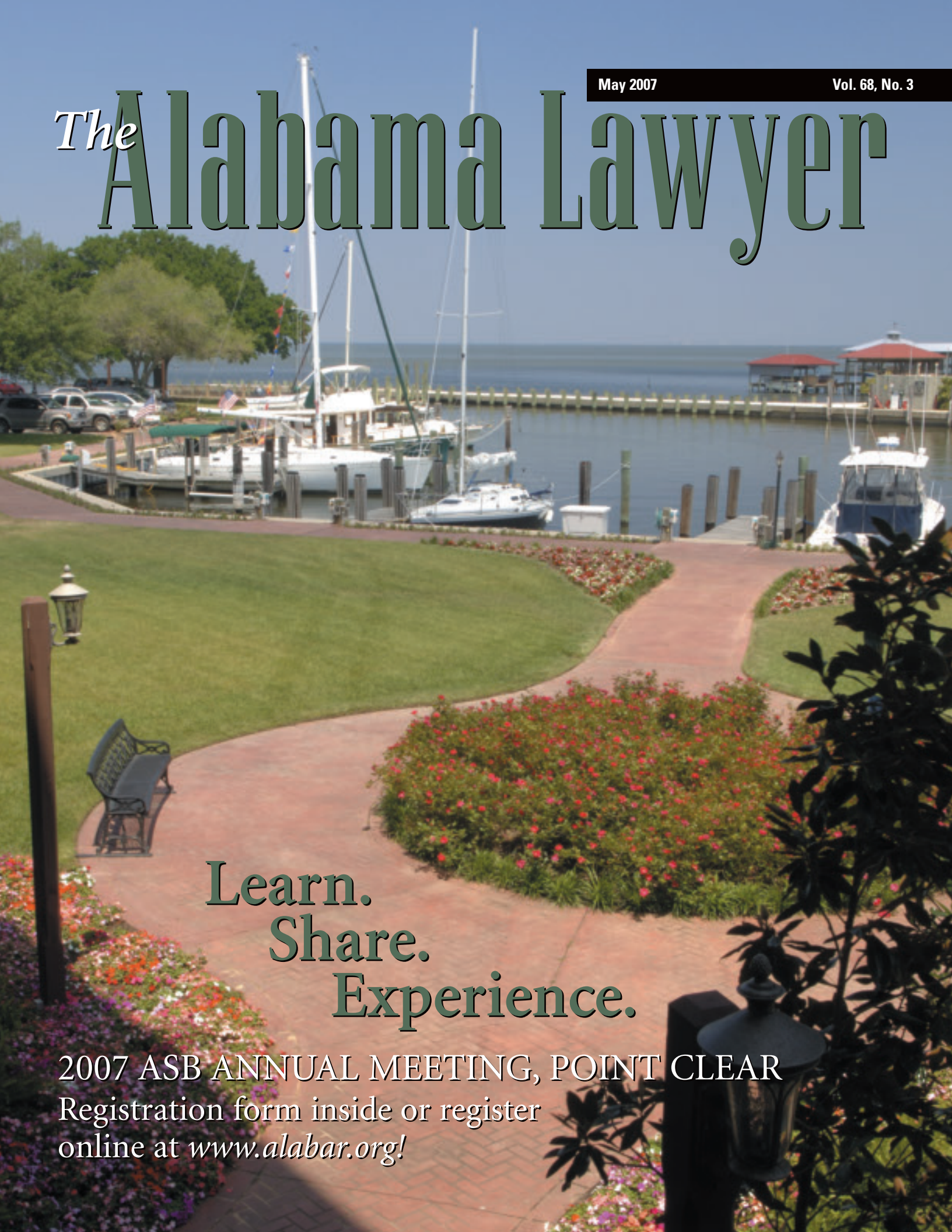
May 2007 Vol. 68, No. 3

The Alabama Lawyer



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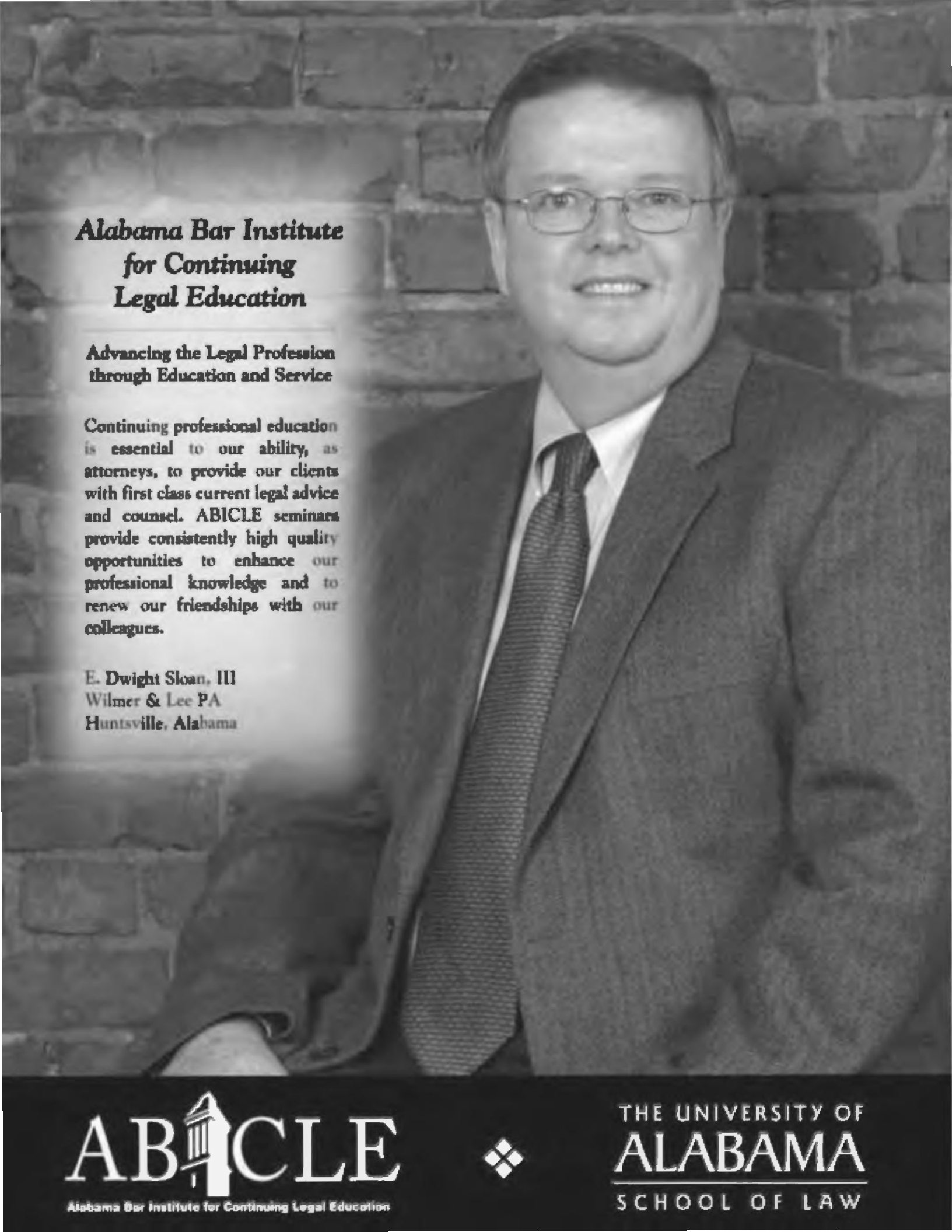

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THE UNIVERSITY OF ALABAMA
SCHOOL OF LAW

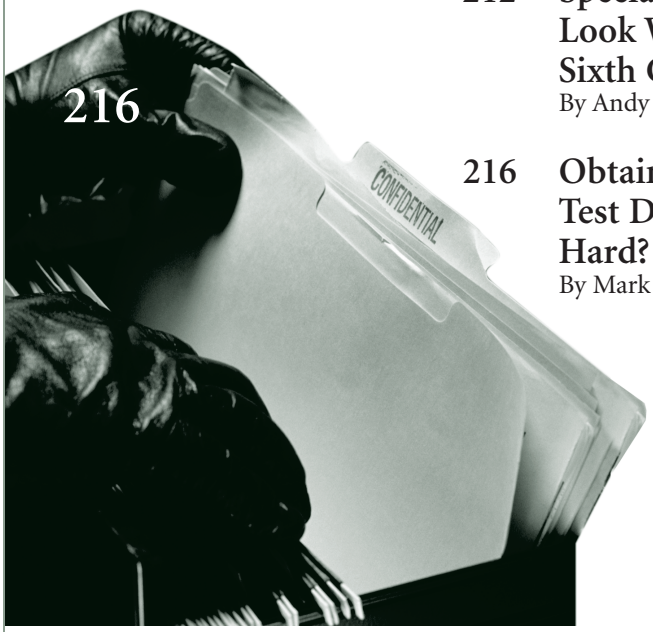
The Alabama Lawyer

May 2007 Vol. 68, No. 3

ON THE COVER

View of marina from the Grand Hotel Marriott Resort in Point Clear, Alabama, site of the 2007 Alabama State Bar Annual Meeting

Photo by Paul Crawford, JD
crawfordpaul@mac.com



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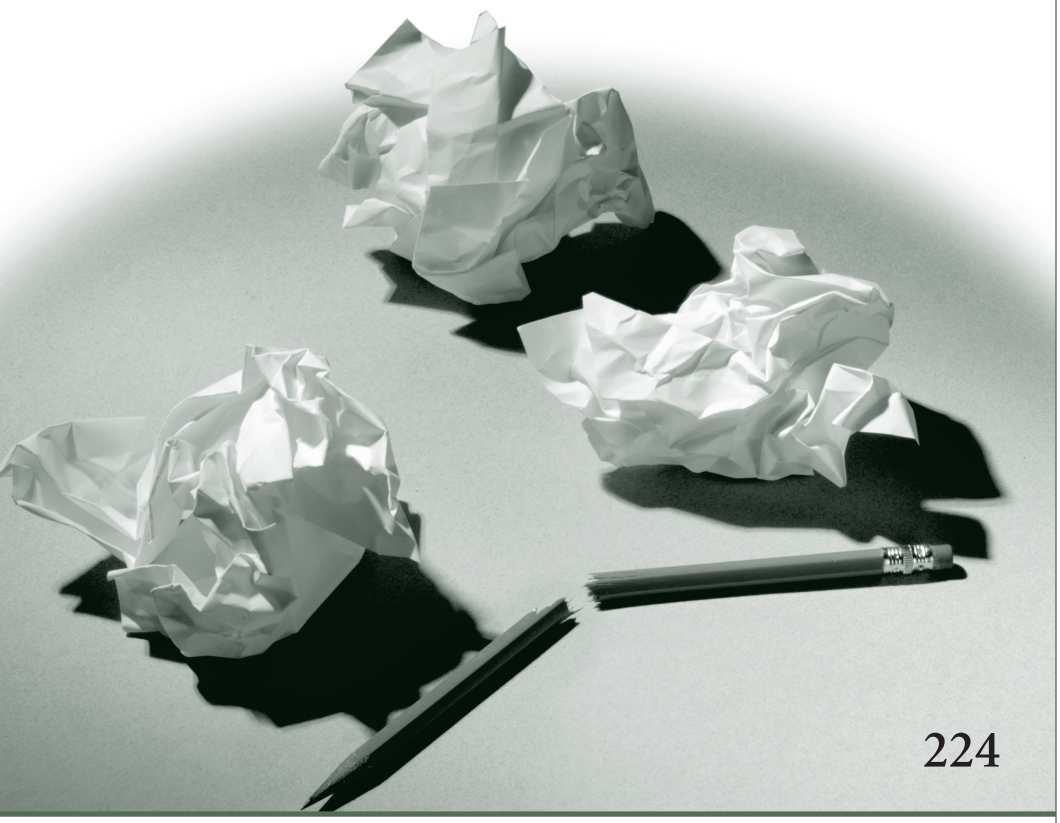

DEPARTMENTS

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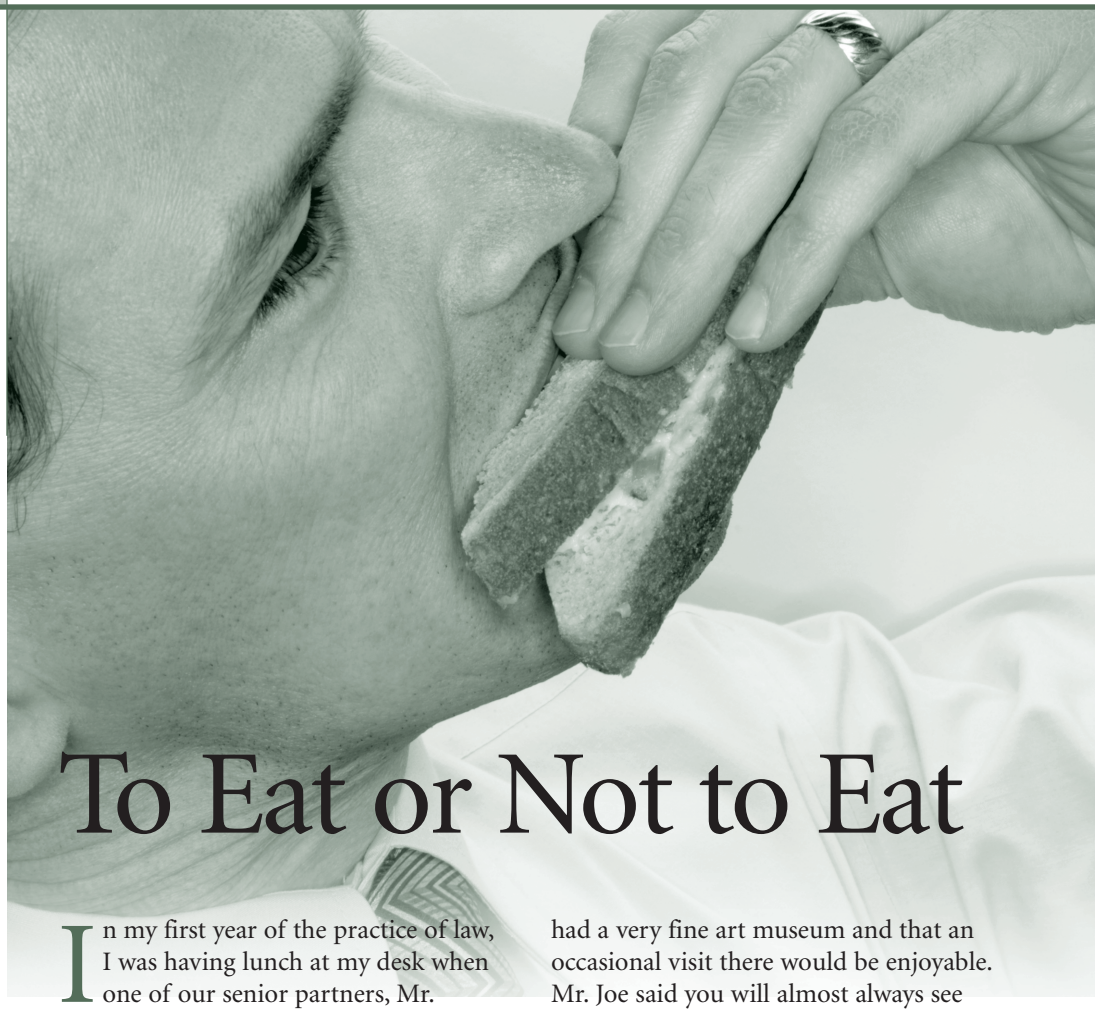
President's Page

Fournier J. "Boots" Gale, III



To Eat or Not to Eat

In my first year of the practice of law, I was having lunch at my desk when one of our senior partners, Mr. Joseph F. Johnston, one of my early mentors and a very well-rounded gentleman with many interests, came into my office and made the point that eating lunch at my desk was not a good habit to develop. Mr. Joe told me that lawyers should try to take a mid-day break for lunch and share a meal and engage in conversations with others.

