet the latter. Two witnesses testified that the notebook had been shown to Scrushy, who became irate with the treasurer who had prepared it. After this confrontation, Scrushy failed to take any action to stop the fraud, and the treasurer promptly resigned.

Indeed, direct evidence that Scrushy himself had participated actively in the fraud came from the testimony of five convicted former HealthSouth CFOs. To those who found Scrushy's exoneration in the criminal trial to be unfathomable, it was the testimony of the CFOs that seemed most compelling of a guilty verdict. However, the CFO's testimony *was* dispositive in the derivative litigation. Each former CFO gave detailed testimony about Scrushy's active role in the fraud. Though the five of them are convicted felons, whose credibility may be in doubt, Scrushy is also a felon, even if in an unrelated criminal proceeding. As Judge Horn concluded straightforwardly, it is "inherently incredible that a CEO could fail to know or discover a fraud of this magnitude of almost seven years." (p. 28).

Scrushy, moreover, was thrust upon his own petard. The derivative action relied on testimony from a deposition that Scrushy had given ten years earlier in an unrelated case involving fraud by a company called MedPartners. HealthSouth was an investor in MedPartners, and Scrushy was on the MedPartners board. When the MedPartners CEO and HealthSouth director, Larry House, resigned over the fraud, Scrushy briefly filled this role at MedPartners.

In Scrushy's deposition in the MedPartners' case, he was asked who was responsible for the fraudulent

MedPartners financial statements. Scrushy answered: "It would be the top financial guys, which would involve the comptroller and the CFO *and it would be the CEO.*" (p. 7, emphasis added). Scrushy apparently hoped to be held to a lesser standard of CEO responsibility at HealthSouth than the standard he had articulated for the MedPartners CEO. Such an inconsistency rises to hypocrisy, given the affiliation between HealthSouth and MedPartners.

"Self-dealing" is one way that officers and directors can violate their duty of loyalty. Like much corporate governance terminology, "self-dealing" means what it says. Officers and directors *self-deal* when they use their positions with the corporation to enrich themselves, rather than the shareholders. Scrushy caused HealthSouth to do business with various entities in which he and family members had an interest. Such affiliated transactions are not *per se* illegitimate. If such a transaction involves a fair market value for the commodity being sold or traded, and if the officers or directors disclose their interest to the board of directors, a court easily may view the transaction to be appropriate. This is so especially where the board or shareholders approve or ratify a transaction. However, the cure-all of disclosure did not occur with regard to Scrushy's self-dealing transactions.¹²

Perhaps the worst example of Scrushy's self-dealing involved a company called MedCenterDirect.com ("MCDC"). HealthSouth owned 29.8 percent and Scrushy owned 28.3 percent of MCDC, which Scrushy formed during the dot com bubble. Scrushy actually tainted the entire HealthSouth Board of Directors with regard to MCDC, by facilitating every director's purchase of MCDC stock. All shareholders—including HealthSouth, Scrushy and the other directors—paid a minimal amount for their stock in MCDC (\$0.30 a share).

Under Scrushy's direction, HealthSouth loaned MCDC \$10 million and guaranteed other loans of \$20 million. However, by committing only HealthSouth to underwrite the loan and loan guarantees, and not Scrushy or the other shareholders, HealthSouth incurred a disproportionate amount of risk if MCDC was unsuccessful. On the other hand, all stockholders would share in the upside if MCDC succeeded and enjoyed a liquidity event, such as an IPO. So Scrushy and the other

directors potentially could benefit from HealthSouth's capitalization of MCDC, but they would not suffer directly from MCDC's default on its loans. Scrushy and his board could lose their minimal equity investment, but they could not lose the value of the loans.

When MCDC became insolvent in 2003, HealthSouth incurred a judgment of nearly \$32 million on the guarantee, including post-judgment interest. Judge Horn awarded the plaintiffs \$57,709,000

(including interest) for the self-dealing involved in the MCDC transactions.

Another allegation involving a type of self-dealing—violating the fiduciary duty of loyalty—concerned insider trading. Having found Scrushy a knowing participant in the fraud, the court linked that inside information with Scrushy's profitable decision to sell HealthSouth stock in 1997 and 2002. Under *Brophy v. Cities Services Co.*,¹³ any profits he made on trades using his special knowledge of the

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company rightly belong to HealthSouth. As noted earlier, those sales, including his exercise of stock options, profited Scrushy by \$147,450,000, which Judge Horn included in the damages awarded in the derivative action, plus interest of \$126,321,000.

Going Forward

If it is said that “hard cases make bad law,” then there should be no danger of the HealthSouth derivative litigation generating bad precedent. Though the case involved billions of dollars, it did not involve a difficult fact pattern to follow; the case simply involved earnings and did not deal with complicated derivatives where the underlying assets are packaged, bundled and leveraged. In the world of corporate reorganization and restructuring, HealthSouth itself was organized fairly simply. Its inpatient and outpatient functions were part of the same corporate entity. There was no claim that the nuances of GAAP had caused a miscalculation of HealthSouth’s EBIDTA.¹⁴ Indeed, under stipulation, even Scrushy agreed with the former

CFOs that fraud had occurred. The outcome of the HealthSouth derivative litigation primarily turned on the factual issue of whether, and, if so, how, Scrushy was involved in the fraud.

Delaware law primarily governed the HealthSouth derivative litigation. Like most publicly held corporations, HealthSouth was incorporated in Delaware, which has laws favorable to business. Although it is not up to Alabama lawyers to contemplate revisions to Delaware law, the Delaware General Corporation Law was more than adequate to govern and redress the kinds of activities in which Scrushy was engaged. The concept of transparency—essential to corporate governance—permeates Title 8 of the Delaware *Code* and Delaware case law. For example, section 144 concerns transactions involving interested officers and directors. It requires disclosure of material facts, plus director authorization or shareholder approval, or ratification of transactions fair to the corporation.¹⁵ The HealthSouth CEO and CFOs spectacularly violated this and other statutes that help define the fiduciary duties of care, loyalty and fair dealing. The Delaware business judgment rule likewise did not insulate the officers’ fraudulent accounting.

If the Delaware *Code* adequately outlawed Scrushy’s behavior (not to mention the restrictions of federal and state securities laws), what or who should have stopped the fraud? Where the CEO and CFO of a publicly traded company—those responsible to report earnings accurately to the market—are complicit in fraudulent accounting, it is not easy for independent directors and shareholders to detect a problem. At HealthSouth, Scrushy dominated the information flow, not only founding the company, but serving as CEO and chairman of the board until he was forced out in 2003. Other board members, especially independent ones, at such a publicly-held company spend comparatively little time on the corporation’s business. They have little recourse but to accept as true the financials being generated by management.

To be sure, the HealthSouth board bore a level of responsibility for the company’s decline. Indeed, Wade Tucker recovered \$100 million on behalf of HealthSouth in a settlement with HealthSouth’s former directors and officers based on the accounting fraud. Nevertheless, there was no direct evidence

that the outside directors of HealthSouth ever knew of or participated in the accounting fraud.

Since the CEO and CFO control the data that go into the financials, unless there is an obvious red flag, a board cannot easily detect falsified figures. At least in the short term, a public company’s directors and shareholders are at the mercy of management’s reporting. In other words, it is difficult for the outside directors of a public company to guard against an outright fraud perpetuated by a conspiring CEO and CFO and their subordinates.

The corporate culture at HealthSouth apparently accentuated the normal limits on outside directors. By all accounts, Scrushy ran the company with more than just an iron fist; he dominated it perhaps tyrannically. Founders of companies that go public often resent the fact that they no longer have controlling ownership, treating questions of their decisions or pronouncements as undercutting their authority. Evidence in the case showed that HealthSouth employees or directors who questioned the financials were exposed to Scrushy’s anger and retribution. Scrushy screamed at the treasurer who tried to discuss the fabricated earnings with him: “Where do you get off telling me how to run my company? I’ve been running this company for 15 years.” (p. 10). Such an intimidating culture at HealthSouth fomented the fraud, to the ultimate detriment of the shareholders.

It was the external accountants who had the best chance of uncovering HealthSouth’s fraud. Ernst & Young was HealthSouth’s outside auditor from the inception of the company and throughout the years of the accounting fraud. The derivative claims against Ernst & Young remain pending and will be decided in an arbitration proceeding. Ernst & Young settled its involvement in the securities fraud shareholders class action in federal court for \$109,000,000.¹⁶

Of course, after the Enron crisis, Congress enacted new regulations of accounting firms, through *Sarbanes-Oxley*. *SOX* may, in fact, deter accounting fraud, but the 1996 origins of HealthSouth’s fraud predated the law. Whatever deterrence *SOX* may provide has come, however, at no small cost; compliance has become a substantial corporate expense. Since the type of accounting fraud occurring at HealthSouth is

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relatively rare, it is questionable whether SOX's prevention of such instances of fraud outweighs the ongoing costs of SOX's implementation.¹⁷

Derivative Litigation as the Concluding Chapter

In the absence of effective and efficient *preventative* anti-fraud measures, attention turns, after the fact, to the effectiveness of litigation in making victims whole. A shareholder derivative suit is one brought, on behalf of the corporation, by shareholders against a third party. After making an unsuccessful demand that the corporation bring the suit, or showing demand futility, a shareholder may proceed with an action, in the corporation's name, against an officer, director and/or another party who allegedly injured the company.

Though instigated by shareholders, the proceeds from a successful derivative action go to the corporation rather than to the plaintiff-shareholders. Since the shareholders are owners of the corporation, they benefit from a positive litigation result. But this benefit to the HealthSouth shareholders is less direct than in class action litigation. The purpose of the derivative litigation is to restore the *company*, an independent legal entity, to its pre-injury state. By comparison, the direct, class-action litigation seeks to make whole those stockholders and bondholders who purchased securities at inflated prices during the time of the fraud. So the HealthSouth derivative litigation provided redress to the corporation and indirectly its *current* shareholders, while the direct class action repaid investors who owned HealthSouth stock from when it traded on pink sheets.

Thus, it is the combination of derivative and direct litigation that seeks to bring economic justice in the face of fraud, which is difficult to prevent. Since it also may be economically inefficient to prevent outright and complicit CEO and CFO fraud through regulation, litigation becomes a necessary resolution of management's *intentional* violation of its fiduciary duties.



A shareholder derivative suit is one brought, on behalf of the corporation, by shareholders against a third party.

The fraud at HealthSouth shook the foundations of trust on which the capital marketplace of securities is built. In the derivative litigation, Judge Horn's opinion provided the "last chapter in the HealthSouth/Scruschy saga . . ." (p. 1). Now, attempting to leave behind these three trials, HealthSouth is working to re-establish itself as one of Alabama's corporate leaders. The judgment in the derivative action, even if not fully satisfied, is an important step forward in HealthSouth's rehabilitation. ▲▲

Endnotes

1. Tucker was represented by John Q. Somerville of Galloway & Somerville and John W. Haley of Hare, Wynn, Newell & Newton.
2. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).
3. Though a firm's leadership should maximize shareholders' multiple of return, it does not mean that a corporation must distribute dividends of every penny of net revenue. Consistent with the nature of the firm's business purpose and philosophy, their articles of incorporation, and state and federal laws, corporate boards establish levels of distributions and retained earnings. A board of directors is given great latitude, since "while always required to act in an informed manner, [it] is not under any *per se* duty to maximize shareholder value in the short-term . . ." *Paramount Communications, Inc. v. Time, Inc.*, 570 A.2d 1140, 1150 (Del. 1989).
4. RICHARD A. THIGPEN, ALABAMA CORPORATION LAW 483 (3d ed. 2003). In fraud cases, the duty of loyalty often involves management's conflicts of interests, as discussed *infra*. See generally, *Symposium on Corporate Governance*, 8 Hofstra L. Rev. 1 (1979) (in which one of this essay's co-authors was involved as an editor).

5. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (emphasis added).
6. Del. Code Ann. tit. 6, § 18-405.
7. Scruschy used some of his stock as repayment of a \$25 million loan from HealthSouth. Since the market price of that stock was too high, it allowed the value of the debt to be erased for fewer shares. The Delaware Supreme Court held that this transaction unjustly enriched Scruschy and required actual repayment of the debt. *In re HealthSouth Shareholders Litigation*, 847 A.2d 1121 (Del. 2004).
8. The court found that it could quantify at least \$457,429,000 of the \$692 million in damages caused proximately from the fraud. Including pre-judgment interest of about \$165 million, the court awarded \$622 million for reconstruction and remediation costs.
9. Michael Jensen, Kevin Murphy and Eric Wruck, *Remuneration: Where We've Been, How We Got Here, What Are the Problems, and How to Fix Them* 33 (ECGI Finance Working Paper 44, 2004, available at <http://ssrn.com/abstract=561305>).
10. Previously, summary judgment rendered nearly \$48,000,000 in damages from Scruschy's 1997-2002 bonuses based on unjust enrichment, since Scruschy admitted that performance was not met in those years. Only the 1996 bonus was litigated at trial.
11. *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (1968) ("Courts may not decide [issues of business judgment] in the absence of a clear showing of the dereliction of duty on the part of the specific directors and mere failure to 'follow the crowd' is not such a dereliction.").
12. Self-dealing under Delaware law is described in the text accompanying note 15, *infra*.
13. 70 A.2d 5 (Del. Ch. 1949).
14. "EBIDTA" means earnings before interest, depreciation, taxes and amortization.
15. Del. Code Ann. tit. 8, §144
16. UBS settled derivative claims for \$133,000,000.
17. See Mark L. DeFond & Jere R. Francis, *Audit Research After Sarbanes-Oxley*, 24 AUDITING: J. PRACTICE & THEORY 5-30 (2005).

Ken Randall is dean and Thomas E. McMillan Professor of Law at the University of Alabama School of Law, teaching in the business curriculum.

Hunter Hill is a second-year law student and is pursuing an M.S. in finance at the University of Alabama School of Law.



From the Dean



I am pleased to announce that Faulkner University's Jones School of Law has been given full approval by the Council of the Section on Legal Education and Admissions to the Bar of the American Bar Association. This is a significant milestone for the school and one which marks us as an outstanding law school. It not only allows our graduates to take the bar exam in every state, but it also means that we will draw students to the school from every state and from foreign jurisdictions.

This achievement is based on a reputation for outstanding classroom teaching, a rigorous academic program which emphasizes both a deep understanding of the law and legal analysis and the accumulation of a broad range of skills necessary to successfully practice law, a significant record of scholarly publication by our faculty, and a consistently high bar passage rate.

Even though this is a great achievement, our pledge is that we will always seek to improve our program of legal education and that we will never rest on our laurels.



Charles I. Nelson
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Milestones and Memories of Jones School of Law: From Reading Law to Accredited Law School

By John H. Wilkerson, Jr.

It is my pleasure to help celebrate the milestone of Jones School of Law becoming the third law school in Alabama accredited by the American Bar Association. To trace the school's progression from beginning to present has afforded me the opportunity to better understand the progress in legal education in Alabama. I also pay tribute to both the students and faculty who have brought the school to this point in its history. Lastly, I acknowledge some of the primary people behind the push to reach accreditation.

The Foundational Years

At the dawn of the 20th century, the University of Alabama School of Law was the only law school in the state.¹ Its graduates were automatically admitted to

practice law in Alabama. In those times, another path to being a lawyer was that of "reading law." A person could read (study) law with a practicing lawyer, and then, when deemed ready by the lawyer, the law reader could apply to take the Alabama Bar Exam. If successful, the reader would become a lawyer.

Presiding Judge Annie Lola Price of the court of appeals (1951-1972) was an outstanding example of a law reader.

In 1915, the first unaccredited law school came into existence—the Birmingham School of Law.² Its graduates could also apply to take the bar exam to enter the practice.

Unofficially, according to an account given by two members of the first graduating class, **Circuit Judge Walter B. Jones**³ began holding sessions in 1924



Jones, class of 1935

“in his chambers on the second floor of the old courthouse . . . The sessions were held at that time for four to five boys who the judge wanted to learn the law and it grew from that point.”⁴

Officially, the second unaccredited law school, the Jones Law School⁵, began in 1928. Judge Jones, Montgomery’s only circuit judge, solicited outstanding local lawyers to volunteer their services as teachers. One of the leading early teachers was Mr. **Walter J. Knabe**, a recent 1928 graduate of Yale Law School, and he was associated with the law school for many years.

The first official graduating class of Jones was in 1934. Many of the graduates became prominent Montgomery lawyers, with several founding law firms. **James Carter** was a founding partner in the Hill, Hill, Carter firm and he later served as president of the Alabama State Bar (1962-1963). Three classmates—**Jack Capell**, **Fontaine Howard** and **Edward E. Cobbs**—joined with their professor, Walter Knabe, and formed Capell, Howard, Knabe & Cobbs. Another, **John O. Harris**, became the law school’s first graduate to become an appellate judge, serving on the court of criminal appeals (1972-1985). That first class included the school’s first two women graduates, Mrs. **Ezelle Tavel** and Mrs. **Ruby Hill Tompkins**⁶.

Judge Jones wanted to make sure that his graduates were ready to pass the bar exam and so the Jones Bar Review was launched:

Judge Jones knew how difficult the Bar Examination would be and was not content to graduate his class and go about his business. He held sessions in his home for those who cared to brush up on past subjects and the past tests that they needed to “bone-up” on. We met once or twice a week at his home in his den and were brought up to date on all the difficult points that would be covered in the bar. We also had at that time a resume of subjects covered and questions asked on previous examinations as a guide to know the type of question that we were expected to know. This was indeed a great help to us and we appreciated it more than anything. Incidentally, among the group who came to Montgomery to take this brush-up course was **James Allen** from Gadsden, who came down twice a month to avail himself of the opportunity of visiting with Judge Jones. He later became a United States Senator until his death. There were other prominent men who undertook this course, most of whom were successful in their examination tests, which were of course very difficult.⁷

ADMINISTRATORS OF THE LAW SCHOOL

Whether known as the school’s owner, president, director, or dean, the names listed below are of those who we have been able to identify as having served, at some time, in the lead position at the law school:

Judge Walter B. Jones
 Walter J. Knabe
 Lawrence J. Fassman, Jr.
 John O. Harris
 Charles F. Bennett
 John R. Matthews, Jr.
 James J. Carter
 Joseph D. Phelps
 Darrell L. Schlotterback
 David G. Bronner
 Lawrence B. Kelly
 Kenneth L. Goodwin
 John R. Huthnance
 Hugh Wade
 David K. Brennan
 Arthur L. Butler
 Wendell W. Mitchell
 Larry O. Putt
 Charles I. Nelson

HOMES OF THE LAW SCHOOL

Throughout the years and prior to being given a permanent home by Faulkner University, Jones classes met in a number of locations. Among them:

Judge’s Chambers in the old Montgomery County Courthouse
 Governor Jones’ House at the corner of Hull and Adams Streets
 Lanier House
 Vandiver Building
 Southern Guaranty Building
 Hill Building
 OPS Building
 Adams Street Building
 S. Hull Street Building
 Frank Leu Building
 Huntingdon College
 Faulkner University



Jones, class of 1971

As the number of students increased, the school moved out of the judge's chambers and into several different locations during its earliest years. Accounts differ, but one is representative:

Study sessions were held in the old courthouse but when it became apparent that the number of prospective lawyers would soon get out of hand, Judge Jones moved operations to a garage apartment on Adams Street where the Shrine Temple now stands.

From there the school shifted to the Commerce Building, then to Massey-Draughon Business College which was then located in the first block of South Perry Street, next to the office of Montgomery Attorney Walter J. Knabe, and finally, in 1950, to the present location on Hull, behind the Judge's family home.⁸

That move in 1950 resulted in relocation into the first dedicated law school building, described as:

The School, now in its thirty-first year, is located in the commodious Law School Building at 124 South Hull Street, Montgomery. All work of the School is done here. The building contains on the first floor an excellent library which contains all needed law books. The upper floor contains a large, comfortable lecture room, air-conditioned, capable of seating 65 students. On this floor are also the offices of administration and the President's Office.⁹

I have been unable to find a comprehensive list of the teaching staff during this time period, but a 1960 partial list is indicative of the strength of the faculty:

Bishop N. Barron
William Mooneyham
John R. Matthews, Jr.
Oakley W. Melton, Jr.
Charles E. Porter
Herman H. Hamilton, Jr.
Maury D. Smith
Ralph A. Franco
Joseph T. Pilcher¹⁰

The school continued to operate as a night law school under the ownership of Judge Jones at Hull Street until his death in 1963.

Changing Years (1963-1983)

Judge Jones's death brought about three changes of ownership and three physical moves for the school over the next 20 years.

When Judge Jones died in 1963, through his will, he passed ownership of the school to Mr. **Charles F. Bennett** ("Mr. Charlie"), a long-time administrator of the school (class of 1951).¹¹ Under Mr. Charlie, the school moved into the Frank Leu Building on Commerce Street. After about ten years, Mr. Charlie's health began to decline, and he announced the school was for sale.

In 1972, the University of Alabama Board of Trustees purchased Jones Law School, and set up a not-for-profit corporation to operate the school. The corporation gave Jones its first name change—to Jones Law Institute,¹² and the corporation appointed newly-graduated lawyer **Dr. David G. Bronner** as its dean. He was quickly hired away by the Alabama Retirement Systems and his legacy there continues today.

My introduction to Jones was by way of the Jones Bar Review. I took the course in early 1972, and I found the faculty of the bar review to be remarkably brilliant practicing lawyers. **Ted Jackson** with the Rushton Stakely law firm topped my list. Ted taught me enough tax law to help pass the bar!

Dr. Bronner asked me to teach a torts class in 1972, and it was my privilege to be an adjunct professor for nearly the next 30 years, teaching primarily civil procedure and federal jurisdiction. I also



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spent almost those same years on the Jones Bar Review faculty, in an attempt to pay back what I felt I owed to Ted and the rest of that fantastic faculty.¹³ My cram courses were civil procedure, federal jurisdiction and equity.

I remember teaching in the Frank Leu Building. As I recall, the classrooms were long and narrow. What I remember most is that the teaching podium would be filled with tape recorders, making it feel like you were giving a press conference at each class. I timed our class breaks by the sound of tapes running out.

Jones Law Institute moved to Huntingdon College in 1973. Most of the classes were held in Flowers Hall and the classrooms were spacious and comfortable. There was an initial problem with music majors practicing in an organ loft directly above the main classroom, but that's another story.

Transitional Years (1983-2009)

Jones Law Institute was sold to Faulkner University, then Alabama Christian College, in 1983. Two events quickly occurred: the law school moved to the Faulkner campus that year and it was renamed the Jones School of Law.¹⁴ Classes were held in several buildings on campus. I remember them as being smaller than those at Huntingdon, but quite serviceable.

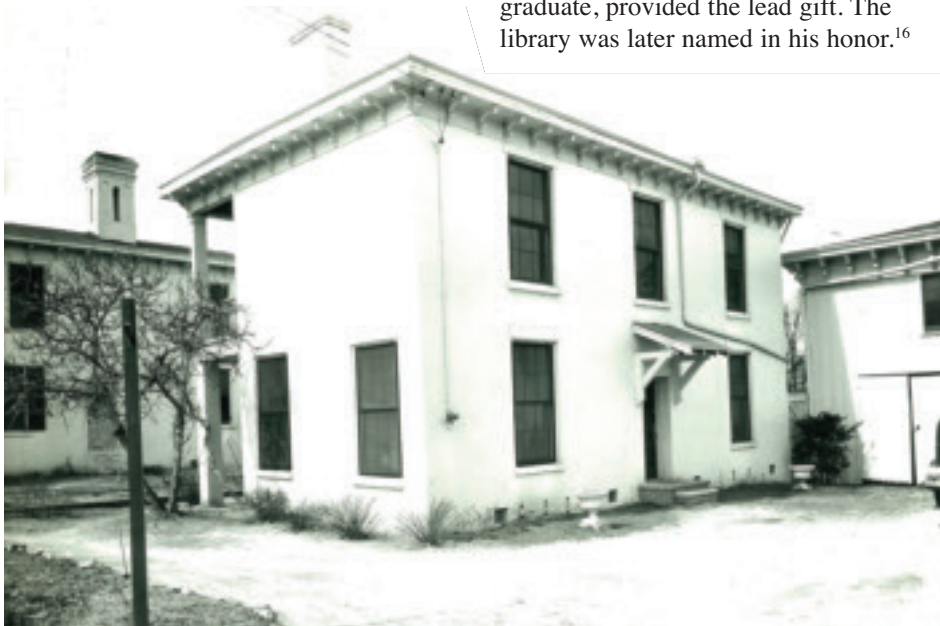


Jones, class of 1958

After several years at Faulkner, the traditional paradigm of night school, adjunct faculty and few administrative staff began a series of transitions.

In 1986, Faulkner hired **Wendell Mitchell** as acting dean (appointed dean in 1987). That same year, **Shirley Howell** was hired as the first full-time faculty member. She was followed by others from 1986-1990; some early faculty members who readily come to mind are **Sharon G. Yates** and **Thurston H. Reynolds**.

In 1991, under the leadership of **President Billy Hilyer** and Dean Mitchell, the dream of a new law school began when the Board of Trustees of Faulkner University approved a plan to construct the law school building. The dream was replaced by actions when the task of fund-raising began in 1993.¹⁵ The fund-raising drive was officially kicked off in November 1993 with the 65th Anniversary Dinner at the Montgomery Civic Center. There were many contributors, and **George H. Jones, Jr.**, 1934 graduate, provided the lead gift. The library was later named in his honor.¹⁶



A former location of the law school

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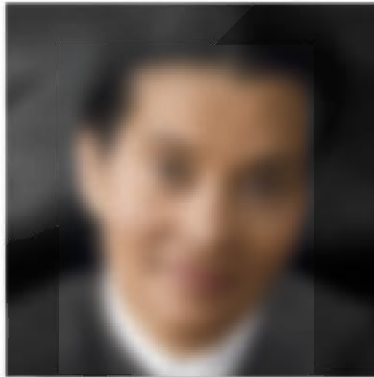


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In 1996, the law school moved into its current facility—the Thomas Goode Jones School of Law (housed in the Marjorie Y. Snook Building). For the first time since 1963, law students studied in a building designed and dedicated to the study of law. It was a privilege to spend the last several years of my tenure as an adjunct professor in that beautiful building.

Two years after moving in, plans were implemented to seek accreditation:

In the fall of 1998 the Faulkner University Board of Trustees, on the recommendation of University President Billy Hilyer and law school dean Wendell Mitchell, approved a plan to go forward with seeking accreditation for the law school by the American Bar Association.¹⁷

The final push for accreditation came in the fall of 2004, when **Charles I. Nelson**

was named dean of Jones School of Law. Dean Nelson had worked as a faculty member and associate dean of Pepperdine University School of Law and was no novice to the ABA accreditation process.

In 2006, under the leadership of Dean Nelson, the American Bar Association granted Jones provisional status as an accredited law school.

In December 2009, the last hurdle was cleared, and the Jones School of Law became the third accredited law school in Alabama.¹⁸

The Student Body

To recount the progression of the institution is to relate only half the Jones story. The other half is the most interesting—the students.