He stressed the need to engage with others, especially non-lawyers, and said that over lunch with different people you could develop a broader perspective of the community and could learn from others what they were engaged in and what was happening in the city, state, etc. He discussed the obvious benefits of being involved in one's community and the advantage of getting to know a broad variety of people. I remember his saying that even if you don't have a lunch companion, you should get up from your desk, go outside and stretch your legs and mind. He told me that Birmingham had a very fine art museum and that an occasional visit there would be enjoyable. Mr. Joe said you will almost always see someone you know on the street and can find out interesting things by being around different people.

Having an external vision, he stressed, will aid in keeping your legal work in perspective. He suggested that having lunch out of the office even with co-workers is much better than eating alone at your desk with work in front of you.

I have tried to heed his good advice and even now think about friends or colleagues whom I haven't seen for awhile and try to connect with them over lunch.

The point Mr. Joe was making is the subject of a very fine and interesting article written in the *Tennessee Bar Journal* (Oct. 2006). I have received permission from the *Journal* and the author, Bill Haltom, a superb Memphis lawyer and past president of the Tennessee Bar Association, to reprint his article in full. Bill was a very entertaining speaker at our annual meeting in 2005. You will enjoy his fine work. ■

Reprinted with permission from the *Tennessee Bar Journal,* a publication of the Tennessee Bar Association
Tennessee Bar Journal, Oct. 2006 - Vol. 42, No. 10

BUT SERIOUSLY, FOLKS!
Missed Opportunities Motion to Compel Lunch

By Bill Haltom

A generation ago, when I was a young lawyer in a hurry, I seldom took the time to go out for lunch. Back in those good ol' days when I had dark hair and boundless energy, I did not want to waste a billable hour in the middle of the day by doing something as foolish as leaving the office to break bread and enjoy stimulating conversation with fascinating friends. Instead, like Thomas Jefferson, I dined alone, if you call wolfing down a bologna sandwich at your desk "dining." Actually, what I was doing was a sure-fire recipe for at best, indigestion, and at worst, a myocardial infarction.

One day back when Reagan was president, I was in a hurry to grab a not-so-nourishing lunch at a downtown sandwich shop. As I dashed from the deli with a briefcase in one hand and a paper bag in the other, so help me, I ran into the legendary Lucius Burch, founder of the firm of Burch, Porter and Johnson, and one of the giants of the Tennessee Bar. I will never forget what happened, because it will always be filed in my brain under the category "Missed Opportunities." Mr. Burch said to me, "Son, where are you headed in such a hurry?"

"Oh, I'm just going back to the office."

"But what about lunch?" asked the great lawyer.

"I'm just going to eat a sandwich at my desk. I have a lot of work to do," I explained, thinking my work ethic would win Mr. Burch's approval.

"Is a statute of limitations about to run on ya' today?" asked Mr. Burch, who was much calmer than I and was clearly in no hurry.

"Umm … well … um, no sir," I replied.

"Well, in that case, son," said Mr. Burch with a smile, "let me take you to lunch at the Wolf." He was referring to the Wolf River Society, a great non-club lunch club Mr. Burch founded in downtown Memphis back in the '60s.

For reasons I will never be able to explain, I declined and politely asked if I could have a rain check. Mr. Burch said that would be fine, but he added, "Son, you shouldn't eat lunch at your desk. You should always go out for lunch and enjoy good food, camaraderie, and stimulating conversation with friends."

I am ashamed to say that I never cashed my rain check. And it's too late now. Mr. Burch has joined Clarence Darrow, Raymond Burr and Gregory Peck at that big courtroom in the sky.

I have no idea what case I was working on that memorable day back in the 1980s, but trust me, it wasn't *Brown v. Board of Education, Bush v. Gore,* or even *The People v. Larry Flynt.* My file could have waited until I returned from lunch with Mr. Burch at the Wolf.

I recently thought about that lunch that never was when I read about Judge Pendleton Gaines, a Superior Court Judge in Arizona, who recently granted a Motion to Compel Acceptance of Lunch Invitation. You read that right, notice-pleading-breath!

In the case of *Physicians Choice of Arizona Inc. v. Mickey Miller,* plaintiff's counsel extended a lunch invitation to defense counsel "to have a discussion regarding discovery and other matters." Plaintiff's counsel even offered to pay for lunch, but defense counsel (who was apparently pretty busy working at his desk) failed to respond, and so the plaintiff filed a motion.

Judge Gaines considered the motion, reportedly over a fine meal at his favorite eatery in downtown Phoenix. He then went back to his office and entered an Order Granting Plaintiff's Motion to Compel Acceptance of Lunch Invitation, providing in pertinent part as follows: "Total cost (of lunch) will be calculated by the amount of the bill, including appetizers, salads, entrees and one non-alcoholic beverage per participant. A 20 percent tip will be added to the bill, which will include tax. Each side will pay his pro rata share according to number of participants. The court may reapportion the cost on application for good cause or may treat it as a taxable cost."

I sure wish that Judge Gaines had been around back in the days when I was too busy to have lunch. Had he or some other judge simply issued an order for me to personally appear at the Wolf River Society at high noon and break bread with Lucius Burch, my life would be immeasurably better.

But I don't need a court order anymore. I'm hungry. Now, if you'll excuse me, I'm headed to lunch. ■

Bill Haltom is a partner with the Memphis firm of Thomason, Hendrix, Harvey, Johnson & Mitchell. He is past president of the Tennessee Bar Association and the Memphis Bar Association.

President-Elect Profile

Pursuant to the Alabama State Bar's Rules Governing the Election of the President-Elect, the following biographical sketch is provided of J. Mark White. White was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2007-08 term, and he will assume the presidency in July 2008.

J. Mark White

J. Mark White was born July 7, 1947 in Florence, Alabama. After graduating from Auburn University in 1969 and Cumberland School of Law, Samford University, in 1974, he was admitted to the Alabama State Bar.

He has served in many capacities for the Birmingham Bar Association, the Alabama State Bar and the American Bar Association.

He was secretary/treasurer of the BBA in 1983, a member of the Executive Committee from 1999 to 2001 and president in 2004.

He served as a member of the ASB Board of Bar Commissioners from 1995 to 2004, chairman of the Alabama Supreme Court Judicial Campaign Oversight Committee from 1998 to 1999, a member of the Task Force on Bench and Bar Relations from 1989 to 1990, chairman of the Alabama Supreme Court Committee on Judicial Canons & Ethics, and a member of the Committee on Judicial Reform. White is the recipient of both the ASB Commissioners' Award and the Award of Merit.

He is also a member of the Alabama Criminal Defense Lawyers Association.

White was a member of the House of Delegates of the American Bar Association from 1995 to 2001, and is a member of the National Association of Criminal Defense Lawyers and the International Academy of Trial Lawyers.

He is co-chair of the National Ad Hoc Advisory Committee on Judicial Campaign Conduct, a member of the board of directors of The Sentencing Institute, a member of the Fellows of the Alabama Law Foundation and a member of the Judicial Inquiry Commission for the State of Alabama.

Mark White is a founder of the Birmingham firm of White, Dunn & Booker (now White Arnold Andrews & Dowd PC). ■

Letter to the Editor

BILL FITE
ATTORNEY AT LAW
P.O. BOX 1359
HAMILTON, ALABAMA 35570
205-921-3321
FAX 205-921-2616
EMAIL: billfite@sonet.net

January 23, 2007

The Alabama Lawyer
Alabama State Bar
415 Dexter Avenue
Montgomery, AL 36104

Gentlemen:

I am most pleased to read in the January 2007 Alabama Lawyer, the Pro Bono activities of our Bar Association. I am afraid so many of us forget that the majority of the people out there who need legal services are financially unable to employ counsel. Please keep up the good work.

Yours very truly,

Bill Fite

Bill Fite

BF:pr

Executive Director's Report

Keith B. Norman

Education Debt for February 2007 Bar Examination Applicants

For the February 2007 bar exam, there were 401 first-time applicants. Of this number, 30 percent had education debt averaging $62,868. Twenty-one of the applicants had debt in excess of $100,000.

The 2007 Annual Meeting Will Be Simply Grand!

The Alabama State Bar annual meeting returns to the Grand Hotel in Point Clear July 18-21. This year's meeting will be the bar's 128th annual meeting, yet it will only be the second time that it has been held at the Grand Hotel, which began operations in 1847. The 2005 annual meeting was our first at this historic resort. Although the hotel was damaged by Hurricane Katrina, it has been completely refurbished and restored to its charm and grandeur as the Gulf Coast's oldest and finest resort. The theme of this year's meeting is ***"Learn. Share. Experience."***

The Grand offers unparalleled service and a host of activities for individuals and families, including two championship golf courses, a world class spa, horseback riding and sailing–even croquet! In addition to these activities, there will be others for those attending the annual meeting, including a cooking demonstration by one of the Grand's *sous* chefs and a luncheon and shopping excursion in nearby Fairhope. Besides outstanding CLE programming, alumni receptions and a host of other activities for adults and children alike, we will be joined by

several national speakers, including noted Los Angeles defense attorney Thomas Mesereau, law firm management expert Stephen Gallagher and Jill Fonte, who will help everyone refresh their perspectives about practicing law.

The focus of this year's annual meeting is on the family. We will have special family events such as Kids' Nite Out on Wednesday. Thursday evening will include dinner, a bonfire on the beach, making ice cream sundaes, night spiker volleyball, carnival games, and musical entertainment. Thanks to the generosity of several legal vendors, ASB sections and law firms, most of the evening's festivities will be free and registrants will be able to purchase deeply discounted tickets for dinner guests. Friday evening will feature alumni receptions, a Gala Reception to honor Boots and Louise Gale and a silent auction hosted by the Alabama Lawyer Assistance Program and the Women's Section of the bar.

If further inspiration is needed to convince you to attend this year's annual meeting, consider the Grand Prize Giveaway–a French-themed weekend for two that includes accommodations at the Atlanta Four Seasons Hotel, two VIP passes to the Louvre exhibit at the High Museum of Art, a romantic dinner at *Anis* (voted #1 French restaurant in Atlanta) and brunch at *Atmosphere*, another acclaimed French bistro. All of this will be topped off by a case of French wine and an array of other French amenities, all compliments of **ISI Alabama**.

With so many programs and activities to choose from, this year's theme of "Learn. Share. Experience." is particularly appropriate. I encourage you to visit the bar's Web site at *www.alabar.org* to learn more and to register for the meeting. With all that's planned, everyone is sure to have a grand time at the Grand! Come and be a part of it. ■

Important ASB Notices

Mandatory Registration for Authorized House Counsel

Since October 2006, we have been accepting applications for the new authorized house counsel rule (Rule IX of the *Rules Governing Admission to the Alabama State Bar*). This rule applies to lawyers who are not admitted to practice in Alabama, but are serving as house counsel to businesses located in Alabama. This is a mandatory registration and the **deadline for compliance is October 27, 2007**.

Please help us by contacting any house counsel you know and informing them about this rule.

A copy of Rule IX, the registration form and instructions are available on the bar's Web site, *www.alabar.org*. For more information contact the bar's membership department at (334) 269-1515.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2007 Annual Meeting, July 18-21, at the Grand Hotel in Point Clear.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2007. For an application, contact Ed Patterson, ASB director of programs, at (800) 354-6154 or (334) 269-1515, or download one from the ASB Web site, *www.alabar.org*. ■

A New Cash Option for Structured Settlement Annuity Holders

Recently enacted statutes now afford structured settlement and annuity holders a **NEW CASH OPTION**.

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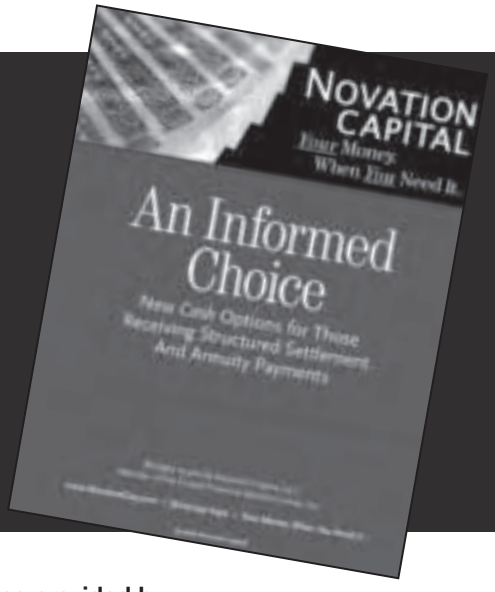
Ask for the FREE informational DVD "An Informed Choice: New Cash Options for Those Receiving Structured Settlement and Annuity Payments."



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Charles Hoffman

Charles Hoffman, who was born over his parents' store on Dauphin Street and went on to become Alabama's oldest practicing attorney, died August 10, 2006 at the age of 97, at home surrounded by his family.