When I began teaching in 1972,¹⁹ I was immediately struck by two impressions: the students seriously sought a law degree

and the students were strong-minded adults. These two impressions were solidified over my 30 years. Over the years our classes were routinely composed of college presidents and professors, state legislators and senators, accountants, lobbyists, physicians, insurance adjustors, business owners, business executives, housewives, teachers, farmers, legal secretaries, law enforcement officers, social workers, and engineers, among others. Many of them were older than I (when I first started).²⁰

Night law school was for grinders.²¹ Nearly all the students worked full time (with mothers working over-time). Yet, they came, and most of them finished the three-and-a-half-year grind. Classes were three hours long, one night a week per subject, and the typical student took three subjects per semester. That meant three nights a week were spent in law school, typically Monday, Tuesday and Thursday.

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Most did not live in Montgomery. Jones had a regional student base of approximately the southern half of the state. As such, students routinely drove one to two hours each way.²² One way to illustrate this is to list some the counties where graduates have become judges: Lauderdale, Shelby, Talladega, Tallapoosa, Chilton, Randolph, Chambers, Lee, Macon, Elmore, Montgomery, Autauga, Lowndes, Dallas, Russell, Barbour, Houston, Covington, Clarke, and Washington.

Graduates of Jones have taken varied paths with their hard-earned degrees. Many went back home to practice law. Some remained in educational settings and others became involved in all levels of our court system—supreme court justices; judges on the courts of criminal and civil appeals; circuit judges; district judges; probate judges; federal magistrates; bankruptcy judges; district attorneys; and U.S. attorneys. Some have gone into the administrative side of the legal system as circuit clerks, the clerk of the court of criminal appeals and as the assistant clerk of the court of civil appeals. Others worked in state government, including as finance directors, legislative budget officers and staff, while others apply their legal talents as assistant attorneys general.

Like other law schools, Jones has a rich family tradition. I include the following three families as examples only. **J.D. Smyth, Jr.** (admitted in 1983) and two of his sons, **Mark** and **David**, attended law school together, driving from Luverne (J.D.'s oldest son, **J.D. Smyth, III**, got his law degree from the University of Alabama and passed the bar in 1980). Sisters **Janice** and **Lynn Clardy** attended together. Janice (admitted in 1978) later became district attorney of Elmore County. Lynn (admitted in 1979) met **Bobby Bright**, a fellow student, and they are perhaps Jones's best known love story. They married after graduation. Lynn became a Montgomery district judge; and Bobby, after serving as mayor of Montgomery, is now serving as Congressman Bright. Lynn retired when he was elected to Congress. As noted earlier, Shirley Howell became the first full-time professor of Jones in 1986; she continues to teach and is, by all accounts, the most beloved professor on staff. Her son, **Chris Howell**, finished at Jones and was admitted to the bar in September 2007.

Congratulations to those who have been part of the progression from reading

law to an accredited law school. This historical sketch is offered as a tribute to Judge Walter B. Jones and to all the men and women who have brought the school to this point in history. For those of us who have been part of that history, we congratulate President Hilyer, Dean Mitchell and Dean Nelson for their vision of a broader mission for the school which accreditation affords. ▲▼▲

I express my grateful appreciation to Ned Swanner, research librarian at the George H. Jones, Jr. Library, for his invaluable assistance in providing the research materials for this article, and to Lynn DeVaughn, on my staff at the court of civil appeals, for her patience and proficiency in preparing this article for print.

Endnotes

1. In 1961, Birmingham became the location of the second accredited law school when Samford University, then Howard College, bought Cumberland School of Law and moved it from Tennessee to the campus.¹ The newest law school in Alabama is Miles School of Law, an unaccredited law school in the Birmingham area (1974).
2. Payne, 27 Ala. Lawyer 334, 341 (1966).
3. Judge Walter B. Jones had a long and distinguished legal career. Among many others, he was a Montgomery circuit judge for 43 years (1920-1963), president of the Alabama State Bar (1954) and founding editor of *The Alabama Lawyer* (1940). He also presided over the Phenix City trials (1954). For a more extensive list, see his profile at 41 Ala. Law. 48 (1980).
4. George Jones and James Pruett, genesis of Jones Law School (1989).
5. Judge Jones dedicated and named the law school in honor of his father—**Thomas Goode Jones** (1844-1914). He, likewise, had an extensive life's work. Among others, he was governor of Alabama (1890-1894), U.S. District Judge for the Middle and Northern districts of Alabama (1901-1914) and author of the first lawyers' code of ethics adopted in the United States (drafted for the Alabama State Bar in 1887).
6. Jones and Pruett, supra.
7. Jones and Pruett, supra.
8. Judith Rushin, "Montgomery's Jones Law School Opened when Judge Coached Candidates for Bar," *Alabama Lawyer*, August 20, 1960.
9. Program, Commencement Exercises, Jones Law School, August 11, 1960.
10. Rushin, supra. Author's note: For those unfamiliar with Montgomery lawyers, this was a very competent faculty, including the president of the Alabama State Bar, bar commissioners, a state senator and the chair of the Advisory Committee for the *Alabama Rules of Civil Procedure*.

11. Feasibility study submitted to the American Bar Association (September 2001).
12. Id.
13. Ted Jackson's wife, **DeeDee**, came to Jones in about 1981 after her children had become teenagers. It was my great delight to return Ted's favor by being one of DeeDee's teachers and bar exam crammers.
14. Jones School of Law is the official name of the school; it is now also being referred to as the Thomas Goode Jones School of Law.
15. Feasibility Study, see FN 11.
16. Interview with **Paul Smith**, assistant dean, Jones School of Law.
17. History statement of Thomas Goode Jones School of Law.
18. Thomas Goode Jones School of Law, Web site, Events and News: "On December 5, the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar granted full approval to Faulkner University's Thomas Goode Jones School of Law."
19. Two of my students that first year were African-Americans—**Lucius Amerson** and **Eddie Mallard**, who drove from Macon County. Amerson became sheriff of Macon County, and Mallard was elected circuit clerk of Macon County, serving for approximately 30 years before recently retiring. I think these were the first two African-American students to attend Jones.
20. Several "seasoned" students, both men and women, came to Jones in their 60s and 70s. One was **Fred Stevens** from Evergreen (admitted in 1990). Fred had a remarkable life story: he was a WWII Marine who participated in the amphibious landings in the island-hopping of the Pacific Theater as a radio operator; the FBI agent whom J. Edgar Hoover assigned to make the exchange of a Russian spy for Gary Powers (the U2 spy plane pilot who went down in Russia); and a practicing attorney in Evergreen until his death several years ago.
21. Night classes are currently being phased out. The last night class group is in their second year; after next year, that part of the Jones experience will end.
22. I think **Chris Pettus** won the longest commute award. He drove from Lafayette, Louisiana during his first year—eight hours each way. His wife convinced him to move to Montgomery after that. Pettus was elected SBA president in 1994.

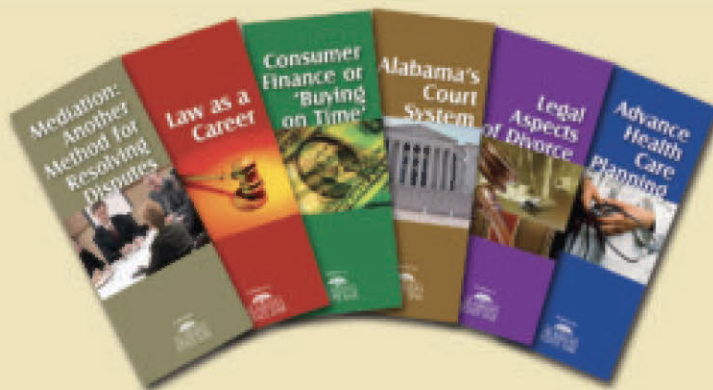


John H. Wilkerson, Jr. received his bachelor's degree from the University of Alabama in 1966 and his law degree from the University of Alabama School of Law in 1972. He was an

adjunct professor at Jones School of Law from 1972 to 2001 and has served as the clerk of the Court of Civil Appeals since May 1975. Wilkerson was the 2000 recipient of the J.O. Sentell Award from the Alabama State Bar.

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What's The Scoop?

Background Checks and
the Fair Credit Reporting Act

By C. Paige Goldman and Elizabeth Huntley



What's more prevalent than marshmallows in a cone of Rocky Road ice cream? Background checks for potential and even current employees. If you want to get a taste, run a quick search on Google. It will yield countless companies that will tell you everything you want to know and then some about job applicants. Not surprisingly, given this new wealth of information, lawyers on both sides of the aisle are looking for a bite of the action. Plaintiff's firms are advising employees and job candidates about what is and is not permissible in background checks for various purposes, including employment. Defense firms and trade associations are providing the same information from an employer's perspective.¹

Credit reports, one of the key ingredients in background checks, are a particular concern of Representative Steve Cohen of Tennessee (D). He points to the following Catch 22—people lose their jobs, fall behind on bills, perhaps file for bankruptcy; then, when they try to find a job, they are often denied opportunities for employment due to poor credit scores.² Representative Cohen has introduced a bill in the House of Representatives called the Equal Employment for All Act.³ The purpose of the bill is to “amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions.”⁴

As the authors write this article, Congress has a lot on its plate: the country is embroiled in a national battle over healthcare, the economy appears to be sputtering back toward a recovery and unemployment numbers are somber. We can only tell you to stay tuned to see whether Cohen's bill is successful. But we can satisfy your appetite for information about the current state of affairs for using background checks including credit reports, medical information, driving records, criminal information, and the like. If you are advising a job applicant who believes he has been wronged or an employer who wants to be sure her company's practices adhere to the law, here is what you need to know:

Obtaining Background Checks

An employer's use of background checks is governed in large part by the Fair Credit Reporting Act (FCRA). 15 U.S.C.S. § 1681 *et seq.* The FCRA refers to background checks as “consumer reports.”

The FCRA was originally enacted by Congress in 1970, in part, to balance the consumer or job applicant's interests against the employer's interests. Substantial changes requiring, *inter alia*, specific notice prior to taking adverse action occurred in 1997.⁵ When an employer uses a background check in hiring or promoting, the employer is ensuring a safe work place and is protecting itself from losses associated with theft, embezzlement, negligent hiring and harassment. On the other hand, when a potential employee consents to the use of a background check, he or she should have an expectation that the employer will rely on confidential, accurate and relevant information. Also, the applicant should be able to trust that the employer will not misuse or be careless with the information obtained.

The FCRA is triggered when employers use a *consumer reporting agency*⁶ to conduct background checks. Indeed, many of the requirements of the FCRA may be avoided if employers simply conduct background investigations in-house. However, employers often find themselves unable to dedicate the time and human resources necessary to perform background investigations in-house.

There are two types of reports usually generated by consumer-reporting agencies for background checks—consumer reports and an investigative consumer report. The consumer report is written or oral information provided by a consumer-reporting agency that may include credit reports, driving records, reference checks, lawsuits, criminal records, educational verification, and any information that bears on a person's general reputation, personal characteristics or mode of living.⁷ The investigative consumer report is a special component of a consumer report which

is obtained through interviews.⁸ Inquiries for a consumer report and an investigative consumer report are permissible for employment purposes. However, a consumer-reporting agency shall not make an inquiry for the purpose of preparing an investigative report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer would violate any applicable federal or state equal employment opportunity law or regulation. Therefore, an employer should make sure that the information sought is relevant to employee or applicant's work or potential work.⁹

There are some general requirements an employer must follow when obtaining and using consumer reports. To get permission to obtain a consumer report from a job applicant or current employee, the employer must notify the applicant in writing in a document consisting solely of this notice and obtain his or her written authorization. Further, if the employer seeks medical information, he or she must get affirmative consent and make sure that the information is relevant to the job. If the employer wants to obtain an investigative consumer report, he must give the applicant notice that the consumer report will include interviews. The employer should disclose the nature and the scope of the requested report. If the applicant asks for additional information, the employer should give a written disclosure telling the applicant how to get a copy within five days of the request.¹⁰

Prior to taking adverse action (such as declining an offer of employment or promotion) based on information from a consumer report, the employer must give the applicant or employee a pre-adverse action disclosure that includes a copy of his or her consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act."¹¹ Finally, when the adverse action is taken, the employer must send the individual notice of the adverse action. After taking adverse action, the employer must give notice orally, in writing or electronically that the action has been taken. The notice must include: (1) the name, address and phone number of the consumer-reporting agency that supplied the report; (2) a statement that the credit-reporting agency supplied the report, but did not make the decision to take the adverse action and cannot give specific reasons for it; (3) a notice of the applicant's right to dispute the accuracy or completeness of any information that the credit-reporting agency furnished; and (4) a statement of rights to an additional free consumer report from the credit-reporting agency upon request within 60 days.¹²

An employer who fails to comply with the FRCA can incur civil and criminal penalties. Civil penalties may include actual damages, attorneys' fees and expenses. An employer's willful noncompliance may result in punitive damages of not less than \$100 and not more than \$1,000 per violation.¹³ Criminal penalties may result when an employer obtains a consumer report under false pretenses.¹⁴

Preventing Identity Theft

In addition to meeting the requirements under the FRCA regarding consent and notice to an employee or job applicant, an employer must also properly dispose of confidential records obtained from consumer reports. Enacted as an amendment to the FRCA, the Fair and Accurate Credit Transactions Act (FACTA) imposes requirements on employers to protect the information it obtains on employees and job applicants.¹⁵ Under FACTA, employers must take "reasonable steps" to prevent the unauthorized use of and access to consumer information during disposal of such information. Disposal not only relates to discarding information but also the selling, donating or any transferal to others of storage media, like computer hard drives, compact disks and floppy disks. Although the regulations do not require specific disposal methods, they do provide examples of types of processes that would be considered reasonable. Examples of appropriate disposal include burning or shredding paper documents; destroying or erasing electronic files or media; or conducting due diligence to hire a document destruction contractor to dispose of material containing consumer report information.¹⁶

As of May 1, 2009, financial institutions and creditors with covered accounts have to develop and implement written identity-theft-prevention programs that provide for the identification, detection and response to patterns, practices or specific activities known as "red flags" that could indicate identity theft. These rules are commonly referred to as the "Red Flag Rules."¹⁷

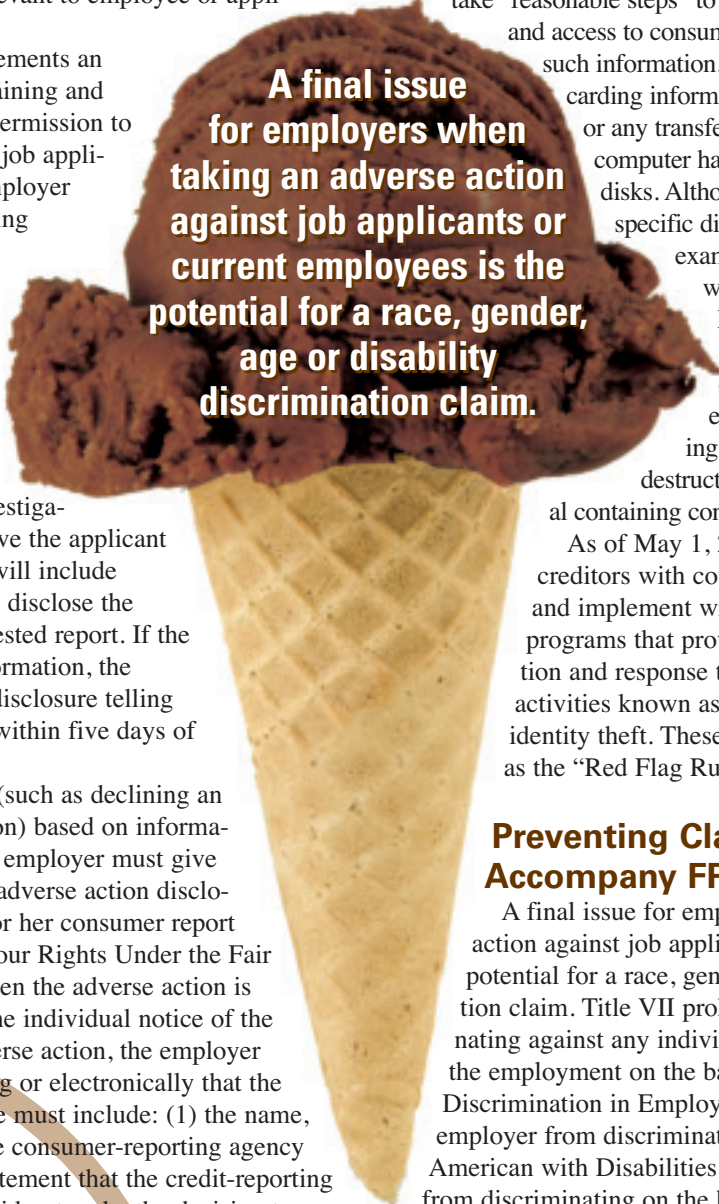
Preventing Claims that Can Accompany FRCA Actions

A final issue for employers when taking an adverse action against job applicants or current employees is the potential for a race, gender, age or disability discrimination claim. Title VII prohibits employers from discriminating against any individual with respect to the terms of the employment on the basis of race or sex.¹⁸ The Age Discrimination in Employment Act (ADEA) prohibits an employer from discriminating on the basis of age.¹⁹ The American with Disabilities Act (ADA) prohibits an employer from discriminating on the basis of a disability.²⁰ The central issue in these cases concerns whether the adverse action by the employer was due to the applicant's status as a member of a protected class.

How does this all apply in "real life" situations? In the following are three scenarios, where employers are put to the test.

How to Avoid the Pitfalls in Hiring and Promoting

You've been hired to counsel Company X (located right here in Alabama) about several hiring and promotion decisions. The human resources director, Sally Straightlace, is concerned about violating the Fair Credit Reporting Act. She recently heard of a lawsuit involving another company that supposedly violated the



A final issue for employers when taking an adverse action against job applicants or current employees is the potential for a race, gender, age or disability discrimination claim.

Act. That company got stuck with a hefty jury verdict. Company X needs to hire an accounts receivable manager and a truck driver. Company X has also recently lost its star marketing director to a sweet deal from a competitor. The company has several internal candidates to consider for promotion to this position.

Ms. Straightlace will contract with *Thorough Investigation Services* (“TIS”) to have background checks performed on the applicants for each position. Until recently, Company X performed all of its own applicant background searches. However, Ms. Straightlace is convinced that TIS will do a comprehensive job. She asks you, her attorney, for guidance. Let’s walk through some considerations to help Ms. Straightlace with the process.

The Accounts Receivable Manager

The person who is hired for this position will supervise the accounting clerks and will have ultimate responsibility for the correct entry of cash, credit card and check payments into the company’s accounts. He or she will have access to company account numbers, customer Social Security numbers, bank account numbers and other sensitive financial information. Company X’s audit department requires this manager to have a bachelor’s degree in accounting, to be responsible and to have good judgment, a clear criminal record and good credit. Ms. Straightlace reviews a stack of 50 applications and selects the top three candidates. She wants to ask TIS to provide a consumer report on the final three. She asks that each report include a criminal record search, a credit report, a reference check, and education verification. To obtain the consumer

reports, Ms. Straightlace must first disclose to the applicants, in writing, her intention to obtain a consumer report as described above. After disclosure, the job candidates must sign a written release before Ms. Straightlace can obtain the consumer reports.

When Ms. Straightlace obtains the consumer reports, she discovers a negative credit report and negative references for Candidate B, a Hispanic female. Ms. Straightlace wants to hire Candidate C, a white male. She wants to reject Candidate A due to inexperience and Candidate B due to the negative items on her consumer report. Before taking any adverse action against Candidate B, Ms. Straightlace must provide Candidate B with a copy of the consumer report and the FTC’s “A Summary of Your Rights under the Fair Credit Reporting Act.” The FRCA does not provide a time to proceed with an adverse action after providing the consumer report to Candidate B, but the FTC has stated that five days is reasonable.²¹

Five days have passed, and Straightlace decides to hire Candidate C. Now Ms. Straightlace must send Candidate B a notice of her adverse action. The notice must include contact information for the consumer reporting agency; a statement that the agency did not make the decision and is not able to explain why it was made; a statement setting forth the applicant’s right to obtain a free disclosure of his or her file from the agency if he or she requests the report within 60 days; and a statement setting forth the applicant’s right to dispute directly with the agency the accuracy or completeness of any information provided in the report.²² Because Company X complied with the requirements of FRCA, Candidate B cannot prevail on a claim under FRCA.

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Suppose Candidate B decides to file an EEOC charge alleging that the actual reason Company X chose not to hire her was because of her ethnicity, rather than her qualifications. She does so within 180 days of the date of the adverse action. Once the EEOC has performed its investigation and reached a decision, Candidate B receives a right to sue letter from the EEOC. She can then file her claim with the court under Title VII.²³

In a Title VII claim, Candidate B must first prove a prima facie case of discrimination through direct or circumstantial evidence. If she establishes a prima facie case, then the employer must articulate one or more legitimate, nondiscriminatory reasons for the adverse action.²⁴ Once the employer articulates legitimate reasons for taking the adverse action, the applicant must produce evidence sufficient to allow a reasonable fact finder to conclude that the employer's reasons were pre-textual, in order to avoid summary judgment for the employer.²⁵

Company X would likely successfully defend itself in this case because it has a legitimate, non-discriminatory reason for not hiring Candidate B. Company X did not hire Candidate B because her background check revealed that she had a negative credit report and negative references. Candidate B was being considered for a position that would require her to be in a position of trust with Company X's financial accounts. Company X was simply protecting itself from the potential for problems.

The Truck Driver

Company X's new driver will drive a mid-sized company truck that is not quite large enough to require a commercial driver's license. He or she will drive and unload customer orders in homes and businesses multiple times per day within the five-county area where Company X does business. The driver needs a clean driving record prior to being hired, which must be maintained throughout tenure in the position. Ms. Straightlace receives 30 applications and selects the top three. She decides to get a consumer report verifying previous employment, reference check, MVR and criminal records.

As discussed above, Ms. Straightlace takes the appropriate steps to obtain the consumer reports. While waiting on the consumer reports, Ms. Straightlace interviews the three candidates. During her interview with Candidate B, he voluntarily informs her that he had a DUI arrest 10 years prior and that he had a pre-existing back injury. After the interview, Ms. Straightlace receives the consumer reports on each candidate. Candidates A (Caucasian male) and Candidate B (African-American male) had clear reports. Candidate C's report contained a three-year-old reckless driving conviction.²⁶ Ms. Straightlace must follow the steps above to give Candidate C notice of the consumer report before taking an adverse action. Five days have passed since notice to Candidate C of his consumer report, and Ms. Straightlace decides to hire Candidate A, the white male.

Candidate B is furious. He believes that he was not hired because he was African-American and because of his pre-existing back injury. Candidate B also believes that his DUI arrest is being held against him. He believes that holding the arrest against him is unfair because the case was dismissed. The arrest and back injury information were unsolicited; Candidate B was just being honest in his interview.

Company X simply did not want to hire a truck driver with a prior DUI arrest. As Company X did not obtain this information

from Candidate B's consumer report, Candidate B does not have a claim under FRCA. An employer does not violate FRCA if the adverse action was not based on the consumer report obtained by the employer.²⁷

However, as discussed in the first hypothetical above, Candidate B can file a complaint with the EEOC and obtain a right to sue letter and pursue his claim for race discrimination under Title VII. He can also pursue his claim that the adverse action was based on his back injury under the American with Disabilities Act (ADA).²⁸

To be covered by the ADA, Candidate B must show that he suffers an impairment that substantially limits a major life activity and that he is a "qualified" person with a disability.²⁹ If he meets the first two requirements, he must then establish a prima facie case by showing that: 1) he suffers from a disability; 2) that there was a position available for which he was qualified; and 3) the position was given to a person who was not disabled.³⁰ If a prima facie case is made, the Court will then apply the burden shifting principles of Title VII discrimination law to the ADA.³¹

Company X has a legitimate, nondiscriminatory reason for not hiring Candidate B. Company X did not hire Candidate B because he admitted to an arrest for a DUI in his past. If Company X were to hire Candidate B and he was involved in an accident, there is a strong potential that Candidate B's driving records will emerge. These may subject the company to claims for negligent hiring and increase potential for exorbitant damage awards.

Director of Marketing

In the midst of an aggressive marketing campaign, Company X's marketing director receives an opportunity to serve as vice president of marketing for a competitor. He leaves Ms. Straightlace in a rush to fill his position. Company X does not want to lose another star performer, so it posts the position internally at \$120,000 in hopes of finding a loyal employee to fill the position. Two top candidates emerge. Ms. Straightlace asks you whether she can have TIS provide consumer reports on their internal candidates. Yes, Ms. Straightlace can obtain consumer reports on the internal candidates as long as she follows the appropriate steps referenced above. Because the candidates are seeking a position in which their annual salary will be \$75,000 or more, the employer can seek information which antedate the consumer report by more than seven years.³²

Ms. Straightlace obtains the consumer reports. Candidate A, the more experienced candidate, has a negative consumer report. Candidate B, the less qualified candidate, has a clean consumer report. Ms. Straightlace discloses the report to Candidate A and waits five days. Candidate A did not notify Ms. Straightlace that there were inaccuracies in her consumer report. Ms. Straightlace hires Candidate B for the position.

Unfortunately, the negative information in Candidate A's consumer report was inaccurate. Candidate A missed her opportunity to correct the inaccuracies prior to the adverse action. Thus, Company X will not be subject to a violation of FRCA. Nonetheless, to dispute the erroneous information, Candidate A can follow the guidelines set forth in the FTC's "A Summary of Your Rights under the Fair Credit Reporting Act." Candidate A must go directly to the consumer reporting agency to dispute the

inaccuracies.³³ Candidate A may have a potential claim against the consumer reporting agency.

Six months after being denied the marketing director position due to an inaccurate consumer report, Candidate A became a victim of identity theft. Apparently, a few months after filling the marketing director position, Company X decided that it needed to create more filing space in its offices. Instead of shredding or burning the files, Company X discarded³⁴ their old files by putting them in their dumpster. The old files were stolen out of the dumpster by a “dumpster diver.” Candidate A’s consumer report was among the discarded files. Thus, Candidate A became a victim of identity theft because Company X failed to comply with the FACTA Act regarding disposal of the consumer report. Company X could now face a lawsuit under the FRCA. Victims can recover actual damages, costs of the lawsuit and attorney fees for negligent violations.³⁵ Greater statutory damages exist for willful violators.³⁶

In conclusion, now that you have the tools that you need to help your clients navigate through consumer reports and background checks, go get the scoop! Happy hiring to you and your clients! ▲▲▲

Endnotes

1. See, e.g., <http://library.findlaw.com/2004/Mar/5/133316.html>; privacyrights.org/fs/fs-15-bck.htm; collegerecruiter.com/employersblog/2009/08/rss_for_recruiting_sourcing_pa.php; <http://hr.toolbox.com/blogs/411background>.
2. Liz Wolgemuth, *Should Your Credit Report Cost You a Job?* US NEWS, July 29, 2009, available at www.usnews.com/articles/business/careers/2009/07/29.
3. H.R. 3149.
4. *Id.*
5. *Using Consumer Reports: What Employers Need to Know*, FEDERAL TRADE COMMISSION: Facts For Businesses, March 1999 available at www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm.
6. “The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. 1681(a)(f).
7. 15 U.S.C. 1681(d)(1).
8. 15 U.S.C. 1681(e).
9. *E.E.O.C. v. Video Only, Inc.*, 2008 WL 2433841(D. Or., June 11, 2008).
10. Eva Shih Herrera, *Fair Credit Reporting Act: What Employers Need to Know about Conducting Background Checks*, EMPLOYMENT & LABOR RELATIONS LAW (American Bar Association, Section of Litigation), vol. 7, no. 3. (spring 2009).
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12. *Id.*
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18. 42 U.S.C. § 2000e-2(a)(1).
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20. 42 U.S.C.A. § 12101 et seq.
21. Advisory Opinion Letter from Clarke W. Brinckerhoff, esq., FTC, to Eric J. Weisberg esq., Szold & Brandwen (June 27, 1997), available at www.ftc.gov/os/statutes/fcra/index.shtm.