Charles Hoffman was born August 1, 1909 to Morris and Mary Hoffman, Romanian-Jewish immigrants who opened a dry goods store on Dauphin Street that became Hoffman Furniture. Charlie graduated in Murphy High School's first graduating class–the class of 1926. He then attended Georgia Tech and Emory Law School. He started practicing law in 1931 and handled every type of case in all of the courts of this area. He entered the military service in World War II and during that time, served two years with the Joint Chiefs of Staff in Washington.

In 2004, the 1931 Emory Law School graduate was honored by the Mobile Bar Association and the Alabama State Bar as the city's and state's oldest practicing attorney. Charlie Hoffman, in his suspenders, bolo tie and wingtip shoes, was a vital and sociable presence in courtrooms. He enjoyed a wonderful career and a profession he relished, having been president of the Mobile Bar Association in 1971.

A lover of books, movies, travel, boating, telling jokes, and dancing, Charlie Hoffman was, above all, devoted to his family. His cherished wife of 67 years, Evelyn, passed away in August 2003. He is survived by his children, Sherrell Hoffman Grean, Becky Hoffman, Robbie Hoffman Nadas and Roy Hoffman; six grandchildren; three great-grandchildren; and numerous nephews and nieces.

–M. Kathleen Miller,
Mobile Bar Association

JUDGE FRANK M. DE BELLIS

Judge Frank M. De Bellis died February 23, 2006 at the age of 77. A native of Italy, he embarked on a ship in Naples and came to this country via Ellis Island at age six. He was almost blown off the ship, but a man saved him, an event he remembered all his life.

He grew up in New York. He was a high school dropout, but enlisted in the United States Navy, where he served his country for two years. After fulfilling his military obligation, he took advantage of the G.I. Bill and enrolled at New York University. He graduated in 1952 with a degree in accounting and proceeded to work as an accountant. In short order, he met Roslyn, his future wife. They were married May 16, 1954.

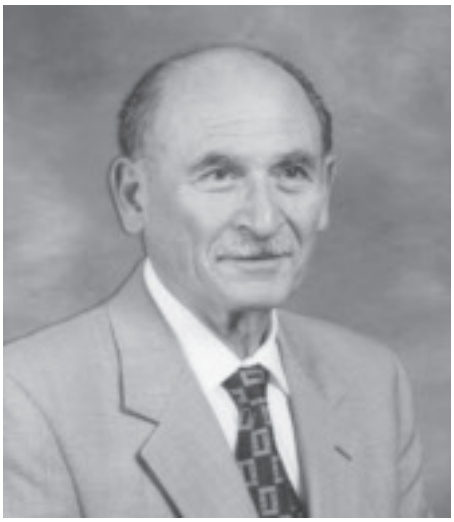
Subsequently, Judge De Bellis garnered a New York State War Service Scholarship to fund his law school education. He attended law school at NYU in one section of Manhattan and business school also at NYU in another part of Manhattan–all while working fulltime. He obtained his MBA in 1958 and his LL.B. in 1959 and was admitted to the New York State Bar Association in 1959.

Judge De Bellis served as the attorney for the Town of Pelham, New York for 19 years, a source of great pride to him. He also served as adjunct professor of business at St. John's University in New York for several years.

In 1990, he became a United States Administrative Law Judge. His first assignment was at the Office of Hearings and Appeals of the Social Security Administration in Montgomery. Shortly thereafter, he returned to New York City, but the lure of the South brought him to Mobile in 1993, where he served as judge with the Office of Hearings and Appeals for 13 years. He worked until the day before he went to the hospital and was looking forward to presiding at hearings the next week.

Among his peers, he was a source of advice and support. His fellow judges, the staff attorneys in his office and other staff members all felt his kindness and humility. He had a wonderful sense of humor and an intellect that permitted him to converse on a broad range of subjects. He was noted as a craftsman, very much interested that his decisions be understood by the claimants who appeared before him. He ran his hearings efficiently, but without sacrificing the notion of due process and fairness owed to the claimants. The attorneys who practiced before Judge De Bellis were struck by his dedication and civility.

Judge De Bellis cared about his profession. He was a member of the Mobile Bar Association and the American Inns of Court. He took his work very seriously, but not himself.



He led a full life. He indulged in his family. In addition to his wife, Roslyn, and his two children, Mark and Marlene, he is survived by his granddaughter, Amy Katherine, his brother, Michael, and his sister, Carmela. He was a member of St. Dominic's Catholic Church. He and his wife traveled extensively. He was a devotee of classical and symphonic music–he knew his composers. He was an avid reader.

Judge De Bellis was a tribute to his family, his profession, his adopted community of Mobile and his country. On his tombstone in the Barrancas National Cemetery in Pensacola are two words: "Integrity and Perseverance"–how fitting. He lived the American dream.

–Benjamen T. Rowe,
Mobile Bar Association

JULIA CHRISTIE GLOVER

On October 2, 2006, Julia Christie Glover, a member of the Mobile Bar Association, died at a local hospital. Mrs. Glover was born in Mobile on January 10, 1961 and was a lifelong resident of this city. She graduated from Birmingham Southern College in 1983 and then received her law degree, with honors, from Tulane Law School.

She practiced law with her identical twin sister, Lynn Miller, for the past ten years in the firm of Glover & Miller. Her law practice focused on domestic and family law and she represented her clients well. Her sister, Kitty Miller, and sister-in-law, Barbara Christie, are also employed with the firm.

She was an avid University of Alabama football fan and a great fan and supporter of the New Orleans Saints. She was an active member of Dauphin Way United Methodist Church and served on the Board of Directors of the Church Child Development Center.

Julia Christie Glover is survived by her husband, William J. Glover, Sr.; one son, William J. Glover, Jr.; two sisters, Virginia Kathleen Miller, and Mobile attorney Lynn C. Miller; and one brother, Frank Russell Christie, Sr. She was well known to all as a loving mother, wife and sister.

–M. Kathleen Miller,
Mobile Bar Association

Continued from page 193

Peter Joseph Palughi, Sr.

On July 29, Peter Joseph Palughi, Sr., a member of the Mobile Bar Association, died. Peter Palughi, Sr. was born in Mobile on August 12, 1930 and remained a lifelong resident of this city. He graduated from Gulf Coast Military Academy and then went on to Notre Dame for his undergraduate degree, where he received his bachelor of arts in accounting in 1954. Upon graduation, he joined the U.S. Army and worked with counter-intelligence during most of his tour of duty. He was honorably discharged from the Army in 1956.

At that time, he entered the University of Alabama School of Law, from which he graduated second in his class in 1959. At the University of Alabama, he was honored with membership in the Farrah Order of Jurisprudence.

During his 42 years of practice in Mobile, he served for a while as a prosecutor for the City of Mobile. At all times he was active in local politics. According to his peers, he was a fierce competitor, but a true gentleman. He never backed down from anything he really believed in. He was known as a "salt of the earth" kind of guy and as a watchdog for the people and as an attorney of integrity who could be wholly trusted.

Mr. Palughi is survived by his four children, Peter Joseph Palughi, Jr., David Nicholas Palughi, Amy Willene Lapalme and Holly Christina Palughi; one brother, Joseph Patrick Palughi, Jr.; one sister, Mary Ella Palughi; and five grandchildren.

–Benjamen T. Rowe, Mobile Bar Association

Joseph M. Powers

Joseph M. Powers, a member of the Mobile Bar Association, died August 23, 2006. He was born in Charleston, South Carolina on May 19, 1927 and served with the United States Coast Guard in World War II and later with the U.S. Navy in the Korean War. He came to Mobile to attend Springhill College. After graduation, he attended the University of Alabama School of Law, from which he was graduated in 1955.

During Mr. Powers's many years of active law practice in Mobile, he participated in numerous civic endeavors, including the American Legion, Mobile Theater Guild and the Knights of Columbus. He was the first Grand Knight of Council 1899 of the Knights of Columbus at Springhill College and was a past faithful navigator of the Archbishop Toolen Assembly of the Fourth Degree Knights of Columbus, and, at all times, a devout Catholic.

During his legal career, Mr. Powers was very successful in taking cases to the court of criminal appeals. He worked closely with many of the troubled youth at the Juvenile Court, improving their lives. He was always available to lend support to young lawyers and often took up for them during court proceedings. He often counseled with young lawyers and no question was too trivial for him to answer. He was, in fact, a consummate professional.

Mr. Powers is survived by his wife, Dorothy Neece Powers; five children, Martin J. Powers, Mary Belle Scott, Thomas J. Powers, Anne Guinn, and Mobile attorney Jean M. Powers; five grandchildren; one great-grandchild; a brother, William B. Powers; and a daughter-in-law, Mobile attorney Susan Powers.

–Benjamen T. Rowe, Mobile Bar Association

JAMES WILFRED SHREVE

James Wilfred Shreve was born April 18, 1922 in Andalusia and lived in Mobile since 1955. He died June 22, 2006.

Mr. Shreve graduated from St. Bernard's College and later attended Auburn University. Subsequently, he graduated from the University of Alabama and from the University of Alabama School of Law.

He was a distinguished combat veteran of World War II, having served in the Asia-Pacific Theater, in New Guinea and in the Northern Solomon Islands where he earned various decorations, including two bronze stars.

At the time of his retirement, Mr. Shreve was district claims manager for Argonaut Insurance Company. During his service as an attorney and businessman, Mr. Shreve was a member of the Sons of the American Revolution, the Alabama State Bar, the Mobile Bar Association and St. Joan of Arc Catholic Church.

He is survived by his devoted and loving wife of 60 years, Mavis Widney Shreve, eight children, 19 grandchildren and seven great-grandchildren.

–Benjamen T. Rowe,
Mobile Bar Association

Allen, Bibb
Birmingham
Admitted: 1950
Died: March 17, 2007

Bailey, Jefforey Craig
Birmingham
Admitted: 1987
Died: March 7, 2007

Brewer, John H.
Birmingham
Admitted: 1954
Died: January 31, 2007

Cheatham, Vincent Taylor
Bessemer
Admitted: 1982
Died: September 22, 2006

Dickerson, Mahala Ashley
Anchorage
Admitted: 1948
Died: February 19, 2007

Duffee, Cecil Gravlee, III
Birmingham
Admitted: 1975
Died: March 29, 2007

Hall, Carl Bynum
Birmingham
Admitted: 1950
Died: April 10, 2006

Hughes, Claude Bentley, Jr.
Trussville
Admitted: 1947
Died: March 11, 2007

King, John Thomas
Birmingham
Admitted: 1951
Died: January 24, 2007

Langford, Charles D.
Montgomery
Admitted: 1953
Died: February 11, 2007

Robertson, William Elbert, Hon.
Talladega
Admitted: 1969
Died: February 5, 2007

Sullivan, Patrick Martin
Dyer, Indiana
Admitted: 1985
Died: December 8, 2006

Vreeland, Albert Loring
Tuscaloosa
Admitted: 1976
Died: March 7, 2007

White, Don Odell
Mobile
Admitted: 1975
Died: February 22, 2007

Wright, John Curtis
Gadsden
Admitted: 1960
Died: December 26, 2006

Disciplinary Notices

Transfer to Disability Inactive

- Guntersville attorney **Johnny Lee Tidmore** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure,* effective February 15, 2007. [Rule 27(c); Pet. 07-12]

Reinstatement

- The supreme court entered an order based upon the decision of the Disciplinary Board, Panel V, reinstating **Peter Austin Bush** to the practice of law in the State of Alabama effective February 7, 2007. [Pet for Rein. No. 06-02]

Disbarment

- Bessemer attorney **LaShante Juanika Brown Jones** was disbarred from the practice of law in the State of Alabama effective December 1, 2006 by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar accepting Jones's consent to disbarment. [ASB nos. 06-93(A), 06-188(A), 06-189(A) and 06-197(A); Rule 20(a), Pet. No. 06-61]

Suspension

- Carrollton attorney **Ira Benjamin Colvin** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure,* by order of the Disciplinary Commission of the Alabama State Bar effective January 24, 2007. Colvin was arrested November 26, 2006 in Pickens County and charged with possession of a controlled substance in violation of *Ala. Code* §13A-12-212(A)(1), a felony. [Rule 20(a); Pet. 07-02] ■

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Recent Developments in Family Law

Legal Ethics Update – 2006

Broken Record—Making Things Right When It's All Gone Wrong

What's In Your Wallet? The Dollars and $ense of Paralegal Utilization

Elder Law & Real Property Section: Legislative Update

Why Losing Patent Rights Is Easy

Preservation of Error and the Record On Appeal

The Duty of Professional Conduct and Civility In Litigation

I.P. Audits: How to Identify and Protect Assets That Your Client May Not Realize It Even Has, and How to Avoid Losing Your Client's Patent Rights

Professionalism: Then and Now

Workers' Compensation Case Law Update: Best Cases for the Defendant

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Communications Department
Post Office Box 671
Montgomery, Alabama 36101

Anita Hamlett
MCLE director, Alabama State Bar

School Is in for the Summer

Ah… the joy of summer. In just a few weeks children will be rushing home buzzing with excitement because school is out for summer! The aroma of sweaty sneakers, the constant chirping of Game Boys, pool toys laced with fresh cut grass stacked in the mud room, mud mixed with chocolate on your favorite leather ottoman. Our kids making their way back into our daily routine will undoubtedly bring to mind all the magical moments of summer: Summer vacation, weekend trips to the lake, longer days to finish that "honey-do" list and longer nights to sit on the porch drinking lemonade and watching kids catch fireflies.

Yeah, right. Who am I kidding? I know that many of you think of summer as a great time to escape that noise at home by spending longer days struggling through brief-writing, longer nights doing legal research that you procrastinated about all spring, and if you need just a little extra justification—let's not forget that longer days at work do equal more billable hours.

In other words, the one thing you might *not* be thinking about in May is MCLE. (Yes, it is true that Continuing Legal Education is offered before December.)

What are the advantages to getting your CLE early for 2007? Many of you wait and file deficiency plans every year for your CLE compliance. We are urging you not to file for a deficiency plan for 2007 unless necessary. It is up to you to become proactive now rather than procrastinating until the end of the year. If you get your CLEs early, you have ample time before December to check your CLE online and make sure all your hours have been reported. Also, if you report your CLEs early, you avoid getting that nasty pink "Notice of Non-Compliance." Most importantly, you have peace of mind in knowing you have complied timely and could actually spend December enjoying the holiday season rather than rushing around trying to fit into any ole' last-minute CLE (you thought we didn't notice that there are divorce lawyers who have endured December programs with titles like "An Intriguing and In-depth Review of UCC Article 9," didn't you?)

It has taken me a little over a year to realize this, but I have come to believe that attorneys respond to *rules* better than *suggestions*. So, as you begin your CLE compliance for 2007, here are a few **CLE Commandments** or guidelines based on our MCLE department's observations in 2006.