22. 15 U.S.C. §1861(b)(3).
23. 42 U.S.C. § 2000e-2(a)(1).
24. *Chapman v. AI Transp.*, 229 F.3d 1012 (11th Cir. 2000).
25. *Id.*
26. Records of arrest must not antedate the report by more than seven years. 15 U.S.C. §1681(c)(a)5).
27. *Williams v. Amity Bank*, 703 F. Supp. 223 (D.Conn. 1988).
28. 42 U.S.C. 12102 et seq.
29. 42 U.S.C. 12102(2); 42 U.S.C. 12112(a).
30. *West v. Russell Corp.*, 868 F.Supp. 313 (M.D. Ala. 1994).
31. *Id.*
32. 15 U.S.C. 1682(c)(b)(3).
33. 15 U.S.C. §1681 (i).
34. For purposes of the FACT Act, “disposal” is not limited to discarding information into a dumpster. It also includes the selling, donating, or any transfer to others of storage media like computer hard drive, compact discs, floppy disks, and the like. 15 U.S.C. §1681w; 16 C.F.R. Part 682.
35. 15 U.S.C. §1681o.
36. 15 U.S.C. §1681n.

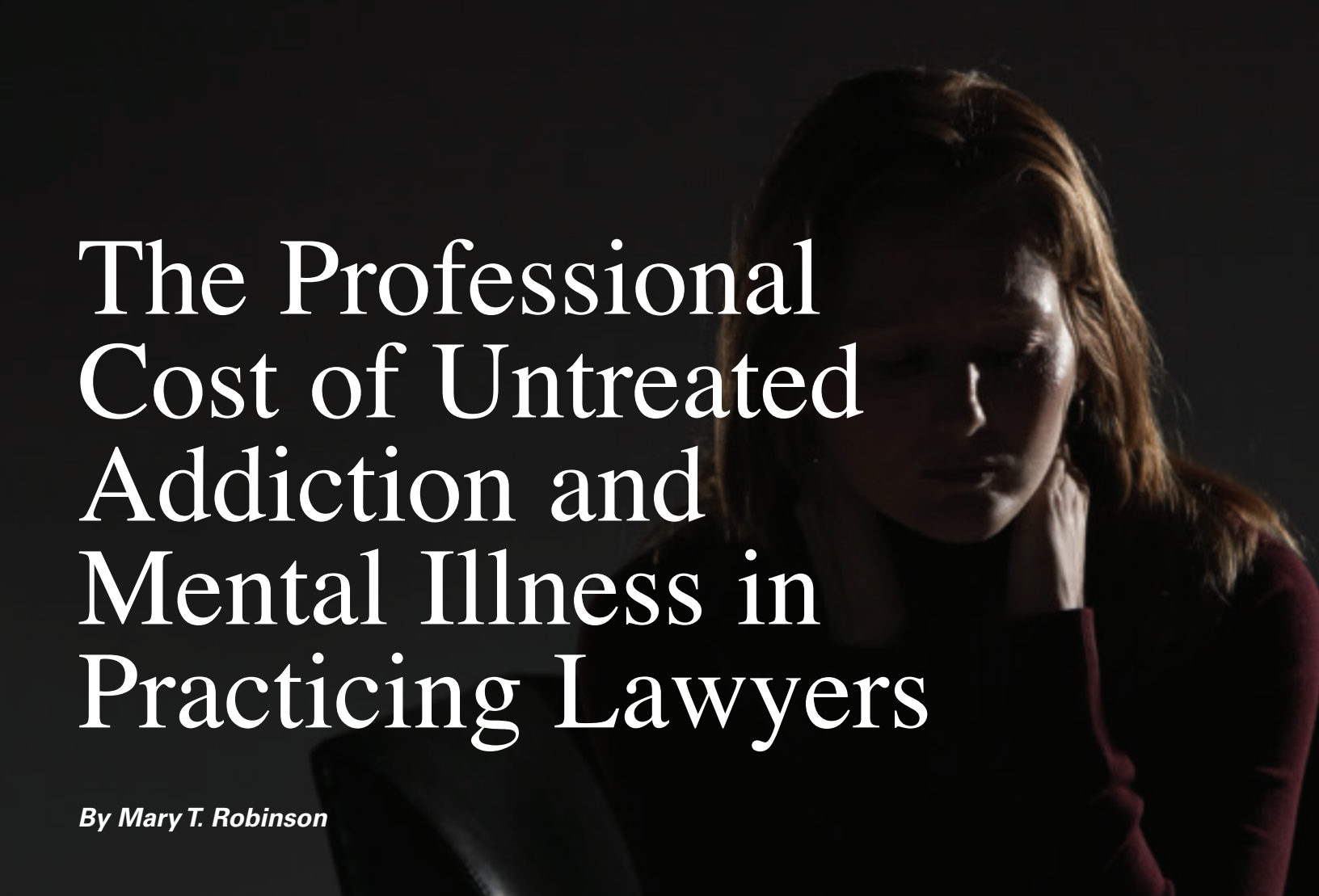


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She is a member of the Board of Trustees of the Farrah Law Society at the University of Alabama, the Alabama Evidence-Based Practices Task Force, the Michael A. Figures Leadership Forum at the University of Alabama School of Law, and the Children’s First Foundation Board of Directors, among others. Huntley earned her J.D. from the University of Alabama School of Law, where she was an editor of the Law & Psychology Review, and her undergraduate degree from Auburn University, where she was named Outstanding Female of the Year.



The Professional Cost of Untreated Addiction and Mental Illness in Practicing Lawyers

By Mary T. Robinson

As Americans and as lawyers, we tend to believe that the personal problems or illnesses of colleagues are just that—personal. We believe in the individual's right to privacy, and we construct laws and practices that protect privacy. We consider it a matter of respect not to inquire about a colleague's personal life unless the colleague invites the inquiry.

That perspective plays an ironic role in allowing mental afflictions, and, in particular, addictive illness to take hold and progress, with dramatically destructive results to the afflicted lawyers and those with whom they interact, including colleagues and clients. Intrinsic to addictive illness is the ability to deny reality as others see it, and those afflicted tend to be surrounded by family, friends and colleagues who protect them from reality, both by taking actions that save them from the consequences of their behavior and by assiduously avoiding naming what seems wrong. Treatment professionals use this analogy: there is an elephant in the living room and everyone pretends it is not there, even as they go through increasingly contorted maneuvers to step around it and clean up its messes.

The reality is that lawyers are almost three times more likely than the general population to suffer from depression and twice as likely to suffer from alcoholism.¹ Lawyers are addicted to illegal drugs, lawyers are gambling and sex addicts and lawyers suffer from serious mental illness, such as bipolar disorder. When these illnesses are not treated, they almost always adversely affect the lawyer's capacity to practice law.

Disciplinary Impact

At least 25 percent of the lawyers who face formal disciplinary charges are identified as suffering from addiction or other mental illness.² Many others belong in that category, but are not counted, ironically, because they are exhibiting symptoms of disease. A surprising number of lawyers default and lose their licenses without ever answering or appearing. Some of those might be making a rational decision to abandon the practice of law and move onto something else, but many more defaulters are immobilized by depression or reduced to shadows of their former selves by addiction. Plus there are many who appear and defend, but they do so in the fog of denial, a unique mix of honest confusion about why life feels out of control and active refusal to acknowledge reality. In some, denial tends to be defiant and off-putting, an aggressive shield against allowing other people to see the symptoms of addiction. For others, the sincerity of the confusion is contagious, and observers are not inclined to question what is going on beneath the surface.

Statistics about addiction and mental illness in discipline cases need to be understood as rather fluid. They can include what has been professionally diagnosed, what the respondent reports, and what observers see as obvious indicators. Even where there has been a professional diagnosis, people can suffer from overlapping addictions and other illness, and when that is the case, it may be years into treatment before each contributing

cause is identified. With that caveat, the illnesses most often identified in the course of disciplinary proceedings are depression and alcoholism. Either standing alone or in tandem, they account for well over half of the cases in which an impairment of some sort has been identified. Addictions to prescription or illegal drugs, and gambling, sex and other behaviors, sometimes along with alcohol addiction or depression, are identified in more than a third of the cases. The more discreet categories of bipolar illness and schizophrenia account for only a small, though dramatic, segment of the cases.

The Disease Model

The conditions which are the focus of this article are all identified as Axis I mental disorders in the Diagnostic and Statistical Manual of Mental Disorders, *Fourth Edition*, published by the *American Psychiatric Association*. An exposition of the medical science on these disorders is beyond the scope of this article and the expertise of the authors. But a few observations on depression and addiction can be helpful.

New technology and understandings are empowering scientists to identify the biological underpinnings of mental illness. Depression has been linked to a shortage of neurotransmitters (serotonin, norepinephrine and/or dopamine) in the brain.³ This shortage can be caused by a combination of factors. Some who suffer from depression have a genetic predisposition. Some have experienced difficulties, such as financial hard times or marital problems that trigger a depressive episode lasting more than several weeks. Some have endured trauma, which, research shows, may cause permanent functional and structural damage to the brain.⁴ Whatever the cause, anti-depressant drugs often help restore the chemical balance and allow the person to function more effectively.⁵

PET (Positron Emission Tomometry) scans of the brains of people who suffer from depression show significantly reduced brain activity, as if the brain were in a state of hibernation. Mental concentration is impaired.⁶

Addictions, whether to alcohol or other drugs, are associated with disruption of brain chemistry. Certain drugs (including alcohol) affect the brain's communication system, interfering with the way nerve cells receive and process information.⁷ Drugs of abuse target the brain's reward system by flooding circuits with dopamine, a neurotransmitter present in regions of the brain that regulate movement, emotion, cognition, motivation and feelings of pleasure.⁸ The brain has inhibitory systems that can mute the stimulation of the messages set off by drugs. But, in addicts, the natural damping circuit, called GABA (gamma-aminobutyric acid), appears to be faulty.⁹ Over-stimulation by the flood of dopamine produces euphoric effects, which the addict seeks to repeat again and again, setting up a cycle of uncontrollable craving.¹⁰ Over time, the flooding causes the brain to produce less dopamine or to reduce the number of receptors that can receive and transmit signals, and that reduces the addict's ability to experience pleasure. Eventually, the addict has to take drugs just to bring dopamine function back up to normal, and it takes progressively larger and larger amounts of the drug to create a dopamine high.¹¹

For those who are addicted, activity in the areas of the brain that control reasoning and judgment is reduced, leaving the addict impulsive and often unable to follow a rational course.

Some people have a genetic predisposition to addiction, but anyone can become an addict if sufficiently exposed to drugs or alcohol.¹² Moreover, behaviors, from gambling to eating to sex, can become addictions, and research is showing similar patterns in brain activity in those afflicted with what the medical profession refers to as these behavior-based "process" addictions.

Although there are pockets of those who disagree, most professionals accept that treatment for alcohol or drug dependence requires total abstinence from all intoxicants, and most prescribe long-term participation in Alcoholics Anonymous (AA), Narcotics Anonymous (NA) or some other 12-step program. Research shows that after a period of abstinence, some areas of brain activity can return to pre-drug states, though the extent of recovery and the time it will take to occur differs depending on the drug(s) that were abused. There is growing evidence that supports a 90-day rehabilitation model, which AA came to embrace through experience (new members are advised to attend a meeting a day for the first 90 days) and which is, or at least used to be, the duration of a typical stint in a treatment program. Research is showing that for many drugs, the brain resets itself and shakes off the immediate influence of the drug within that time frame, and a gradual re-engaging of proper decision-making and analytical functions in the brain's pre-frontal cortex will be seen after an addict has abstained for at least 90 days.¹³

The Fallout: What Impaired Lawyers Do to Become Disciplinary Cases

Lawyers who suffer from depression can become overwhelmed by seemingly routine legal or administrative tasks, sometimes literally unable to bring themselves to look at files, to return phone calls or to open mail (including letters from the discipline agency). Eventually, clients become frustrated and start making complaints because they cannot get information or action. Once discipline agencies start requiring explanations, they often find cases where statutes of limitation have passed or where clients have been defaulted because of the lawyer's inability to act. In some of those cases, they will find that the lawyers misled the clients about what they had or had not done in the case. One of the more painful recurring patterns is known by some disciplinary counsel as "phantom settlement" cases, where, rather than confronting the truth, lawyers will tell clients that a case has been filed and settled and then they actually pay the "settlement" out of their own funds. Of course, once those clients learn what really occurred, nothing can convince them that they have not been cheated out of the full value of what they would have gotten if the lawyer had handled the case properly.

Lawyers who are addicted to alcohol or other drugs eventually become so focused on drinking or using that nothing else matters. They spend more and more time and resources obtaining, using and recovering from using alcohol or another drug of choice. Addicts reduce or give up entirely what they once considered important social, occupational or recreational activities in order to drink or use. They may try time and again to cut down or control consumption, but once that first drink or hit is taken, they are incapable of not moving on to the next and the next. Yet, no matter how many times they fail, they maintain a

belief that the next time they will be able to do it. In the throes of impaired reasoning and judgment and uncontrollable cravings, addicts do things inconsistent with their own long-held values, ethics and beliefs.

Lawyers who are alcoholics or drug addicts neglect cases because they are not thinking clearly; they come to the office in a hangover and they cannot ignore the craving for a drink or a fix to get through the day. They take retainers they will never earn, convincing themselves that they will be able to get it together with one more valiant try, or they dip into funds they are holding for clients to stave off collectors and to feed their habits. They lie to cover omissions or missed due dates. They come to court late and unprepared and insult judges and opponents. They sometimes commit crimes. Some do each and every one of those things many times over.

What Colleagues Need to Know

Addiction often builds slowly, and it can be difficult to see the changes that signal that a colleague is in trouble. The same can be true for depression. Add to the equation our professional reluctance to interfere in a colleague's personal life or to question a partner's capacity or integrity, and it becomes fairly clear how easily we can slip into inertia, blind to the signals that our own professional life may be endangered because our colleague has lost the capacity to practice diligently or ethically.

No one wants to start pointing fingers when a partner takes a few long lunches, or when those lunches extend later and later. No one wants to draw any conclusions when a partner becomes more and more irritable, and then angry, and then explosive, especially as the day wears on. Maybe it's not fair to be judgmental when a partner has failed to come through on a commitment. Why worry that he has some clients who are complaining? Why doubt when she says that her secretary forgot to put something in the mail or the other side never served her or her computer crashed?

It is not that any one of those behaviors should cause us to wonder. Instead, it is the recognition that several things feel differently and out of character.

Sometimes a clear signal that something is wrong is how we ourselves feel toward the colleague. When someone we have known to be trustworthy starts to lie to us, we will not believe it at first. And then we may get angry or hurt or disapproving or all of those things. After we step up to help someone out of one too many problems, we may start to feel used. Or we find ourselves becoming resentful when, having once enjoyed frank and comfortable conversations, we start to recognize that interactions have become superficial and uneasy, with topics that might bring any failings into the open having become absolutely off-limits.

What may be most difficult, particularly about addiction, is that it is decidedly and inherently irrational. All of those superior reasoning skills that serve us so well in our work as lawyers are not particularly helpful, and sometimes those skills actually get in the way of understanding what is going on.

So why even try? One reason is that many of us are legally accountable for the malfeasance of our colleagues, and stand to lose money and reputation if we do not recognize what is going on before the damage has been done. Another reason is that addiction and depression are terrible places to be, and if the person who is afflicted happens to be someone we care about, we will not want to look the other way. Depression leads to suicide, as do addic-

tions. Addiction is a progressive disease that is eventually fatal.

Most states have lawyer assistance programs, with staffs and volunteers who are well versed in the symptoms and treatment options for addiction and other mental illness. Most of the programs are protected by a privilege that allows staff members and volunteers to confer confidentially with lawyers who come for help because they themselves have problems or because they are concerned about a colleague. A call to a lawyer assistance program can yield confirmation of what appears to be wrong, advice about what else to look for or referrals to information or professionals that might help decide whether or what concrete action is called for. Some lawyer assistance programs and many treatment centers provide help in arranging assessments or interventions that could get the afflicted lawyer to appropriate treatment. ▲▼▲

Endnotes

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The VLP, Matlock and Perry Mason

By Pamela H. Bucy

“**W**e may not have had lights but we could still tell jokes.” That’s how Mrs. Bradley,¹ her husband and their four children made it through the six hard years that began when their home burned to the ground. For one and one-half years immediately after the fire, the family of six lived in one room with two beds at a roach-infested hotel where drug deals, prostitution and police raids were common. That hotel was the only place they could afford. When their money ran out and they could no longer stay there, they moved back to their unfinished house. There they lived without water, electricity or heat for another year.

The fire that destroyed the Bradley’s home started in the kitchen and spread to the entire house. Fortunately, no one was hurt, but the house was a total loss. Fully insured, the Bradleys received a lump-sum payment from their insurer to rebuild their home. They carefully investigated contractors, settling on one who did an excellent job renovating their church. They signed a contract and began paying him.

At first, the contractor appeared to be doing a good job. He started quickly on their home and brought out work crews. Soon, though, he started asking for advance payments, explaining that because of Katrina, building materials and

work crews were more expensive. Trusting him, the Bradleys gave him one advance payment after another. Work slowed on their house, and then stopped. Their contractor always had an excuse: “I was sick. I had to go to the doctor.” Then, the Bradleys discovered that their contractor was lying, telling his subcontractors and the Bradleys’ neighbors, that the Bradleys had not paid him and that was why he stopped working on the house.

Their contractor quit showing up and the Bradleys had given him all of their insurance money. Living at the hotel was miserable. The drug-dealing, prostitution and filth were getting worse. The Bradley’s four children could not go outside because it wasn’t safe. Throughout the summer, when they were out of school, all the children could do was watch television, play games and, as their dad said, “make up games.” There was no money to take them to do anything else. The family’s single hotel room grew more unbearable.

Frustrated, and out of insurance money for living expenses, the Bradleys moved back to their unfinished house. Boxed-up toilets and sinks sat on the living room floor. It was cold, then unbearably hot. Without electricity, there was no heat and no air conditioning. There was no water. As the Bradley’s youngest child, now 12, explained, “We had to bring in water in

Milo’s jugs.” They had to cook on a kerosene stove.

The Bradleys took out loans and dipped into their retirement savings to buy materials for the house, materials they had already paid for but were nowhere to be seen. They began doing the work themselves. Aware now that they had been cheated by the contractor, the Bradleys consulted several attorneys but did not have the money to hire one. Then they went to Legal Services of Birmingham for help. That is how they heard about the Volunteer Lawyers Program and met Chris Williams of Maynard, Cooper & Gale², their VLP lawyer.

Started in 1991, the Alabama State Bar’s VLP recruits lawyers throughout the state to provide, pro bono, up to 20 hours of legal services per year for those who cannot afford them.³ Legal Services Alabama screen cases that come to their offices to determine if they are appropriate for referral to VLP attorneys. Cases which meet the following criteria are eligible for referral to the VLP: (1) the case involves certain issues of law⁴ and (2) the case is simple, straightforward and appears to be resolvable within 20 hours or less.⁵ In Alabama, 23 percent of licensed attorneys are volunteers in the VLP.⁶

Mrs. Bradley told what happened next. “Our backs were against the wall. It looked

like every door was shut. After Chris got involved, we started seeing results.” Six months after Williams was assigned to the Bradley’s case, they received a settlement from the contractor and were able to have their house completed.

Williams and one of his colleagues, Gregg McCormick, another associate at Maynard, Cooper & Gale, worked hard on the Bradleys’ case. First, they sent a demand letter to the contractor. Receiving no response, they filed a complaint and a motion for summary judgment. The contractor hired an attorney and litigation began. Williams and McCormick filed discovery requests and deposed the contractor. The Bradleys were present at the deposition and described their lawyers with pride: “Chris and Gregg were like ‘Matlock and Perry Mason.’” Their pride was justified. Under their questioning, the contractor admitted that he had breached the contract.

Williams and McCormick were worried, however, that the contractor would declare bankruptcy before they collected a judgment for the Bradleys. Acting quickly, they hammered out a settlement with the contractor, structuring his payments to the

Bradleys with penalties if he failed to pay on time. The contractor made his last in spring 2009.

How much time did the Bradleys’ VLP attorneys put in on their case? With multiple attorneys, a paralegal and other support staff, the total came to 177 hours. Was it worth it? You decide. Here’s what Mr. Bradley had to say about Williams: “He’s a lawyer but he’s like a good friend to us.” Today, six years after burning down, their house is a two-story, spacious home surrounded by green grass and flower beds. ▲▼▲

Endnotes

1. Pseudonym
2. Chris Williams received the Alabama State Bar’s 2009 Volunteer Lawyers Pro Bono Award.
3. Individuals qualify as VLP clients if they live below the poverty level, which is currently \$13,538 gross income per year for an individual, or \$27,563 gross income per year for a family of four.
4. Adoption—by relatives with consent of natural parents; Bankruptcy—Chapter 7; Child Support Modification—caller has major change in circumstances; Collections—small claims with attorney on other side; Contracts and Warranties; Custody—by

agreement; Divorce—uncontested parties are separated or defendant’s whereabouts are unknown; Education; Guardianship of Child—if needed to enter child in school; Guardianship of Adult—person not of sound mind or medical condition prevents person from caring for self; Home Ownership—deed preparation, pre-foreclosure negotiation or land dispute; Landlord/Tenant—private housing; Legitimations—by consent; Name Change—adult and minor; Power of Attorney; Probate—wills, living wills or small-estate administration; Tax; Tort Defense; Visitation Change—by agreement.

5. The average VLP case actually takes five and one-half hours to resolve.
6. If you would like to volunteer for the VLP, go to the Alabama State Bar’s Web site (www.alabar.org) and click on the VLP link.



Pamela H. Bucy is the Bainbridge-Mims Professor of Law at the University of Alabama. She has served as a member of the Alabama State Bar Access to Legal Services Committee, as an at-large bar commissioner and as vice president of the Alabama State Bar.



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J. ANTHONY MCLAIN

A close-up photograph of a person's hand, wearing a white shirt cuff and a grey suit sleeve, resting on the cover of a dark brown leather book. The book has gold lettering on the cover and spine. The background is a wooden surface.

Ethical Obligations of a Lawyer When His Client Has Committed or Intends to Commit Perjury

QUESTION:

What are a lawyer's ethical obligations when his client reveals his intent to commit perjury? What are a lawyer's ethical obligations when a lawyer learns that a client has committed perjury?

ANSWER:

Regardless of whether the lawyer is representing a civil client or a criminal client, the lawyer's ethical obligations remain the same. Where a client informs counsel of his intent to commit perjury, a lawyer's first duty is to attempt to dissuade the client from committing perjury. In doing so, the lawyer should advise the client that if the client insists on committing the proposed perjury then the lawyer will be forced to move to withdraw from representation. The lawyer should further explain that he may be required to disclose the specific reason for withdrawal if required to do so by the court. If the client continues to insist that they will provide false testimony, the lawyer should move to withdraw from representation.

When a lawyer has actual knowledge that a client has committed perjury or submitted false evidence, the lawyer's first duty is to remonstrate

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with the client in an effort to convince the client to voluntarily correct the perjured testimony or false evidence. If the client refuses to do so, the lawyer has an ethical obligation to disclose the perjured testimony and/or submission of false evidence to the court.¹

DISCUSSION:

Having a client threaten to commit perjury or actually committing perjury is one of the most difficult ethical dilemmas a lawyer can face. The lawyer is torn between his loyalties to the client and his duties as an officer of the court. In the context of the civil client, however, Rule 3.3, *Ala. R. Prof. C.*, and its Comment clearly require the lawyer to place his duties as an officer of the court above his duties of loyalty and confidentiality to the client. Rule 3.3 provides as follows:

RULE 3.3—CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

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

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

The Comment to Rule 3.3 provides in pertinent part as follows:

Comment

* * *

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could, in effect, coerce the lawyer into being a party to fraud on the court.

* * *

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is

to confidentially remonstrate with the client. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer’s version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

* * *

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

As such, a lawyer may not submit false evidence to a court or assist a client in doing so. When a lawyer learns that a client intends to commit perjury or to offer false testimony, the lawyer should counsel the client not to do so. The lawyer should inform the client that if he does testify falsely, the lawyer will have no choice but to withdraw from the matter and to inform the court of the client’s misconduct. If the client insists on testifying falsely, the lawyer should refuse to offer the perjured testimony or should immediately move to withdraw from the representation.² In counseling the client, the lawyer should inform the client that if the client continues to insist on testifying falsely, then the lawyer will be required to withdraw. The lawyer should further explain that he may be required to disclose the client’s intentions to the court, if the court requires the lawyer

to disclose a specific reason for the withdrawal.

Some states, such as Florida, in Formal Opinion 04-1, require the lawyer to affirmatively disclose the client’s intent to testify falsely to the court upon withdrawal. According to the opinion, “[i]f the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyer’s ethical obligations, because withdrawal alone does not prevent the client from committing perjury.” However, Florida requires a lawyer to reveal any information that is necessary to prevent a client from committing a crime, including the crime of perjury.

Alabama has no such counterpart in the *Rules of Professional Conduct*. Rather, Rule 1.6, *Ala. R. Prof. C.*, provides as follows:

1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or



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to respond to allegations in any proceeding concerning the lawyer's representation of the client. Under Rule 1.6, a lawyer is permissively allowed to disclose confidential information only when disclosure is required to prevent a client from committing a criminal act that is "likely to result in imminent death or substantial bodily harm . . ." The crime of perjury does not fall within this narrow exception to Rule 1.6. As such, the lawyer is not, upon withdrawal, required to disclose the client's intent to commit perjury. However, if the court requires the lawyer to disclose the specific reason for his withdrawal, the lawyer may disclose the client's intent to commit perjury.

When a lawyer learns of the client's perjury after the fact, Rule 3.3 requires the lawyer to immediately take

remedial measures to correct the client's misconduct. Ordinarily, the lawyer should first remonstrate with the client in an attempt to convince the client to, of his own volition, inform the court and/or the opposing party of his misconduct. In doing so, the lawyer should explain that if the client refuses to do so, the lawyer will have no choice but to inform the court of the client's actions. If the client refuses to disclose his misconduct, then the lawyer has a duty to inform the court and/or opposing party of the false evidence or testimony.