Thou shalt learn (okay, at least read once) the MCLE Rules and Regulations

The Alabama MCLE Rules and Regulations can be found at *www.alabar.org/cle* under RULES AND REGULATIONS. We urge you to review those rules and regulations and contact us with any questions *prior* to submitting courses for credit or reporting your CLE hours. For example, we probably will not approve your presentation at the local Junior League luncheon on "How to Prepare Your Own Will" if the primary audience is not lawyers. Nor would we be likely to approve your firm's brunch presentation on "Marketing Our Firm for Success" if all the speakers are from your firm. Many times, you can save the expense of submitting courses by simply reviewing the rules prior to submission.

NOTE TWO CHANGES IN THE MCLE RULES AND REGULATIONS EFFECTIVE MARCH 9, 2007

REGULATION 2.7

We are working to review the rules and regulations and offering changes to help clarify any ambiguities. Recently, the Supreme Court of Alabama handed down revisions to MCLE Regulation 2.7 and MCLE Rule 6.B. Regulation 2.7 changed very little, but made it clear that out-of-state attorneys who become members of the Alabama State Bar still must complete the professionalism course as mandated by MCLE Rule 9. The new MCLE Regulation 2.7 reads as follows:

> ***An attorney who resides and maintains a principal office for the practice of law in another state that requires Mandatory Continuing Legal Education (MCLE) and who can demonstrate compliance with the MCLE requirements of his or her principal state of practice is exempt from these rules, except as provided in Rules 5 and 9.***

RULE 6.B

Likewise, Rule 6.B had minor semantic changes. (Please, do not interpret this rule to require you to file paperwork if you are compliant and receive an accurate report on a green or blue annual reporting form.) The court merely helped us clarify that the $300 penalty incurred at certification was intended to be in addition to all late fees incurred prior to certification. Therefore, an attorney who owes the maximum late fees of $300 will incur an additional penalty of $300 when certified (for a total of $600 owed by the attorney at the time of certification). The MCLE Rule now reads as follows:

> ***As soon as practical after January 31 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who have failed to file either an annual report for the previous calendar year, as required by Rule 5, or a plan for making up the deficiency as permitted by Rule 6.A. In addition, as soon as practicable after the first anniversary of an attorney's admission to the Bar or of an attorney's being licensed to practice law in Alabama, the Chairman shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who were required to complete, but failed to complete, the professionalism courses required by Rule 9.A.***
>
> ***The Secretary shall thereupon forward these lists of attorneys to the Chairman of the Disciplinary Commission.***
>
> ***The Chairman of the Disciplinary Commission shall then serve, by certified mail, each attorney whose name appears on those lists with an order to show cause, within sixty (60) days (i.e., within 60 days from the date of the order) why the attorney's license should not be suspended at the expiration of the sixty (60) days. Any attorney so notified may within the 60 days furnish the Disciplinary Commission with an affidavit (a) indicating that the attorney has in fact earned the 12 required CLE credits during the preceding calendar year or has since that date earned sufficient credits to make up any deficiency for the previous calendar year, or (b) indicating that the attorney has in fact completed the professionalism course required by Rule 9.A, or (c) setting forth a valid excuse (illness or other good cause) for failure to comply with either requirement. Payment of a penalty in the amount of $300 must accompany the affidavit. This sum is in addition to all late fees incurred before compliance.***

According to the order dated March 9, 2007, these two changes were to take effect immediately. If you have questions regarding this rule or any of the MCLE Rules and Regulations, contact our office for guidance from previous decisions by the MCLE Commission.

Thou shalt attend courses that are approved for Alabama credit

The general rule is that applications are due 30 days before the seminar date (see MCLE regulations 3.3 and 4.5). Some sponsors do not request CLE credit in Alabama. It is your responsibility to submit the course if the sponsor does not. If neither you nor the sponsor submitted the course in advance, you may request for the course to be reviewed retroactively. We strongly prefer that you request retroactive review of live courses within at least *30 days after a seminar, but MCLE Regulation 3.3 reads that, "No program submitted more than 60 days after December 31 of the compliance year will be approved.*"

Applications for accreditation can be found at *www.alabar.org/cle/* under APPLY FOR COURSE CREDIT. The application should be accompanied by an agenda of the course, including faculty members and their credentials and a processing

Continued from page 199

fee ($50 if submitted by the sponsor/$25 if by the attending attorney). Allow 30 business days for a reply to this application.

After attending a seminar, always check your transcript online within 30 days.

Note: All online courses must be interactive. Online or firm-sponsored programs should be submitted at least 30 days in advance of programming.

MCLE regulation 4.1.16 requires that all online courses must be pre-approved. MCLE Regulation 4.1.14 also requires programs sponsored by law firms to be pre-approved. In the past, we have worked with attorneys to help educate them on these rules, but it is your responsibility to either attend courses listed at *www.alabar.org/cle* as APPROVED COURSES, request that the sponsor apply for credit 30 days in advance of the seminar or apply yourself at least 30 days prior to the seminar.

Sponsors should verify in writing that they track participation of their online programs and that they allow the participants to ask questions of the faculty.

Thou shalt always provide a valid Alabama State Bar (ASB) number when signing in for a seminar

Always sign in with the sponsoring organization at the seminar. It is very important that you sign in the day of the seminar and provide the sponsor with your correct Alabama State Bar number and name. Sponsors now post most of the attendance electronically. If you do not write legibly or if you do not provide a valid ASB number, the sponsor may not be able to post your attendance.

Thou shalt provide the Alabama State Bar with current contact information

Please double-check any address changes on the ASB Web site to confirm that the changes you submitted with your CLE changes are reflected on your membership information page. If incorrect, you should e-mail Membership Services at *ms@alabar.org* and inform them of any changes.

Thou shalt not lie when reporting CLE credits

Currently, Alabama attorneys are allowed to report their CLE hours using an honor system. If you report that you attended a full six hours of MCLE credit, we will post you accordingly.

As sponsors have moved to online reporting, we have noticed some discrepancies in the sponsors' records of attendance and the records reported by individual attorneys. For example, if you complete an online course on January 6, even if downloaded to your computer on December 31, the completion date is January 6. If you attend a live program that was approved for six hours and you leave an hour early, then you only need to report five hours of actually attendance. If you did not register for a course, you may not report attendance at that course. For example, if you sat outside a lecture hall and did not pay a registration fee or sat behind someone as they completed an online course but did not pay the registration fee, then you cannot report those stolen hours.

We do not foresee that the MCLE Commission will need to move toward stronger regulations in this area, but we caution you that intentional misrepresentations on MCLE reporting is unethical behavior and may subject you to an examination by the Office of General Counsel.

Thou shalt not send incomplete applications

Instructions for filing for CLE credit in Alabama may be found at *www.alabar.org/cle* under APPLY FOR COURSE

CREDIT. Please always include the appropriate filing fee, the name of the sponsor, the name of the city and state where the seminar will be held, a detailed timed agenda, and a brief description of the written material or a copy of the written material provided on each topic. At the bottom of the application, there is a place for your e-mail address so that we can readily e-mail you notice of the ruling as to the accreditation of the course.

Incomplete applications may not be processed.

Thou shalt not request an extension past December 31 unless absolutely necessary

All attorneys are busy. That is why there are hundreds of CLE opportunities at diverse times and dates throughout the year. Waiting until after December 31 to complete your courses doesn't reduce your workload; it merely increases your requirements for the following year, while causing you more financial strain and stress. We urge you, on behalf of the MCLE Commission, to complete your CLE prior to December 31 and only use deficiency plans when absolutely necessary due to extraordinary circumstances for that year. If there is an extraordinary circumstance that arises, write the MCLE Commission about any request pursuant to MCLE regulations 3.1 or 3.2. If you have questions, please call the MCLE department of the Alabama State Bar, (334) 269-1515.

Getting your CLE out of the way now will free you up for the rest of the year to enjoy things that we all take for granted. You have to admit, it wouldn't hurt any of us to venture out to the lake with the kids or spend time catching a firefly or two this weekend. Chances are the office and your full workload will still be there when you get back. But once you've had mud between your own toes, you may never look at the stained ottoman–or the long days of summer–the same. That is, if you are lucky. ■

Is Change on the Way for Alabama's Open Records Law?

BY STEPHEN GIDIERE

In the fall of 2005, the Alabama legislature decided it was time to seriously consider rewriting the state's open records law, and for good reason. The statute currently on the books, *Ala. Code* § 36-12-40, was written in the 1920s—practically eons before computers, the Internet, e-mail, faxes, and even copy machines.

Recognizing that there is no easy fix, the legislature took the prudent step of commissioning a working group to tackle the issue. Joint Resolution 90, passed in the fall of 2005, created the **Alabama Open Records Study Task Force** and directed it to "study current Alabama law and provide for new proposed legislation to reform access to public records in Alabama."

Current Open Records Law in Alabama

The current state of the law in Alabama simply says, "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute." *Ala. Code* § 36-12-40. Unfortunately, the simplicity stops there. For one thing, there is no definition of "public writing" in the open records statute or elsewhere in the code. There is a definition of "public record" in another title of the code, but the definition does not apply directly to the open records requirement. *See Ala. Code* § 41-13-1 (definition of the term "public record" "[a]s used in this article"). In light of this omission, the Alabama Supreme Court has defined "public writing" by reading § 36-12-40 and § 41-13-1 *in pari materia*. According to the supreme court, a "public writing" is "such a record as is *reasonably necessary* to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens." *See Stone v. Consolidated Pub. Co.*, 404 So.2d 678, 681 (Ala. 1981) (emphasis in original).

This judicial definition provides some help. For example, a calendar or appointment book of a government official with purely personal entries would seem to fall outside of the definition, since such activities are not "required to be done or carried on" by the official. As the supreme court said after announcing its definition of "public writing," "This is not to say, however, that any time a public official keeps a record, though not required by law, it falls within the purview of § 36-12-40." *Stone*, 404 So. 2d at 681. In other words, under current law, there are limits to the reach of the statute, and not every document or record in the possession of a state official is subject to public disclosure.

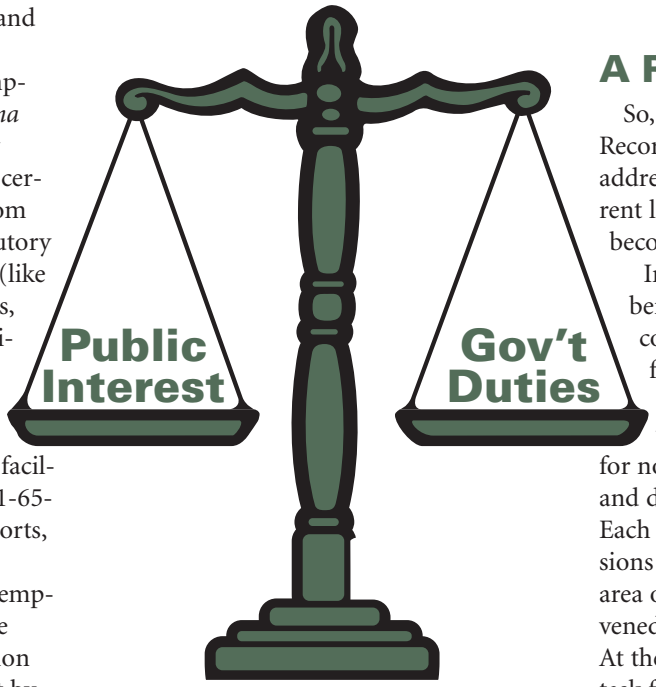
What this court-made definition does not do, however, is clarify what forms of writings or records are potentially subject to public disclosure. Are e-mails "writings?" How about digital voice-mail recordings? Computer databases? The law is not clear on these points.

If all of this is not confusing enough, consider the seemingly innocuous phrase in § 36-12-40 "except as otherwise provided by statute." Whether or not it was originally intended to be, this phrase has proven to be the proverbial elephant in a mouse hole. Section 36-12-40 itself contains only two such exemptions. The section exempts "registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state." *Ala. Code* § 36-12-40. And, as a result of an amendment passed after 9/11, the Act exempts certain homeland security information. *Id.*

But, in addition to these two exemptions in § 36-12-40 itself, the *Alabama Code* contains hundreds of statutory exemptions that "otherwise" protect certain specific types of information from public disclosure. These "other" statutory exemptions range from the obvious (like law enforcement investigative reports, *Ala. Code* § 12-21-3.1, and communications between a domestic abuse victim and counselor, *Ala. Code* § 15-23-41) to the obscure (like percentage ownership in a horse racing facility license application, *Ala. Code* § 11-65-15, and biannual catfish product reports, *Ala. Code* § 2-11-36).

And, if all these other statutory exemptions were not confusing enough, the courts have created their own common law exemptions to fill in the gaps left by the legislature. These include "recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations and records the disclosure of which would be detrimental to the best interests of the public." *Stone*, 404 So. 2d at 681. This last category involves a case-by-case balancing test to decide whether a specific piece of information must be disclosed. As the supreme court explained, "Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of the government carried on efficiently and without undue interference." *Stone*, 404 So. 2d at 681.

In the 26 years since *Stone* was decided, the courts have applied their balancing test on a case-by-case basis to specific types of information. *See, e.g., Water Works and Sewer Board of the City of Talladega v. Consolidated Publishing*, 892 So. 2d 859 (Ala. 2004) (exempting disciplinary records of water board employees as "sensitive personnel records" until such time as employees have completed appeal process); *Munger v. State Board for Registration of Architects*, 607 So.2d 280 (Ala. Civ. App. 1992) (exempting architectural registration examinations under *Stone* test); *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala. 1991) (exempting W-2 forms as personal information).



Importantly, in *Stone*, the Alabama Supreme Court expressed its preference that exemptions to disclosure be set forth specifically in the statute, as opposed to leaving it to the courts to handle on a case-by-case basis. "It would be helpful," the court said, "for the legislative department to provide the limitations by statute as some states have done." *Stone,* 404 So. 2d at 681.

Finally, the current statute provides no guidance whatsoever as to the procedures for requesting a public writing. Must a request be in writing or can it be made orally? How long does the public official have to respond? Can fees be charged for searching and copying? If so, how much?

Some of these questions have been answered through non-binding Attorney General opinions and agency practice. For example, a government entity can charge "reasonable" cost of copies or retrieving the information. Ala. A.G. Opinion, 98-161 (June 12, 1998). Such costs may include staff time and duplication costs, but not attorney fees. *Id.* But besides this reasonableness standard, there is no uniformity on fees among government offices. Fees and other procedures vary from office to office. As a result, members of the public get the impression (and it is sometimes reality) that they are being treated in an arbitrary and unfair manner. Clear and consistent procedures would benefit both the public and the public officials responding to their requests.