Obviously, a lawyer's ethical responsibilities do not continue *ad infinitum*. Rule 3.3(b), *Ala. R. Prof. C.*, provides that the duties under Rule 3.3 only continue to the conclusion of the proceeding. For example, if a lawyer learns that his client testified falsely after the conclusion of the case, the lawyer would not have a duty to disclose the fraud to the court. The Disciplinary Commission has determined that a proceeding is concluded when a certificate of judgment has been issued or the time has expired for all post-trial motions or pleadings.

It is also important to distinguish between a lawyer's actual knowledge versus a reasonable belief or suspicion that the client has lied or offered false evidence. Where a lawyer has actual knowledge that a client has testified falsely, then the lawyer would be required to comply with Rule 3.3. When a lawyer does not have actual knowledge, but rather only a reasonable belief that the client has lied or offered false evidence, then the lawyer would not have any obligation to disclose his suspicions to the court or the opposing party. Rather, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. . . a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. . ." *ABA Annotated Model Rules of Professional Conduct, 316-317, 6th Edition. (2007)*. However, Rule 3.3(c), *Ala. R. Prof. C.*, does allow a lawyer to refuse to offer evidence on behalf of a client that the lawyer reasonably believes to be false.

LEGAL SERVICES CORPORATION

Notice of Availability of Competitive Grant Funds for Calendar Year 2011

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2011. A Request for Proposals (RFP) and other information pertaining to the LSC grants competition will be available from www.grants.lsc.gov on April 8, 2010. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. The listing of service areas for each state and the estimated grant amounts for each service area will be included in Appendix A of the RFP. Applicants must file a Notice of Intent to Compete (NIC) in order to participate in the competitive grants process. The NIC will be available from the RFP. Please refer to www.grants.lsc.gov for filing dates and submission requirements. E-mail inquiries pertaining to the LSC competitive grants process to competition@lsc.gov.

While the Comment to Rule 3.3 also addresses the ethical obligations of lawyers in their representation of criminal clients, the outcome is less clear. First and foremost, “[t]he level of knowledge sufficient to trigger the prohibition against presenting a client’s false testimony is high for criminal defense counsel.” *ABA, Annotated Model Rules of Professional Conduct, 317, 6th Edition. (2007)*. Ordinarily, a lawyer must abide by the client’s decision to testify unless he actually knows that the testimony will be false. In regard to the representation of criminal clients, the Alabama Comment provides, in pertinent part, as follows:

Comment

* * *

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer’s duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer’s effort to rectify the situation can increase the likelihood of the client’s being convicted as well as open the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer’s questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the

client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client’s perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the

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OPINIONS OF THE GENERAL COUNSEL Continued from page 163

commission of perjury or other falsification of evidence. See Rule 1.2(d).


Under the Comment to Rule 3.3, it is clear that a lawyer cannot actively assist a criminal client in presenting false evidence or false testimony to the court. The closer question, however, appears to be whether a criminal defense lawyer may use the narrative approach so as to not infringe upon his client's Sixth Amendment rights and still be in compliance with his ethical responsibilities under Rule 3.3.

Both the *Annotated Model Rules of Professional Conduct* and *The Law of Lawyering* note that the Supreme Court of the United States disapproved of the narrative approach in dictum in *Nix v. Whiteside*, 475 U.S. 157 (1986).³ In *Nix*, the court granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel was violated when a lawyer refused to cooperate with the defendant in presenting perjured testimony. The defendant was on trial for murder. The defendant had stabbed the victim after he believed that the victim was reaching for a gun. Throughout the representation, the defendant repeatedly told his lawyer that he had not actually seen a gun in the victim's hand. However, just prior to trial, the defendant announced to his lawyer that he would testify that he saw something "metallic" in the victim's hand.

The lawyer told the defendant that such testimony would be perjury and that he would withdraw from representation if the client insisted on testifying as such. The lawyer also told the defendant that if he did so testify, he would inform the court of the perjury. *Id.* at 161. After testifying truthfully at trial and being convicted of murder, the defendant moved for a new trial based on the alleged denial of his Sixth Amendment right to effective assistance of counsel because his defense counsel would not allow him to testify that he saw a gun or something "metallic." *Id.* at 162.

In rejecting the defendant's claims, the court noted that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." *Id.* at 173. The court went on to note that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." *Id.* As such, a criminal defendant does not have a right to testify falsely on his own behalf or have the assistance of counsel in doing so.

It is the opinion of the Disciplinary Commission that a lawyer's use of the narrative approach to allow a client to testify falsely would be inconsistent with the requirements of Rule 3.3 and inconsistent with a lawyer's obligations as an officer of the court. As a result, the Disciplinary Commission has determined that under Rule 3.3, a lawyer's ethical obligations remain the same, regardless of whether the lawyer is representing a criminal client or a client in a civil matter.

The Disciplinary Commission has also determined that these obligations apply equally to prosecutors in a criminal case. Just as a defense attorney would have an obligation to disclose perjury committed by a criminal defendant, a prosecutor would have a duty to disclose perjury committed by a prosecution witness during direct examination. The duty to disclose the false testimony of the witness would apply regardless of whether the prosecutor deems the false testimony as exculpatory or material under the *Brady*⁴ standard. [RO-2009-01] 

Endnotes

1. This opinion is consistent with ABA Formal Opinion 87-353.
2. Hazard & Hodes, *The Law of Lawyering*, § 29.13. 3rd Edition (2005).
3. Hazard & Hodes, *The Law of Lawyering*, § 29.19. 3rd Edition (2005). ABA, *Annotated Model Rules of Professional Conduct*, 317, Sixth Edition (2007).
4. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

2010: The Legislature Begins

On Tuesday, January 12, 2010, the Alabama legislative term began and will continue for 105 calendar days, with its last day no later than Monday, April 26, 2010.

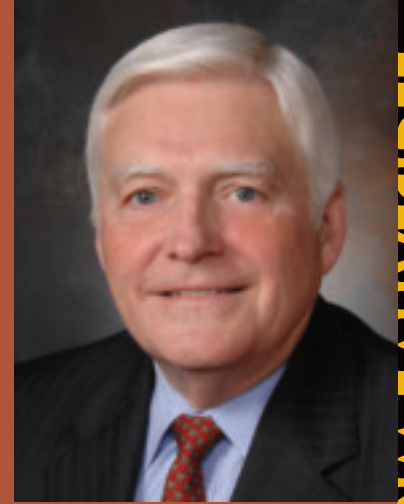
This is a big election year for the state of Alabama. The governor, Lt. governor, supreme court justices, all members of the house and senate, sheriffs, district attorneys, and all other constitutional officers will be elected. The last day for qualifying will be April 2, 2009, with the primary election day being Tuesday, June 1, 2009. The primary run-off will be July 13.

The public often thinks that legislators are predominately lawyers, while in fact, fulltime legislators have now become the largest occupational group in state legislatures. Previously, attorneys *were* the largest occupational group but the number in state legislatures has decreased substantially nationwide over the last three decades, from about 25 percent in the 1970s to only 15 percent today. Now the largest group is fulltime legislators, comprising 16.4 percent of the legislators. This is up from 2.7 percent in the '70s; however fulltime legislators are still relatively low in Alabama at 5 percent. The third largest group of legislators is retired persons, making up about 12 percent, both nationally and in Alabama.

In Alabama, the biggest block of people are those who are business-owners or business employees, which compiles 26.5 percent of the legislature. Educators, either employed at colleges or in grades K-12, comprise 14.3 percent. Other facts about legislators are as follows, showing the first number being Alabama and the parentheses being the national statistic. Ethnically, 77 percent (88 percent) of legislators are Caucasian, with 23 percent (10 percent) Afro-American. Gender ratio shows men at 88 percent (78 percent) and female at 12 percent (88 percent). With respect to age, the distribution of those 65-plus years is 36 percent (23 percent), 50 to 64 years is 40 percent (49 percent), 35 to 49 years is 22 percent (25 percent), and under 34 years is 2 percent (3 percent), with the overall average age of a state legislator in the United States being 56 years old.

For the past two decades, 23 percent of senate seats and 26 percent of the house seats have been filled by Afro-Americans. No other state has a greater percentage of minority representation in the senate as Alabama, and only Mississippi exceeds Alabama with minority legislators in their house of representatives. This is especially significant nationwide where only 8 percent of the state senators and 9 percent of the state house members are Afro-Americans.

There is a higher percentage of lawyers in the southeast who are members of the legislature than nationally: Alabama—17.1 percent, Florida—24.1 percent, Georgia—17.8 percent, Louisiana—26.4 percent, Kentucky—21.3 percent, North Carolina—19.4 percent, South Carolina—23.8 percent, and Virginia—30 percent.



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 WRAP-UP

Continued from page 165

In the Alabama senate, there are currently 21 Democrats and 14 Republicans, while in the house of representatives there are 60 Democrats, 44 Republicans and one vacancy. In the surrounding states, both Tennessee and Mississippi legislatures are Democratic while Georgia and Florida are controlled by the Republicans. The Republicans control both houses of the South Carolina legislature, while both houses of North Carolina's legislature are controlled by Democrats. All of these are up for election in 2010.

The above information was compiled by the National Conference of State Legislatures and may be found at www.NCSL.org.

With the elections now eminent, candidates cannot solicit or receive contributions beginning the first day of the legislature, January 12, 2010 (Section 17-5-7(b)(2)). Republican and Democratic parties will end state qualifying on April 2, 2010.

Alabama has no limitation on the number of terms a person may serve in the legislature. Sixteen states do have a limit and six more, at one time, had term limits that have since been repealed. The dean of the senate, Senator Bobby Denton, first elected in 1978, will be retiring, while the dean of the house, Alvin Holmes, was first elected in 1974 and is again seeking reelection. Approximately half of the members of the house have been legislators for less than ten years, while approximately one-third of the senate has served for less than ten years.

Nationally, the pay of state legislators varies greatly from a low of \$100 a year in New Hampshire to a high of \$116,000 in California. Alabama is in the middle with compensation at approximately \$47,000. This includes expenses since their legislative salary of \$10 a day was set in the 1901 Constitution.

Law Institute Legislative Presence:

The Law Institute has proposed for the 2010 legislature the following acts:

- Alabama Trademark Act Amendments;
- Adult Guardianship Jurisdiction Act;

Child Abduction Protective Proceedings Act; and
Residential Mortgage Satisfaction Act

Summaries of these acts can be found in the September and November 2009 editions of *The Alabama Lawyer*. Copies of these acts and the commentary can be found at www.ali.state.al.us.

Assisting in the legislature this year are the following lawyers who serve as counsel to the house of representatives committees:

- Bill Messer, Montgomery
- Samuel A. Rumore, Jr., Birmingham
- Al Vance, Birmingham
- Karen Mastin-Laneaux, Montgomery
- Charlanna W. Spencer, Montgomery
- Trina S. Williams, Montgomery
- Sandra Lewis, Montgomery
- Scott T. McArdle, Montgomery
- Charles Prince, II, Birmingham
- Bill Espy, Montgomery
- Fred Gray, Sr., Tuskegee
- William B. Sellers, Montgomery
- Bob McCurley, Tuscaloosa
- LaVeeda M. Battle, Birmingham
- Brandi C. Williams, Birmingham

Also serving as counsel to the senate are the following lawyers:

- Bill Messer, Montgomery
- Teresa Norman, Montgomery
- Misha Mullins Whitman, Montgomery
- LaVeeda Battle, Birmingham
- Pat Rumore, Birmingham
- Scott T. McArdle, Montgomery

The Institute provides 16 interns to the house and senate during the session. These students must be at least juniors in college and will provide constituent services and legislative assistance to members of the legislature.



Reinstatement

- The Supreme Court of Alabama entered an order reinstating **Todd Houston Barksdale** to the practice of law in Alabama, effective November 17, 2009. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Barksdale was suspended from the practice of law for one year, effective April 11, 2008. Barksdale admitted to forging the signature of his client's wife to documents, notarizing same and falsely attesting that the client's wife, in fact, signed the documents. Barksdale then executed the documents and recorded them at the courthouse. [Rule 28, Pet. No. 09-2263]

Disbarments

- The Supreme Court of Alabama entered an order disbaring Montgomery attorney **William Bell Blount** from the practice of law in Alabama, effective November 12, 2009. On October 9, 2009, an order was entered by Panel I of the Disciplinary Board of the Alabama State Bar accepting the surrender of the law license of Blount, for a period of five years. This order was entered pursuant to Blount's having filed a surrender of license on October 2, 2009.
- The Supreme Court of Alabama entered an order disbaring Birmingham attorney **Robert Hunter Ford** from the practice of law in Alabama, effective November 15, 2009. On October 8, 2009, the Disciplinary Board, Panel II, entered an order accepting the surrender of the license of Ford. This order was entered pursuant to Ford's having filed a surrender of license on October 2, 2009. [Rule 23, Pet. 09-2361; ASB nos. 06-92(A), 09-1578(A) and 09-1958(A)]

DISCIPLINARY NOTICES

Continued from page 167

- Tuscaloosa attorney **Tari DeVon Williams** was disbarred from the practice of law in Alabama, effective October 13, 2009, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Williams's consent to disbarment. Williams entered a guilty plea in federal court to an information containing one count charging her with obstruction of justice in violation of 18 U.S.C. §1503. Said count involved Williams's actions in a pending federal investigation of her husband. [Rule 23, Pet. No. 09-2456; ASB No. 09-2430]

- Birmingham attorney **Daryl Patrick Harris** was summarily suspended from the practice of law in Alabama pursuant to Rule 8(e) and Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective December 2, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Harris had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 09-2677]

Suspensions

- Brundidge attorney **Robert Jeffrey Davis** was intermly suspended from the practice of law in Alabama pursuant to Rule 8(c)(2) and Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective October 30, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Davis had been charged with a serious crime. Davis voluntarily consented to an interim suspension pending outcome of the criminal charges. [Rule 20(a), Pet. No. 09-2574; ASB No. 09-2152(A)]
- Irvington attorney **Ronald Ray Goleman, Jr.** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for 91 days. The Disciplinary Commission ordered that said suspension be held in abeyance and Goleman be placed on probation for a period of two years pursuant to Rule 8(h), *Alabama Rules of Disciplinary Procedure*. The Disciplinary Commission accepted Goleman's conditional guilty plea wherein he pled guilty to violations of rules 1.15(a), 1.15(b) and 8.4(a), *Alabama Rules of Professional Conduct*. Goleman failed to timely remit settlement funds to a client and used these funds to benefit another client. [ASB No. 09-1552(A)]

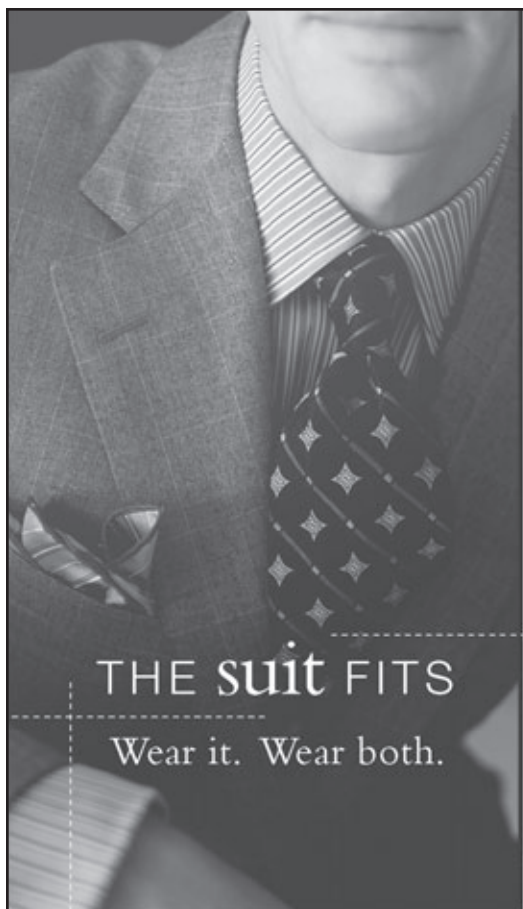
Public Reprimands

- On September 11, 2009, attorney **Loretta Denise Collins**, formerly of Gadsden, received a public reprimand without general publication for having violated rules 1.5(a) and 1.5(c), *Ala. R. Prof. C.* On May 20, 2008, Panel IV of the Disciplinary Board determined that the fees Collins charged the complainant were clearly excessive. This decision was based upon the evidence presented at the hearing held April 15, 2008. In or about July 2003, the complainant retained Collins to represent her in an estate matter. Collins and the complainant agreed to a \$6,000 fee plus \$150 per hour thereafter. After liquidating an investment account in February 2004, Collins deducted a \$50,000 fee from the estate assets without her client's approval. The complainant retained new counsel to close the estate and to file a malpractice action against Collins. The complainant was able to recover a portion of the disputed fee. When her new counsel began working on the estate, he discovered that very little had been accomplished in the matter. He also estimated that he would have charged approximately \$2,000 to close the estate and that the legal issues involved in the matter were not complex. However, due to the excessive fee Collins previously charged, new counsel completed the estate matter *pro bono*. [ASB No. 05-42(A)]

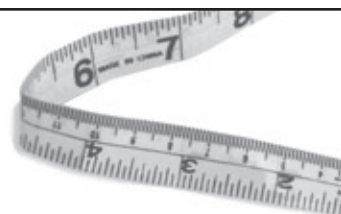
- On September 11, 2009, Gadsden attorney **John Edward Cunningham** received a public reprimand with general publication for violations of rules 8.4(a), 8.4(b), 8.4(c) and 8.4(g), *Alabama Rules of Professional Conduct*. Cunningham's prior discipline was also considered by the Disciplinary Commission. In November 2005, Cunningham was found guilty of failure to pay occupational license fee return. He was sentenced to 30 days, suspended and placed on probation with conditions for two years. On April 18, 2006, a notice to appear and show cause was entered in the Municipal Court of Gadsden, stating that Cunningham had not complied with the terms of his probation. At the hearing, Cunningham was found guilty, fined \$300 and sentenced to serve 60 days in the county jail. He was ordered to serve 48 hours with the remaining 58 days suspended and he was placed on probation for two years with conditions. Cunningham was to report to jail April 21, 2006 to

begin serving his sentence. Cunningham failed to report to serve the 48 hours and, therefore, on May 30, 2006, his probation was revoked and he was ordered to serve the original sentence of 60 days and pay a fine. [ASB No. 06-109(A)]

- Birmingham attorney **David Paul Dorn** received a public reprimand with general publication on October 30, 2009 for a violation of rules 1.3, 1.4(a), 1.4(b), 1.16(d), 8.1(a), and 8.1(b), *Alabama Rules of Professional Conduct*. Dorn was retained to represent a client in a divorce action and paid a \$5,000 fee. The client understood that the divorce complaint would be filed and served promptly. The client went out of state awaiting service of the complaint on her husband. Dorn did not file the complaint for divorce until more than two months after he had been retained; did not provide his client with a copy of the complaint and did not advise her that her husband had



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DISCIPLINARY NOTICES

Continued from page 169

been served. During the representation Dorn did not reasonably communicate with his client. Dorn explained the reason he did not communicate with his client during an extended period of the representation was that he thought she had reconciled with her husband. However, he took no action to confirm the reconciliation with his client. The client terminated Dorn's representation and demanded a full refund. Dorn did not promptly refund the unearned portion of the retainer. He explained that he waited to make the refund because he was waiting on an order from the court granting his motion to withdraw. When asked to produce a copy of the motion, Dorn failed to respond. Further, Dorn, when terminated, failed to take action reasonably necessary to protect his client's interests. [ASB No. 08-46(A)]

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5 BEST

- Montgomery attorney **John Scott Hooper** received a public reprimand without general publication on October 30, 2009 for a violation of Rule 8.4(c), *Alabama Rules of Professional Conduct*. Hooper hired an expert witness in a case who performed an evaluation and testified at a deposition. During the deposition, the expert witness testified what his daily rate was. Later, when the case was settled, Hooper did not pay the expert witness. When contacted by the expert witness, Hooper told him he did not make enough money off the case to pay his entire fee, but would pay him a lesser amount. The expert witness declined his offer. Hooper ignored the invoice and claimed that the expert witness's testimony was flawed and alleged that he did not deserve the full fee. However, Hooper later paid the fee in full. [ASB No. 08-121(A)]
- Birmingham attorney **Anthony Chuma Ifediba** received a public reprimand with general publication on October 30, 2009 for a violation of Rule 7.3, *Alabama Rules of Professional Conduct*. Ifediba allowed an employee to directly solicit professional employment on Ifediba's behalf from an individual who was involved in a motor vehicle accident with whom Ifediba had no familial or current or prior professional relationship. [ASB No. 08-40(A)]
- On October 30, 2009, Birmingham attorney **Stewart Gregory Springer** received a public reprimand without general publication for violations of rules 8.4(d) and 8.4(g), *Alabama Rules of Professional Conduct*. In or about July and August 2006, during an incumbent judge's re-election campaign, Springer was a guest on a radio talk show. Springer used the talk show as a forum in which he made disparaging comments about the incumbent judicial candidate. Springer also distributed fliers at the courthouse which were highly critical of the judicial candidate. Springer's comments attacked the judicial candidate's qualifications and integrity. These statements undermined the public perception of the court and, therefore, were prejudicial to the administration of justice. Springer's actions also adversely reflected on his fitness to practice law. [ASB No. 06-128(A)]

- On October 30, 2009, Bessemer attorney **James Gordon Stevens** received a public reprimand with general publication for violations of rules 1.4(a), 1.4(b), 1.15(b) and 1.16(d), *Alabama Rules of Professional Conduct*. In or about January 2007, the complainant paid Stevens a retainer of \$5,000 to represent him and his former company in a civil matter. The complainant noted on the check that it was a retainer. Stevens told him that he would bill him against the retainer at a rate of \$300 per hour and deposited the check into his trust account. In the court file, Stevens discovered that the complainant had not been served with the civil complaint and that the statute of limitations was about to expire. Stevens advised the complainant to "lay low" and allow the statute of limitations to run. In July 2007, Stevens informed the complainant that he had expended approximately six hours on the case and advised him to await the outcome. The case was settled in October 2007, and the claims against the complainant were dismissed. Although the complainant repeatedly requested an accounting, Stevens failed to provide him with one. Later, Stevens told the complainant that the fee was not a retainer but was actually a flat fee. Stevens never entered an appearance, never attended any depositions, never filed a responsive pleading and did not participate in the mediation. Stevens failed to keep the complainant reasonably informed about his case. He collected an excessive fee in relation to the services he performed and did not communicate to the complainant the basis or rate of his fee. Stevens also failed to return any unearned fees. [ASB No. 08-50A]



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

About Members

Brian W. Moore announces the opening of **The Law Firm of Brian W. Moore LLC** at the Aliant Center, 2740 Zelda Rd., Fourth Fl., Montgomery 36106. Phone (334) 293-0568.

J. Bradley Ponder announces the opening of the **Law Office of J. Bradley Ponder PC** at 286 Magnolia St., Lincoln 35096. Phone (205) 763-1232.

Balch & Bingham LLP announces that **Todd Lowther, Brent Cobb, Steven Burns, Jeremy Retherford, and Walter McKay** have joined as partners.

Brett Bloomston and **Joseph J. Basgier III** announce the formation of **Bloomston & Basgier** at 1330 21st Way, S., Ste. 120, Birmingham 35205. Phone (205) 212-9700.

Bradley Arant Boulton Cummings LLP announces that **Timothy Peter Cummins, Charles M. Furguson, Jr., Jennifer J. McGahey, John Neiman, Jr., J. Andrew Robison, and R. Thomas Warburton** have been named partners.

Burr & Forman LLP announces that **Anna L. Scully** and **Jason B. Nimmer** have joined as associates.

Charley M. Drummond and **David Jamieson** announce the opening of **Drummond & Jamieson LLC** at 205 20th St. N., Ste. 636B, Birmingham 35203. Phone (205) 701-1201.

Christian & Small LLP announces that **Deborah Alley Smith** has been elected the firm's managing partner and **Bradley R. Hightower** and **John W. Johnson, II** have been named partner.

Among Firms

Adams & Reese announces **M. Ann Huckstep** has been named partner in charge of the Birmingham office and **Ashley Steven Harris** has been named a partner in the Mobile office.

The **Anniston Army Depot Legal Office** announces that **Polly E. Russell** and **Kyle C. Barrentine** have joined as depot counsel.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **Marianne H. Combs, Daniel J. Ferretti, Jennifer H. Johnson** and **Jason M. Meyerpeter** have joined the firm.

ABOUT MEMBERS, AMONG FIRMS

Continued from page 173

Estes, Sanders & Williams LLC announces that **Fisher E. Wise, Timothy M. Allen, R. Matthew Elliott** and **Robert Hornbuckle** have joined the firm.

Thomas S. Hales, Terry A. Sides and **G. Meador Akins** announce the formation of **Hales, Sides & Akins LLC** at 400 Berry Building, 2015 Second Ave., N., Birmingham 35203. Phone (205) 453-9801.

Hand Arendall announces that **Wes Hunter** has become an associate and **Anne G. Burrows**,

Lane Finch and **Mark Hart** have become partners.

Sharon Hindman Hester and **C. Shane James** announce the opening of **Hester & James LLC** at 13830 Hwy. 43, S., Ste. B, Russellville 35653. Phone (256) 332-7440.

Huie, Fernambucq & Stewart announces that **Megan J. Head** has joined as an associate and **Joseph R. Duncan, Jr., Charles J. Fleming, Jr.** and **David M. Fleming** have become partners.

Christopher H. Jones, Attorney at Law LLC announces that **Rachelle E. Toomey** has joined as an associate.

Junkin, Pearson, Harrison & Junkin LLC announces that **David H. Pate** has joined as a shareholder and the new firm name is **Junkin, Pearson, Harrison, Junkin & Pate LLC**.

Lightfoot, Franklin & White LLC announces that **John Baker, Ryan Germany, James Gibson, Marchello Gray**, and **Ryan Robichaux** have joined the firm.


The City of Madison announces the appointment of **Kelly Cain Butler** as city attorney.

Maynard, Cooper & Gale PC announces that **Maria B. Campbell** has joined as *of counsel*.

McPhillips Shinbaum announces that **Alfred Norris, III** has joined as an associate.

Sullivan & Gray LLC announces that **Sarah K. Dunagan** has joined as an associate.

Taylor Ritter PC announces that **Rosemary S. Moore** became a partner.

Wallace, Jordan, Ratliff & Brandt LLC announces that **Sally S. Reilly** joined as *of counsel* and **Thomas A. McKnight, Jr.** became a member. 

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| AGE: | 30 | 35 | 40 | 45 | 50 | 55 | 60 |
| 10 | \$165 | \$165 | \$215 | \$310 | \$495 | \$820 | \$1,335 |
| 15 | \$195 | \$200 | \$255 | \$485 | \$725 | \$1,150 | \$1,830 |
| 20 | \$255 | \$255 | \$355 | \$620 | \$950 | \$1,480 | \$2,520 |
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