A Recipe for Change?

So, what has the Alabama Open Records Study Task Force done to address these shortcomings in the current law? And will the task force's work become law?

In December 2005, task force members divided themselves into five subcommittees (labeled A through E) to focus their work. The subcommittees were: A) definitions; B) exceptions; C) procedures; D) penalties for non-compliance; and E) ownership and disposition of government records. Each subcommittee met on various occasions in 2006 to work on their respective area of focus, and the task force reconvened as a whole in mid-September 2006. At the September 2006 meeting, each task force chair presented the final subcommittee proposals.

Subcommittee A proposed definitions of "record" and "government record" that would, among other things, clarify that electronic and computer-generated information fell within the scope of the new law. But some other questions were unresolved. For example, Subcommittee A did not propose a definition of "government body" or "government entity." Such a definition is critical to defining the scope of the new law. For example, are the records of a non-profit organization that receives state funding subject to public disclosure?

Subcommittee B proposed a series of statutory exemptions intended to respond to the supreme court's statement in *Stone* that the legislature "provide the limitations by statute." The proposed exemptions cover such areas as personal privacy information, sensitive personnel information and confidential business information, and each of these terms is

defined within the exemption. In addition, Subcommittee B's proposal includes procedures for notification to affected businesses when their confidential business information becomes part of a public records request.

Subcommittee B's proposal also includes a "catch-all" provision for information that is confidential, privileged or otherwise exempted from disclosure by other state law or federal law–similar to the one currently found at *Alabama Code* § 36-12-40. The subcommittee's study of similar laws revealed that such a provision is common in modern public records laws in other jurisdictions. For example, both Georgia's and Virginia's public records laws contain such a provision. *See Ga. Code Ann*. §§ 50-18-70(b), -72(a)(1); *Va. Code Ann.* § 2.2-3704(A). The federal Freedom of Information Act (FOIA) also contains an exemption for records protected by other statutes. *See* 5 U.S.C. § 552(b)(3). Much like in Alabama, this "catch-all" in the federal FOIA incorporates scores of other statutes protecting specific types of information from public disclosure. *See, e.g.*, P. Stephen Gidiere III, *The Federal Information Manual* at App. 8-1 (American Bar Association 2006).

Subcommittee C's proposal focused on providing much-needed guidance on the procedures that apply to a request for a public writing. The subcommittee proposed a recommended standard request form that members of the public could use to make a request. The standard form, though not required to be used, would provide harmony and consistency across government bodies. Subcommittee C also proposed a five-working-day deadline for a government body to respond to a requester (with provisions for a limited extension), and specified the required contents of the response (*e.g.*, the response must be in writing and state the reasons for any denial of access). The proposal also makes clear that a government body may assess reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying or searching for requested records. In addition, under the proposal, a government body must produce nonexempt records maintained in an electronic database and do so in any tangible medium identified by the requester, so long as that medium is regularly used by the government body.

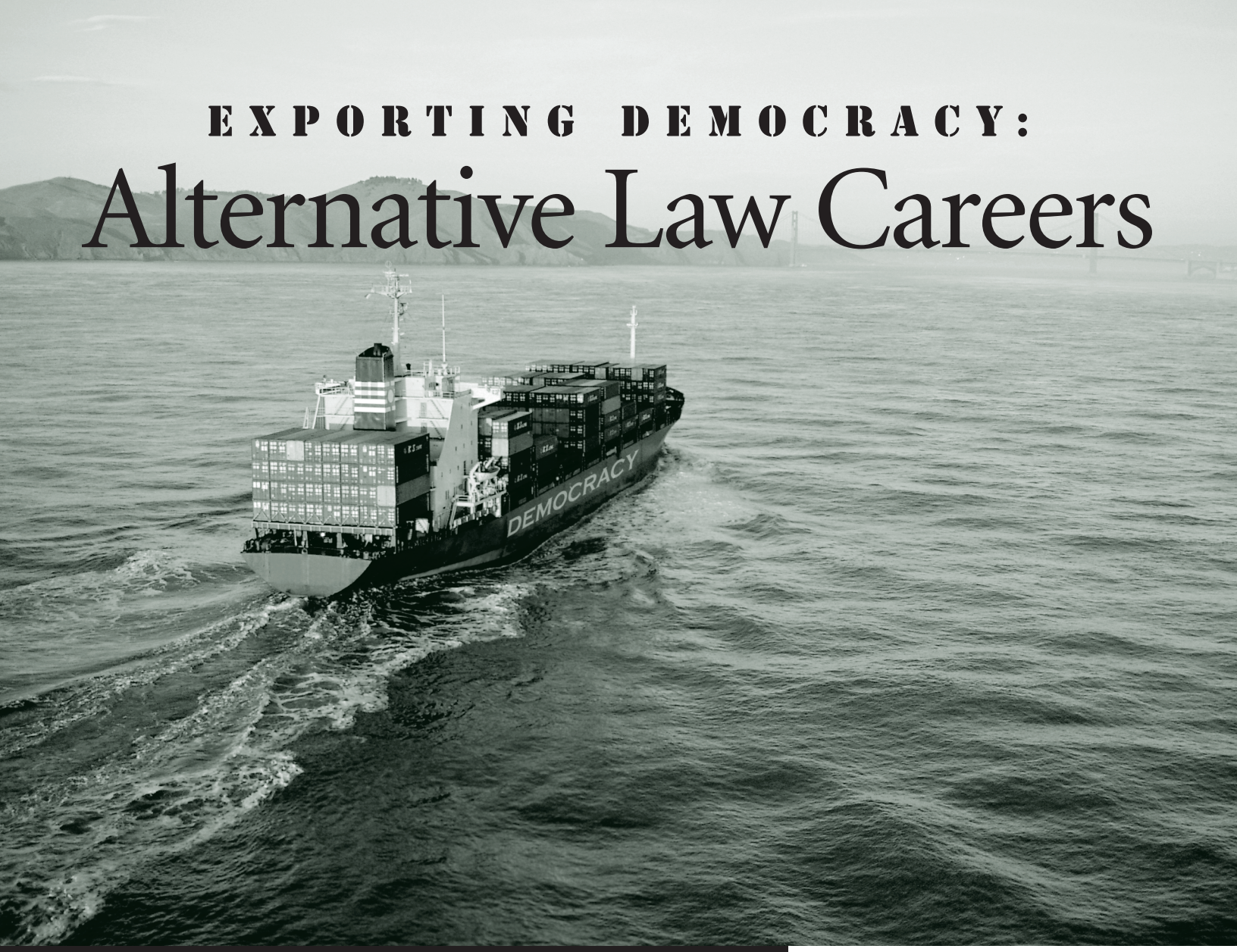
Subcommittee D proposed to continue judicial enforcement of the open records law in state circuit courts, but would require the circuit courts to undertake an initial unilateral review of the complaint and to dismiss it if the initial review fails to raise a sufficient reason to believe a violation of law may have occurred. Subcommittee D's proposal would significantly alter current law by assessing civil penalties *personally* against government officials who fail to comply with the new law. Under the proposal, a circuit court "shall" impose a civil penalty against the custodian of a record who is determined to have intentionally withheld a government record without reasonable justification. The penalty ranges from a maximum of $500 for the first violation to a maximum of $1,500 for the third and subsequent violations. Further, penalties imposed shall not be paid by, nor reimbursed to the custodian by, the governmental body he or she serves, and all civil penalties would be placed in the state general fund.

Lastly, Subcommittee E proposed the creation of a process by which improperly alienated government records could be recovered utilizing the State Records Commission and the Local Government Records Commission. The subcommittee also recommended that the theft, tampering or deliberate destruction of government records be elevated from a Class A felony to a Class C felony. Further, under the subcommittee's proposal, the State Records Commission and the Local Government Records Commission would have the authority to determine that particular records no longer have any legal, administrative or historical value (and, thus, need not be archived), even where the records were technically listed as "permanent" in the code.

Even though it was clear that significant revisions would be needed to harmonize the five proposals into one legislative proposal, the task force, for all practical purposes, has been disbanded. Instead, the five subcommittee proposals were delivered to the Legislative Reference Service for consolidation. To date, no bill has been introduced. ■

Stephen Gidiere
Stephen Gidiere is a partner in the Birmingham office of Balch & Bingham LLP. He was appointed by the Alabama Law Institute as its representative on the Alabama Open Records Study Task Force.

EXPORTING DEMOCRACY:
Alternative Law Careers



BY TERESA L. CANNADY

One day I was practicing law in Alabama, the next I was working on legal reform in Kazakhstan, for a year—at least that was the original plan. However, eight years later I am still in the international development field, currently living and working in the Philippines. "Mabuhay" ("Greetings") to all of you from the 7,000 islands of the Philippines.

Many people have asked, "How did you get from Alabama to Kazakhstan?" I respond with one of our southern phrases, "You can't get there from here—you have to go somewhere else to start." I started with a CLE program conducted by the Alabama State Bar as an exchange program with the St. Petersburg, Russia Bar Association. In June 1996, a group of Alabama lawyers went to St. Petersburg during the wonderful white nights festival. We visited courts, participated in roundtable legal discussions and did some great sightseeing. We stayed with host families, many of whom spoke little English and had meager accommodations. We reciprocated by hosting our fellow Russian lawyers in Alabama later that year and I remain in touch with my judge/friend, having visited her three times since our CLE trip and thanks to e-mail and online translators.

Two years later, in July 1998, I finally managed to find the courage to move abroad, going first to Kazakhstan for two years as a rule of law liaison for the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) program. In 2000, I became a public defender in the pacific island nation of the Federal States of Micronesia, before returning to the ABA/CEELI program in the Balkans as a regional gender legal specialist for Serbia, Montenegro and Macedonia. Following a year in Serbia, I spent time in Macedonia working on a legal support project for Kosovo refugees and then in Bosnia working on judicial reform at the Independent Judicial Commission of the Office of the High Representative. I returned to the U.S. for two and a half years, working from Washington, D.C. on two international projects on women's legal rights and anti-trafficking in persons. Those positions led me to travel again to Eastern Europe as well as to Africa. In February 2006, I returned to the ABA, this time with the Asia Law Initiative, working in the Philippines.

Lest you think I am on a permanent vacation and living at some exotic resort, let me "make it real" for you. This is serious work requiring a multiplicity of skills, diplomacy among them, and the circumstances can be very difficult, both mentally and physically. I have conducted several training programs in buildings with no heat, clad in thermal underwear and gloves. But I have also conducted programs outside in a beautiful grove of trees for young women attending a Peace Corps summer camp. At our last judicial training program in the Philippines, I took a car, a plane, a van, a boat, and a tricycle (motorized rickshaw-type vehicle) to get there. It certainly has its up and downs but fortunately, as the Gladys Knight song says, "The downs have been few."

Many people ask me, "What do you actually do?" or "What is a typical day like?" Well, fortunately there are no typical days and things change rapidly. Actually, it is not about exporting democracy—it is truly about helping others help themselves. Lawyers and judges around the world know what they need, but often lack the means to accomplish it. We provide that support, both technically and financially, to make it happen for them. This has become more and more difficult as our nation's image as a true democracy has faltered and we have lost our standing on the world stage as the protector of human rights. Fortunately for us, most of our colleagues abroad can separate Americans from American policy, but it certainly makes for many interesting conversations about U.S. politics.

Cannady (center) with the officers of the Philippine Women Judges Association at the 2006 annual meeting

The ABA-Asia project in the Philippines focuses on judicial and legal reform and is funded by the United States Agency for International Development (USAID). The agency works in 100 developing countries and has working relationships, through contracts and grant agreements, with more than 3,500 companies and over 300 U.S.-based private voluntary organizations. USAID projects include democracy, humanitarian, economic, environmental, and health initiatives. Through USAID, help from the American people is delivered directly to the places where it is needed most.

The Philippines is a unique situation compared to other places I have worked, as it was a colony of the U.S. from 1901-1942 and modeled many of its laws and procedures on the American system. However, there is no jury trial system. Our project activities include working with the Supreme Court, the judicial academy, local law schools, the bar examination committee, and the bar associations. As one of our activities, ABA-Asia conducted the Judicial Reform Index. The JRI is a tool developed by the ABA to rate judicial systems on a series of 30 international standards. For each standard, a country is rated positive, negative or neutral. The Philippines received nine positives, nine negatives and 12 neutrals. The index is conducted through personal interviews and review of documentary evidence. The JRI report was presented to the Philippines in an event held in September 2006 with highlights discussed and questions taken by the author of

Teresita Leonardo de Castro, presiding justice of the Sandiganbayan (anti-graft court); Cannady; and Gloria Macapagal-Arroyo, president of the Philippines

the report, Judge Evelyn Lance, a retired judge from the Hawaii Circuit Court. This report will help shape future reforms and pinpoint the areas where assistance is needed.

The Philippine legal system faces a number of challenges, including insufficient funding, a large number of judicial vacancies and huge backlogs of cases. In 2001, then-Chief Justice Hilario Davide, Jr. devised an Action Plan for Judicial Reform to be completed by 2006. While not all reforms were achieved, the APJR continues and we work closely with the Supreme Court to implement those. Former Chief Justice Davide was a co-recipient, along with Justice Anthony Kennedy, of the International Rule of Law Award, which was presented at the ABA Annual meeting this August in Hawaii. This award was a great opportunity to showcase the work of ABA-Asia and the achievements of the Philippine judiciary.

True to our strength as a bar association, we provide assistance to both the mandatory bar, the Integrated Bar of the Philippines, and the voluntary Philippine Bar Association (PBA), which celebrated its 115th anniversary in 2006. During 2006, we worked with the PBA to provide a train-the-trainers program for CLE providers and with the MCLE commission to explore alternative technologies for delivering CLE. We also collaborated with the PBA on a 36-hour CLE program focused mainly on commercial law and family law. Our goal was not only to increase the depth of knowledge of the local attorneys but also to teach them adult learning methodology and interactive training techniques. Most CLE and judicial training programs here are conducted through lectures, and lawyers are very interested in learning new techniques that will engage the participants.

I work closely with a small staff, including two local lawyers who are invaluable to the program. Utilizing local knowledge and working within the cultural context of any country is an imperative. We always seek solutions that fit the local context and never try to export the U.S. legal system as a one-size-fits-all model. Not only are people reluctant to accept being told what to do by outsiders, but what works for one does not work for all. Responses have to be

fashioned in a collaborative manner with local "buy-in." Yet, knowing where to draw the line between cultural sensitivity and standing firm to make changes can be a difficult one. And, change is slow. I often refer to our work as "drive-thru" democracy, where expectations are that major reforms be accomplished in two to three years, the average funding life of a project. But, as I have learned so well, these types of changes take a least a generation to yield real results.

So, what is it that I really do? Some days I am running a business–going to the bank, working on expense reports, dealing with employment issues, dealing with USAID. Others, I am a trainer attempting to build capacity of the women judges' association by helping them develop a strategic plan. Or, I am attending a CLE program we are funding, delivering the opening remarks and observing the progress. At times, I meet with the Chief Justice or other judges to plan activities and develop strategies to solve problems. I prepare agendas and training materials and locate expert judges and lawyers from the U.S. and the region to participate in training programs. Sometimes, I spend three to four hours in the horrendous traffic of Manila, a city with more than ten million people. There are many aspects to my work, legal and otherwise. But my experience as a solo practitioner and an active member of both the local and state bars prepared me well for the variety of tasks I am called upon to perform.

Philippines Bar Association President Hector Martinez; Cannady; Leah Olores, ABA-Asia attorney; Linda Jimeno, past president, PBA; and Maria Teresita C. Sison Go, PBA member

An added benefit has been the ability to travel the world both for work and for fun. I am approaching 50 countries visited since that first trip to Russia in 1996 and looking forward to the next 50. The Friendship Force, who was an organizer of the Russia CLE trip, works on the principle that a world of friends is a world of peace. This could not be truer. It is very hard to dislike a country or a group of people when you have made friends there. People everywhere are the same, working for a decent living, trying to enjoy life and hoping for better for the next generation. It is truly the small things that make us different; in the big things of life we are one.

There are many opportunities to utilize your legal knowledge in countries around the world, either on a short- or long-term basis. The American Bar Association has international programs in Eastern Europe and Eurasia, Africa, Latin America, and the Caribbean, and of course, Asia. Many other organizations, both for-profit and non-profit, hold contracts through USAID, World Bank or other foundations to implement legal reform projects. If you are fortunate enough to be in a position to take a one-year sabbatical this would be an excellent way to use it. But beware, I know many who did exactly that and never went back. You can find job postings at the ABA Web site (*www.abanet.org*) or through other international organization job sites.

And what are the possibilities? There are long-term positions as country directors of small, medium and large projects as well as positions actually serving as public defenders or prosecutors. There are opportunities with the international tribunals and the special courts in Bosnia. There are possibilities for short-term technical support in a specific area of the law. There are even opportunities within the U.S., as the ABA is always on the lookout for experts to review laws or proposed changes to rules and provide comments that result in assessments. We have conducted two such assessments for the Philippines this year, including a review of the *Rules of Evidence* and the *Rules of Civil Procedure.* Experts from the U.S. and around the world contributed to those assessments providing specific recommendations for changes that conform to international norms, which are now being considered by the Philippine's Supreme Court rules committee.

I went into international development work hoping to change the world, but, thankfully, the world changed me. Thanks, or no thanks, depending on your point of view, to globalization, the world is a much smaller place. Whether we like it or not, what happens around the world affects our lives. Particularly as lawyers, we should be concerned that as Dr. Martin Luther King Jr. so aptly noted, "Injustice anywhere is a threat to justice everywhere." We really are our brother/sister's keeper and we should be willing to share the success we have achieved in our legal system, as well as be open to how we can improve our own by learning from others. Taking the best of the best is surely a recipe for success.

Whether you are interested in short-term assignments or a long-term career in international development, there are plenty of opportunities to share your knowledge and skills. In this age of globalization, we can all benefit from learning about, and learning from, our neighbors throughout the world. Ensuring effective legal systems in developing countries means progress for everyone, not only the citizens of that nation. Countries with effective legal systems tend to have greater economic progress as businesses are attracted to an environment where they can easily organize and operate within a sound legal framework. You can get there from here; it is up to you to find the way. ■

TERESA CANNADY

Teresa Cannady graduated from the University of Alabama School of Law in 1991 and holds a degree in business administration/accounting from Jacksonville State University, as well as two associate's degrees from Snead State Community College. She served as a law clerk to the Hon. Inge Johnson, then presiding circuit judge of Colbert County (and now U.S. Federal District Judge), before opening her own practice in Albertville. Cannady has worked on international rule of law projects since 1998 when she began working for the ABA/CEELI program in Kazakhstan. She also worked for ABA/CEELI as a regional specialist in the Balkans, as a public defender in Micronesia and as a judicial reform officer at the Office of the High Representative/Independent Judicial Commission in Bosnia-Herzegovina. Cannady is currently the country director for the ABA-Rule of Law Initiative/Asia Division program in the Philippines where she is implementing a program of legal and judicial reforms.

Honors Fellows

The Alabama Law Foundation begins each year acknowledging service and commitment by announcing both the names of the lawyers selected to join the foundation's Fellows Program and those elevated to "Life Fellows" status. No more than one percent of bar members may become Fellows; therefore, the selection committee invites into fellowship an exceptional group of lawyers who have demonstrated their dedication to improving the world around them. Life Fellows are members previously inducted who have met their pledge and continue to provide support and leadership for the Alabama Law Foundation.

This year's annual Fellows' cocktail reception and dinner was held February 2nd at the Capital City Club in Montgomery. Friends and colleagues gathered from across the state to honor the new Fellows and the Life Fellows for their professional service and excellence.

The Fellows program was established in 1995 to honor Alabama State Bar members who have made significant

contributions to their profession and their community. Those chosen to become Fellows are given the opportunity to increase their leadership roles through the Alabama Law Foundation. As leaders in the legal community, Fellows provide financial and personal support for the Alabama Law Foundation, the charitable arm of the Alabama State Bar. ■

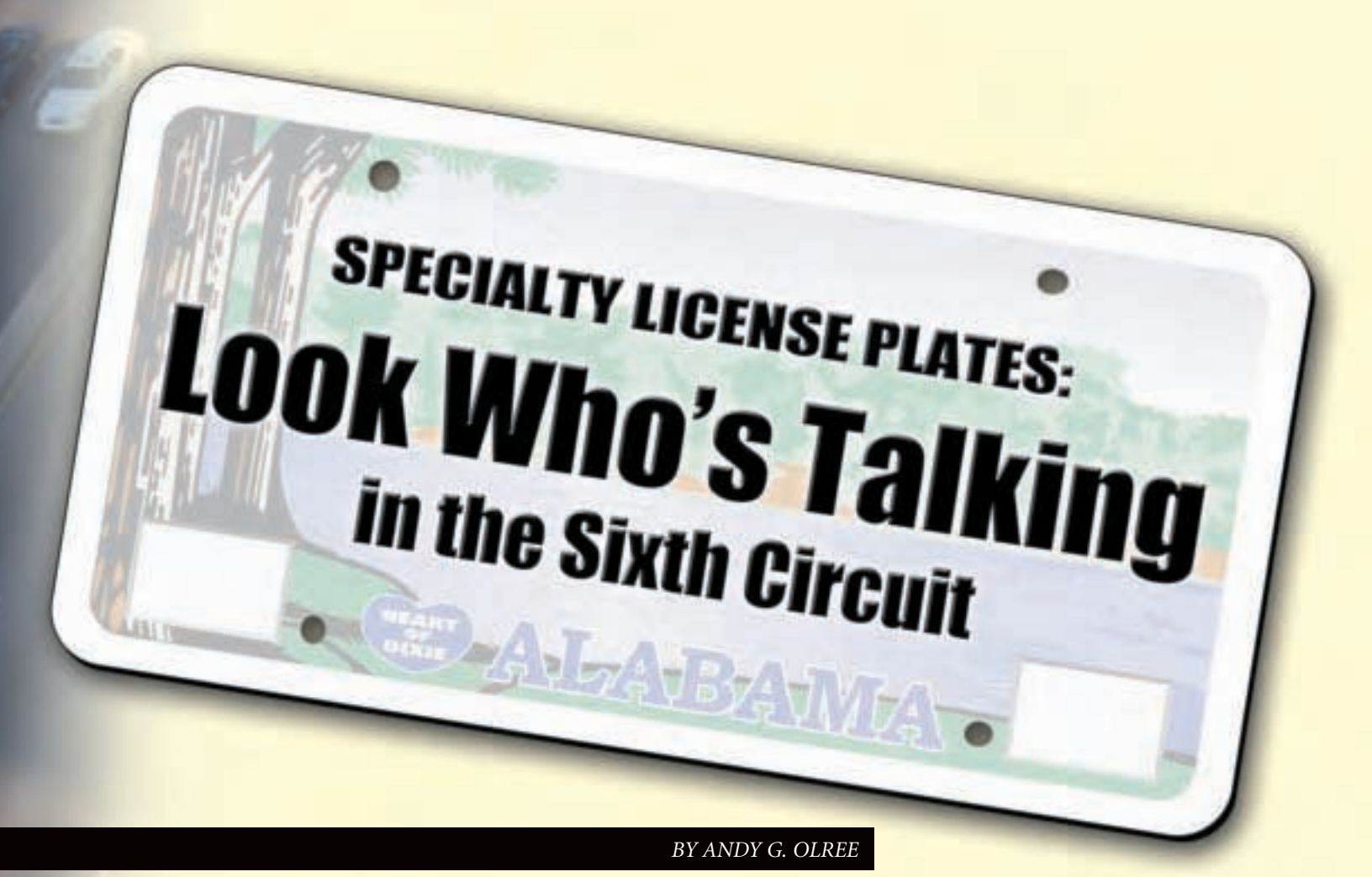
Fellows accepted into membership for 2006:

Helen J. Alford, Mobile
Walter M. Beale, Jr., Birmingham
Professor Pamela H. Bucy, Tuscaloosa
Judge U. W. Clemon, Birmingham
Russell J. Drake, Birmingham
Harry I. Frohsin, Birmingham
Judge Mark E. Fuller, Montgomery
A. Henry Gaede, Jr., Birmingham
Wyman O. Gilmore, Jr., Grove Hill
Robert L. Gonce, Florence
Merceria L. Ludgood, Mobile
Vanzetta P. McPherson, Montgomery
Thomas J. Methvin, Montgomery
Anne W. Mitchell, Birmingham
Martha Jane Patton, Birmingham
Gerald R. Paulk, Scottsboro
Judge Samuel C. Pointer, Birmingham
James. R. Pratt, Birmingham
Robert F. Prince, Tuscaloosa
L. Drayton Pruitt, Jr., Livingston
Bruce F. Rogers, Birmingham
Irving Silver, Mobile
E. Ted Taylor, Prattville

2006 Life Fellows:

Helen Johnson Alford
J. Mason Davis, Jr.
John V. Denson
R. Jackson Drake
Mark E. Fuller
Frederick G. Helmsing
Champ Lyons, Jr.
A. Hugh Maddox
Frank H. McFadden
Crawford S. McGivaren, Jr.
Vanzetta Penn McPherson
Tyrone C. Means
Thomas J. Methvin
Tabor R. Novak, Jr.
Gerald R. Paulk
James R. Pratt, III
Sam C. Pointer
S. Dagnal Rowe
Robert H. Rutherford, Jr.
Irving Silver
Carol Ann Smith
Sydney S. Smith
Harold L. Speake
E. Ted Taylor
H. Thomas Wells, Jr.
Jere F. White, Jr.
Thomas A. Woodall
Cathy S. Wright


I'm a hunter!
I'm a vegetarian!
Pro-Choice
Choose Life
Roll Tide!
War Eagle!



SPECIALTY LICENSE PLATES: Look Who's Talking in the Sixth Circuit

BY ANDY G. OLREE

Today, license plates often do more than display a vehicle's unique registration number. They have become a means of expressing oneself. Vanity tags have long allowed motorists to express themselves by choosing the particular alphanumeric combination that will serve as their vehicle's registration number. But the most recent project for enhancing the expressiveness of license plates is the concept of specialty plates. For a separate fee, motorists are allowed to choose from among a state-approved menu of license plate designs containing preprinted slogans or symbols to be displayed alongside the vehicle's unique registration number.

Typically, specialty plates cost the state nothing; before producing a certain plate and offering it to motorists for the first time, the state will require a certain number of pre-orders or other commitments from interested motorists. If a plate goes into production, a portion of each motorist's specialty plate fee reimburses the state for the costs of the program, with the remainder allocated to a group affiliated with the cause the particular plate endorses.

Sweet charity?

Since the late 1980s, a majority of states have adopted specialty plate programs, with the available menu ranging from 20 or 30 different choices in some states to over 500 in others. Alabama offers over 100 different specialty plates, with the most popular being the Auburn University plate, the University of Alabama plate and the "Helping Schools" plate.[1] According to a spokesperson for the University of Alabama, Auburn and Alabama alone have raised a combined total of over $27 million through the specialty plate program in the state of Alabama.[2]

Doubtless, many view specialty plate programs as a win-win proposition—benefiting charitable organizations through voluntary private donations, at no net cost to the taxpayer—but they don't seem so benevolent to organizations who have applied for a specialty plate only to be told by the state that their particular cause is unworthy. The First Amendment of the U.S. Constitution protects freedom of

expression by forbidding laws "abridging the freedom of speech, or of the press . . . ." Predictably, state denials of applications for specialty plates have spawned First Amendment litigation, notably in the case of groups that take a stand on abortion laws. Although many states offer "Choose Life" license plates, few states offer any kind of pro-choice tag, and as a result, a number of challenges to "Choose Life" plates recently have been litigated.[3] And in a strange twist, at least two cases have involved a challenge by a complaining pro-life group, whose applications for "Choose Life" plates were rejected in their respective states on the ground that the plates represented a viewpoint that was too politically divisive.[4]

The *Bredesen* case

The Sixth Circuit became the latest circuit court to address the issue as it decided a "Choose Life" case in March 2006. In *ACLU of Tennessee v. Bredesen*,[5] the Tennessee legislature authorized "Choose Life" tags but defeated a proposal to authorize a "Pro-Choice" tag. Rejecting the approaches of other circuits that had confronted specialty plates, the Sixth Circuit asserted that a recent U.S. Supreme Court opinion, *Johanns v. Livestock Mktg. Ass'n.*,[6] announced a new rule for determining whether any particular speech is government speech, and that *Johanns* controlled the case. According to the Sixth Circuit, *Johanns* set forth a universal test for all speech: "When the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes."[7]

Applying the *Johanns* test to specialty plates, the court determined that specialty plates are neither purely private speech nor some blend of public and private speech (as the Fourth Circuit had concluded),[8] but pure government speech, because the government claimed authority to "approve every word" on each specialty plate. On that basis, the specialty plate program was upheld, viewpoint discrimination and all. After all, said the court, the state of Tennessee can choose to send a pro-life message if it wishes, without being forced to send a pro-choice message as well.

A problematic interpretation

Of course, the government is not required to be neutral when expressing itself, which is why *Johanns* came out the way it did. The Court has long held that the right of freedom of speech does not preclude the government from expressing its own viewpoint, nor does it require the government to fund or support viewpoints at odds with its own. On the other hand, the Supreme Court has been equally clear that if the government is not itself speaking, but is instead regulating the speech of a number of private parties speaking on its property or in its "forum," the government may not exclude particular speakers or messages based on viewpoint.

The Sixth Circuit interpreted *Johanns* to mean that *any* speech becomes pure government speech whenever "the government determines an overarching message and retains power to approve every word disseminated at its behest." That is a broad holding indeed, and it presents a big problem: If this is true, and if it shows that specialty plates are government speech, then, similarly, no private party is really speaking when the government tells people what viewpoints they can express in its town square, city sidewalks or public parks. The government can engage in all the viewpoint discrimination it wants because in these scenarios as much as in specialty plate programs, "the government determines an overarching message and retains power to approve every word disseminated at its behest," and that converts the private speech into government speech. Of course, such a conclusion flies in the face of a long line of Supreme Court precedents holding that the state must maintain strict viewpoint neutrality in its forums.[9]

The Sixth Circuit arrived at its problematic interpretation of *Johanns* by ignoring the operative facts of that case. In *Johanns*, the federal government had established a program to encourage beef consumption and, as part of that program, had taxed sales and imports of cattle to fund a beef advertisement. Some beef producers who had to pay the tax did not like the ad and claimed that the tax constituted compelled speech in violation of the First Amendment. The Supreme Court rejected that claim and upheld the tax because the ad was government speech, not private speech, and the government did not force anyone actually to convey the message, only to pay for it. In that context, the Court was able to determine that the ad in question was government speech because the government approved the final wording. The take-home message was that government is always allowed to tax in order to fund its own communications.

In *Johanns*, although no one was forced to convey a message personally, the government readily admitted that it was trying to encourage certain activities by transmitting a particular message, the costs of which were borne by unwilling taxpayers. Specialty license plate programs are fundamentally different. No one is being forced to pay for anything; the entire cost of specialty plates is borne voluntarily by those who agree with the message. And specialty plate programs are not part of a larger governmental scheme to encourage some private activity, like beef consumption.

The difference matters. If the government creates a program to promote some particular activity and then forces people to fund a message encouraging that activity, as in *Johanns*, the government is already deeply involved, and perhaps we can attribute the message to the government merely upon discovering, in addition, that the government has authority to approve or veto the message's final wording.[10] On the other hand, if the expression does not occur in the context of a larger governmental program intended to encourage some particular activity, and no one is forced to pay any tax or convey any message, then the governmental involvement is minimal, limited only to opening its property or forum to some private speakers. Under these circumstances, surely we will want to know more than whether the government exercises power to veto the final message, before we characterize the message as government speech rather than private speech. If absolutely any speech becomes government speech just because the government gives itself the power to veto the final wording in advance, then the government can safely begin reviewing in advance the "final wording" of absolutely any speech, silencing any prospective public speaker with whom it disagrees. Are we prepared to sanitize such an arrangement, calling it a program of governmental expression? We used to call that "prior restraint," and it was bad.

Living in the real world

As various federal circuits remain at odds over the question of specialty plates and the U.S. Supreme Court continues to deny certiorari, one can only hope that the *Bredesen* decision will have little impact on circuits that have yet to confront this issue. Silent as to its implications for the law of public forums, the Sixth Circuit's analysis, which does little more than cite *Johanns*, evinces a disturbing disconnection from the real world. When a motorist in Alabama displays an Auburn University specialty tag on his car, no reasonable person interprets that to mean that the state government supports Auburn University above all other schools. Nor does anyone think for a moment that the message is "Auburn, and the University of Alabama, and a bunch of other schools and causes are all equally terrific." Rather, as we all know, the message is "Go Auburn!" (And perhaps "Beat Bama!") We understand that the Auburn plate is intended to show the loyalties, not of the state of Alabama, but of the person behind the wheel. (Indeed, University of Alabama alumni would likely be shocked to discover that an Auburn University specialty tag is actually intended to proclaim that the Alabama government is loyal to Auburn University!) The state did not wake up one day and decide people needed to support Auburn; rather, Auburn supporters petitioned the state for permission to fundraise and express themselves on state property, for a fee—which makes it extremely unnatural, and unrealistic, to view the tag as a state-crafted message to all of us.

In the real world, specialty plates are widely understood to operate as a forum for private speech, not the state's bully pulpit. And, as in any government forum for private speech, state censorship of disfavored viewpoints is a constitutional violation, the same violation that is committed when the government tells speakers in advance which viewpoints are acceptable for expressing on public sidewalks and in city parks.

This does not mean specialty plate programs are completely impermissible. If the state wants to approve in advance the messages allowed on its limited number of specialty plates, it could easily design rules for doing so in a viewpoint-neutral way—say, allowing only 100 distinct plate designs, to be allocated by random drawing among all organizations that apply by a certain date and present a certain number of signatures in support of their applications. Or, of course, it could do without a specialty plate program altogether, as states have done throughout most of the history of the automobile. What the state cannot do is to open a forum for private speakers, widely inviting any interested organization to apply for access, and then selectively deny access to disfavored groups and messages. Intentionally setting up a one-sided, private-party debate on public property violates the First Amendment, even if the state says a specialty tag is really the state's way of talking to us, and has nothing to do with allowing motorists to express themselves. The Sixth Circuit may believe this, but we all know better. ■

Endnotes

1. Jay Wilson, "HOT Plates: Alabama Offers More Than 100 Specialty Tags," *The Decatur Daily*, Aug. 22, 2005, *available at www.decaturdaily.com/decaturdaily/livingtoday/050822/plate.shtml.*
2. Pat Whetstone, "UA Car Tags Raise Almost $2 Million for Scholarships," *The University of Alabama News*, Jan. 23, 2006, *available at http://uanews.ua.edu/anews2006/jan06/cartags012306.htm.*
3. *See, e.g., Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 2967 (2006); *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972 (2006).
4. *See Arizona Life Coalition, Inc. v. Stanton*, No. CV031691PHXPGR, 2005 WL 2412811 (D. Ariz. Sept. 26, 2005); *Choose Life Illinois, Inc. v. White*, No. 04-C-4316, 2007 WL 178455, slip op. (N.D. Ill. Jan. 19, 2007).
5. 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 126 S. Ct. 2972 (2006).
6. 544 U.S. 550 (2005).
7. *Bredesen*, 441 F.3d at 375.
8. *Rose*, 361 F.3d at 794, 800–01.
9. *See, e.g., Rosenberger v. Rector* and *Visitors of the University of Virginia*, 515 U.S. 819, 833–34 (1995); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45–46 (1983).
10. *See also Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* involved a federal grant program that made federal funds available to certain family planning clinics as long as their viewpoint on abortion was acceptable to the federal government. The Court upheld the program and its restrictions on the ground that the program was funding government speech, not private speech.

Andy G. Olree
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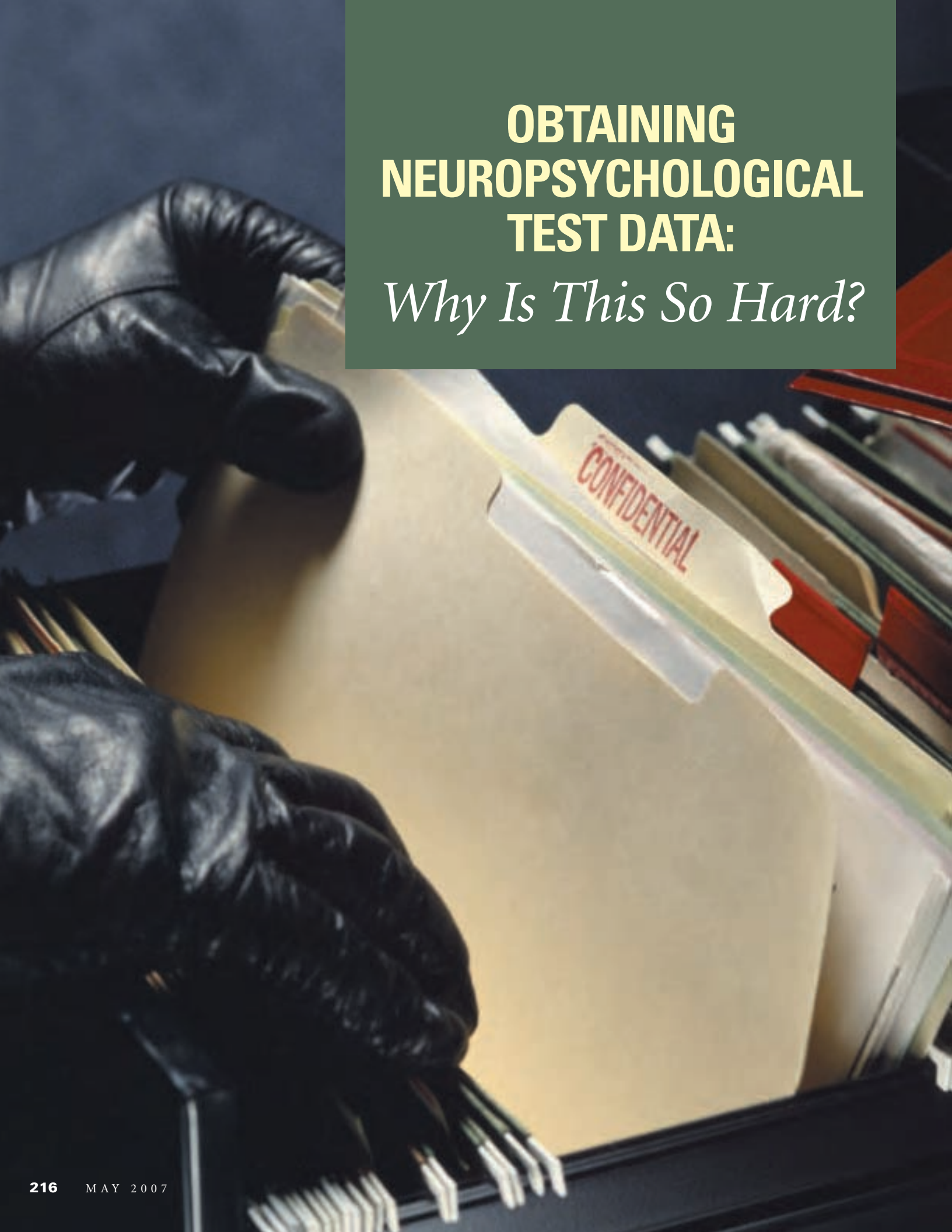
OBTAINING NEUROPSYCHOLOGICAL TEST DATA:

Why Is This So Hard?



BY MARK PROHASKA AND DAVID P. MARTIN

Alex, a 45-year-old operations manager for his company, severely injured his head and back in an automobile accident. He is now on daily pain medication. Since this accident, Alex has been very forgetful and has had a hard time with numbers. His daily medications also make him drowsy. He can't do his job with these limitations.

Alex filed claims for long-term disability benefits and pension plan disability benefits with his company, but both claims have been denied. He also tried to settle his accident claim, but was not successful. A major obstacle has been substantiating Alex's claim of cognitive loss related to his head injury. Alex was seen by a neuropsychologist who performed an extensive evaluation of his cognitive abilities, and concluded that Alex was indeed experiencing problems in attention, concentration, learning and memory, all of which were consistent with the injury he suffered in the accident.

When his claims were filed, each insurance company or claims administrator wanted to view the neuropsychological test data, commonly called raw test data. Even though Alex gave his consent for the release of his test data, his neuropsychologist refused to surrender it, expressing concern over potential misuse if turned over blindly to unqualified persons.

Alex subsequently hired counsel to appeal the denial of his benefit claims. His attorney found that the denial of the benefit claims was based on the failure of the neuropsychologist to send the raw data to the claims administrators' staff physician. There had to be a way to solve this problem. It was unfair for Alex to be caught in the middle.

Alex also hired counsel to file suit on the accident claim. Discovery was served in the accident case seeking the raw data and a subpoena was served on Alex's treating neuropsychologist. Again he refused to release the raw data to Alex's attorney, citing the same concerns. Additionally, the defendant desired to conduct a neuropsychological exam of Alex. This, of course, meant that Alex's attorney would want the raw test data from that examination to likewise cross-examine the opposing neuropsychologist opinion. The stage is now set for a hearing on these issues.

Battles like these are waged in all sorts of claims, civil or criminal, by parties on both sides. For example, see *McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991) and *Neumann v. Prudential Ins. Co. of America*, 367 F.Supp.2d 969 (E.D. Va., 2005) an E.R.I.S.A. benefits case; and *CSX Transportation, Inc. v. Ryan*, No. 2005-SC-0275-MR (Ky. 5/18/2006) a F.E.L.A. claim. But why is the raw data so important and

why is it so hard to get? Understanding this requires understanding what a neuropsychologist is and what he or she does. It is also important to understand the ramifications of surrendering the raw test data.

What is a Neuropsychologist?

A neuropsychologist is a clinical psychologist with specialty training in the study of brain-behavior relationships. Although neuropsychology is a subspecialty of clinical psychology, it is actually more closely aligned with neurology and the science of medicine than with the study and treatment of mental health that is typically associated with the field of psychology. Every neuropsychologist is trained as a clinical psychologist and licensed through the state board of examiners in psychology; however, the training of a neuropsychologist goes well beyond that required to obtain a Ph.D. in clinical psychology. The National Academy of Neuropsychology recognizes the following as the minimal training criteria for a neuropsychologist:

1. A doctoral degree in psychology from an accredited university training program;
2. An internship, or its equivalent, in a clinically relevant area of professional psychology;
3. The equivalent of two (full-time) years of experience and specialized training, at least one of which is at the post-doctoral level, in the study and practice of clinical neuropsychology and related neurosciences that include supervision by a clinical neuropsychologist; and
4. A license in his or her state or province to practice psychology and/or clinical neuropsychology independently, or is employed as a neuropsychologist by an exempt agency.

At present, board certification is not required for practice in clinical neuropsychology. Board certification, though optional, is available through the American Board of Clinical Neuropsychology or the American Board of Professional Neuropsychology, which does provide evidence of the above advanced training, supervision and applied fund of knowledge in clinical neuropsychology. (See, NAN, *Definition of a Clinical Neuropsychologist*, Official Position Statement May 5, 2001; *Definition of a Clinical Neuropsychologist,* The Clinical Neuropsychologist 1989, vol. 3, no. 1, p. 22.)

A neuropsychologist typically provides expert testimony in civil and criminal matters whenever the physical state or functional capacity of the brain is at issue. This could involve determining the

impact of an injury to the brain, the effects of medication on cognitive functioning, issues of competence to manage one's affairs or determining the impact that other brain-related conditions have had on an individual's ability to function. What is being evaluated is the brain's ability to perform the tasks that it is designed to do every day, which include the areas of attention; processing speed, planning and reasoning (i.e., executive functioning); language abilities; visuospatial functions; motor skills; learning; and memory.

Examining the training and qualifications of the neuropsychologist is important because there is not a separate license that designates competence in this subspecialty. Without advanced specialized training, even a licensed clinical psychologist is *not qualified* to practice neuropsychology or to administer and interpret neuropsychological tests, and neither are other professionals such as psychiatrists or physicians. Courts, at varying times, have recognized the problem of giving credibility to the opinions of experts who self-describe themselves as neuropsychologists. For example see, *Minner v. American Mortg. & Guar. Co.,* 791 A.2d 826, 864 (Del. Super., 2000).

The American Psychological Association (2002) Ethical Principles of Psychologists and Code of Conduct (*www.apa.org/ethics*) ethically bars psychologists from practicing outside their area of expertise. Standard 2.01 requires, "Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience." It is therefore unethical for a psychologist without the proper credentials to practice neuropsychology, including the evaluation and interpretation of raw neuropsychological test data.

The credentials of the individual performing a neuropsychological evaluation are important for legal reasons as well. As has often been noted in case law, expert evidence can be both powerful and misleading because of the difficulty in evaluating it. See, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 595, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993). Both ethical and legal issues arise when unqualified individuals interpret neuropsychological test data as discussed below.

Why is Test Data Important?

The right of cross-examination or verification of opinions of the neuropsychologist is especially important given that this is a highly specialized area that involves gathering and sifting through a large amount of data. Issues to be considered include whether or not the proper tests were utilized, whether there was an omission of tests that should have been given to address the issues at hand, whether appropriate normative data were used, whether any scoring errors were made, and whether the data were interpreted in a reasonable manner given all of the available information. A good cross-examination, whether at trial or in a deposition, will require a detailed examination of the raw data in order to provide the above types of information. Given that a review of the data is so important in preparing a case, why are neuropsychologists so reluctant to release the raw data, even when consent is provided by their patient? The answer involves two basic issues–appropriate use of the data and test security.

The First Objection: Improper Use by Unqualified Persons

The term *test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*. Following the guidelines put forth by the National Academy of Neuropsychology and the ethical principles of the American Psychological Association, neuropsychologists will appropriately go to great lengths to avoid surrendering raw data to anyone other than another qualified neuropsychologist. APA Ethical standard 9.04 governing the release

of raw data states, "Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test." The argument is that such a risk arises anytime someone without sufficient training is given access to neuropsychological data.

Imagine getting the raw data from an extensive neuropsychological evaluation consisting of a multitude of tests that include the test items, patient responses, raw test scores, scaled scores, standard scores, Z scores, computer printouts, and tables–what would you make of it? How would you know what each test is supposed to measure? What do all those funny symbols and terms mean? What is an interference quotient? How would you determine whether the scoring is correct, or whether it was administered and scored in accordance with the standardization requirements? How would you know if the doctor's interpretation makes any sense?

Most attorneys simply lack the background in statistics, test administration and interpretation and neuroscience to make any sense out of raw test data. If you happen to have some statistical, research and medical training in your background, you may be able to make some sense of some data, but likely not enough to do the level of detailed analysis required to prepare an effective cross-examination. It would be akin to looking at a CT scan or MRI of the brain–we can all see it and perhaps make some sense of it, but only a trained radiologist can look at it and glean the subtleties and nuances that make it truly meaningful.

Thus, the first objection you will encounter to obtaining raw data will be that not only is it a violation of the ethical principles of the APA, but also that the data is really of little practical use to anyone not trained to interpret it.

The Test Security Objection

The second concern in releasing raw test data is one of test security. The issue here is not so much one of protecting the raw data, but one of protecting the instruments that are used to collect it. The 2002 revision of the APA ethics code made a distinction between raw data and test materials. Standard 9.11, which governs Maintaining Test Security, clarifies that, "The term test materials refers to manuals, instruments, protocols and test questions or stimuli and does not include test data as defined in Standard 9.04, Release of Test Data." It goes on to state that, "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code."

The real concern is one of placing confidential test procedures in the public domain. The reason for this concern is that maintaining test security is critical because of the harm that can result from public dissemination of novel test procedures. The National Academy of Neuropsychology's position paper on the release of raw test data illustrates that, "The potential disclosure of test instructions, questions, and items can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test." There are at least two relevant concerns over the consequences of violating test security. The first is the potential for public harm. For example, with access to test items and adequate preparation, an individual in a sensitive position (e.g., airline pilot, law enforcement official) with true impairment could potentially circumvent detection and continue to perform their duties with a high risk of potentially causing harm through impulsive responding or poor judgment. Conversely, with proper coaching, a competent defendant could learn how to manipulate the test results, including tests of effort and malingering, to make it appear that the testing is valid, and that there exists underlying cognitive impairment of sufficient severity to alter the outcome of the case.

The second concern is that if test items and responses are disseminated widely, the tests will become invalid and new ones will have to be developed, standardized and published. This process is both costly and time-consuming, with the process typically taking several years. The National Academy of Neuropsychology underscored this concern in its official statement of October 5, 1999 which pointed out, "Invalidation of

tests through public exposure and the prospects that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit new scientific and clinical advances." (Archives of *Clinical Neuropsychology,* vol. 15, no. 5, pp. 383–386, 2000, *http://nanonline.org/paio/security.shtm*.)

Even though there is a distinction between the release of test data and test materials, it is really impractical and often impossible to separate the two. Imagine obtaining the raw scores to a test that consist of a number of scores ranging from one to five. Without the test items, these numbers are essentially meaningless and certainly have the potential to mislead. In many cases, tests are administered on the test forms themselves; thus, the test materials and test data are combined in a manner that does not allow the release of one without the other. And, yet, in other cases, test materials might easily be inferred from test data, and though the release of the data might not technically violate APA Ethics Code 9.11, it may well violate the intent of the guideline and still be in conflict with the procedures or principles articulated in 9.11.

Thus, the second argument you are likely to encounter in obtaining raw test data is that there is an unacceptable risk that test security would be violated, and the neuropsychologist will be compelled to take measures to ensure that test security will be maintained.

Objection Because of Harm to Patient, Misuse, Misrepresentation, Lack of Control over Ethical Use

There are other ethical standards that apply to the release of test data as well. For example, Standard 9.07 specifically states, "Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision." Standard 1.01 regulates the Misuse of Psychologists' Work. It reads: "If psychologists learn of misuse or misrepresentation of their work, they take reasonable steps to correct or minimize the misuse or misrepresentation."

Based on the ethical guidelines mentioned, neuropsychologists are compelled to be very reluctant to release raw test data from a forensic examination that could be used by an attorney however he/she saw fit and regardless of whether its use was legitimate. Attorneys would be unfettered to act like amateur psychologists or neuropsychologists without a professional or scientific referee

to stop the misconduct. The same concerns apply if the request is to turn over the raw data to an insurance company, or a clinical psychologist without specialty training in neuropsychology, a neurologist, a psychiatrist, or a physician. Absent additional training, none are qualified to interpret the raw data and the potential for misuse and compromise of testing materials is opened.

This concern over misuse of test data and lack of control as to how the data is used frequently puts neuropsychologists and attorneys at odds. While it is often assumed that the neuropsychologist's concern is limited to protection of his/her opinion and interpretation, that is not the objection that will sustain debate. The real battle is waged over the right mechanism to police and protect the profession and yet allow for needs to be met in the legal system.

In the legal profession, attorneys have preferred to police themselves as to ethical misconduct. There are many reasons for this, but none of them relate to trying to hide the wrongful conduct of attorneys from the public. Neuropsychologists, likewise, believe it is most reasonable for ethical liability and test security to be regulated by peers accountable to an organization. Accordingly, a solution to the battle over the release of raw test data may be possible if the concerns of both sides of this issue are recognized.

How Should Raw Test Data Be Produced?

Ethical standards governing neuropsychologists do allow production of raw data pursuant to a court order. APA Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority requires, "If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority." The requirement of taking "steps to resolve the conflict" and knowing whether the steps taken went far enough leaves many neuropsychologists feeling vulnerable and uncomfortable. However, neuropsychologists' objections are remedied by production of the raw data *between* neuropsycholoigsts who are governed by their own ethical standards. Recently the Kentucky Supreme Court reinstated a trial court order in *CSX Transportation, Inc. v. Ryan*, No. 2005-SC-0275-MR (Ky. 5/18/2006), relating to the production of raw test data. The trial court had ordered the production of the raw test data obtained from a Rule 35 examination, but the production was to another

neuropsychologist. It is reasonable to tailor a subpoena or court order to meet these concerns, especially given that the right to verify or cross-examine is not harmed but actually strengthened.

Attorneys who disregard the concerns of neuropsychologists by seeking production of raw data to themselves rather than to their neuropsychologist may face ethical issues as well. Counsel is then exposed to allegations of schooling his/her client or future clients on how to answer questions. The temptation is there even apart from allegations. Rule 3.4 of the *Rules of Professional Conduct* forbids falsification of evidence which arguably occurs when tests are taught to clients. Rule 3.3 of the *Alabama Rules of Professional Conduct* forbids a lawyer from offering "evidence that a lawyer knows to be false" or of failing to inform the court of a material fact to avoid assisting a client with a fraudulent act. The better practice is to address the neuropsychologists' concerns and avoid ethical issues for all. Otherwise, testing integrity is compromised, which will affect the criminal and civil justice systems as well as the practice of neuropsychology.

These issues also arise outside of the courtroom where parties must strive to resolve these issues without the assistance of a judge. For example, in claims proceedings before an insurance company, it is also reasonable to require an insurance company to have a neuropsychologist receive raw data if its production is required. For an example see *Neumann v. Prudential Ins. Co. of America*, 367 F.Supp.2d 969 (E.D. Va., 2005). A benefit denial under circumstances in which a claims administrator did not receive raw data because of legitimate neuropsychologists' concerns should be viewed as an unsubstantiated denial. Even if the raw data was turned over to an unqualified person, opinions proffered from a review of the data should be insufficient to substantiate a denial.

Likewise, if the claims administrator requires the claimant to undergo a neuropsychological evaluation, the claimant should not directly receive the raw test data. It should only be forwarded to the claimant's neuropsychologist. The claimant's right to his records should not extend to the neuropsychologist's tools in his or her trade.

Summary

It is unreasonable for attorneys or decision-makers to assume that individuals with improper training or no training may be able to utilize raw neuropsychological test data in a proper manner. Neuropsychologists have ethical duties and practice concerns that are due consideration. Ironically, the main concern of attorneys, which is the right to a cross-examination conducted in a fair manner, is of mutual interest to both the neuropsychologist and the attorney. The neuropsychologist does not want to see the data misused or abused and the attorney, likewise, has ethical concerns over the falsification of evidence through compromised test materials. Production of raw test data directly to an attorney who is not a trained neuropsychologist or to other untrained professionals falls short of the protection relevant to the verification or cross-examination process. The best course of action is for the production of the raw test data to take place between neuropsychologists. ■

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Preventing Waiver of Arguments on Appeal

Preventing Waiver of Arguments on Appeal

BY ED R. HADEN

Waiver can end your appeal before it begins.[1] The Supreme Court of the United States has stated that whether and how an appellate court applies the principles of waiver to deny review of an argument or issue is governed by "no general rule," but is left "primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The appellate court's discretion, in turn, may be guided by the competing policies of fairness to the opposing party, the regard for the trial court's role, the caseload of the appellate court, the importance of the issue, the practical realities of trial work, and the preferences of the individual judge writing the opinion, among others.[2]

In an adversarial system of justice it is generally considered fair to afford the opposing party the opportunity to respond.[3] Appellate courts are loath to reverse a trial court based on an argument that the trial court has not ruled upon. Moreover, because of heavy caseloads, appellate judges generally do not have the time to canvas the record or to conduct extensive legal research to determine if a party's argument should prevail.

On the other hand, when an issue is of sufficient importance to the development of the law, an appellate court may address an otherwise inadequately preserved issue.[4] Similarly, to preserve an issue, appellate judges may not require a perfect objection or argument in the midst of the hectic realities of trial.

In balancing these policies, individual appellate judges may have different standards for concluding an argument or issue is waived. When different individual standards combine with collegial deference to the writing judge, the strictness of waiver can vary from case to case on the same court depending on which judge writes the opinion, unless the court adopts a uniform standard.

Because counsel cannot control the strictness with which an appellate court will apply waiver principles, it is prudent to adhere to a standard that would survive a strict review on appeal. This article addresses the general principles for when and how to raise arguments in civil cases to avoid waiver of an argument or issue on appeal.

When and How to Raise Arguments

As a starting point to avoid waiver, an argument should be raised in the trial court with citations to record evidence and supporting law, raised in time for one's opponent to respond, ruled upon by the trial court, and raised in one's initial appellate brief with citations to the record on appeal and supporting law.[5] More specifically, counsel should take care to comply with the rules at each stage of the litigation process, beginning with the complaint.

Complaint

In general, a claim must appear on the face of the well-pleaded complaint, or it is waived.[6] Three specific rules also have an impact on the prevention of waiver. First, even where a claim is omitted from a complaint, it can be salvaged under Rule 15(b) of the *Alabama Rules of Civil Procedure* by being tried with the consent of the other party or upon a motion to conform the pleadings to the evidence.[7]

Second, when the constitutionality of a statute or municipal ordinance is at issue, the attorney general must be notified of the issue and action.[8] Without the required notification, the trial court has no subject matter jurisdiction and any ruling on the case will be void.[9]

Third, for claims against a municipality, a plaintiff should notify that municipality within two years of the accrual of a claim for payment (six months in the case of a tort claim).[10] Otherwise, the claim is barred.[11]

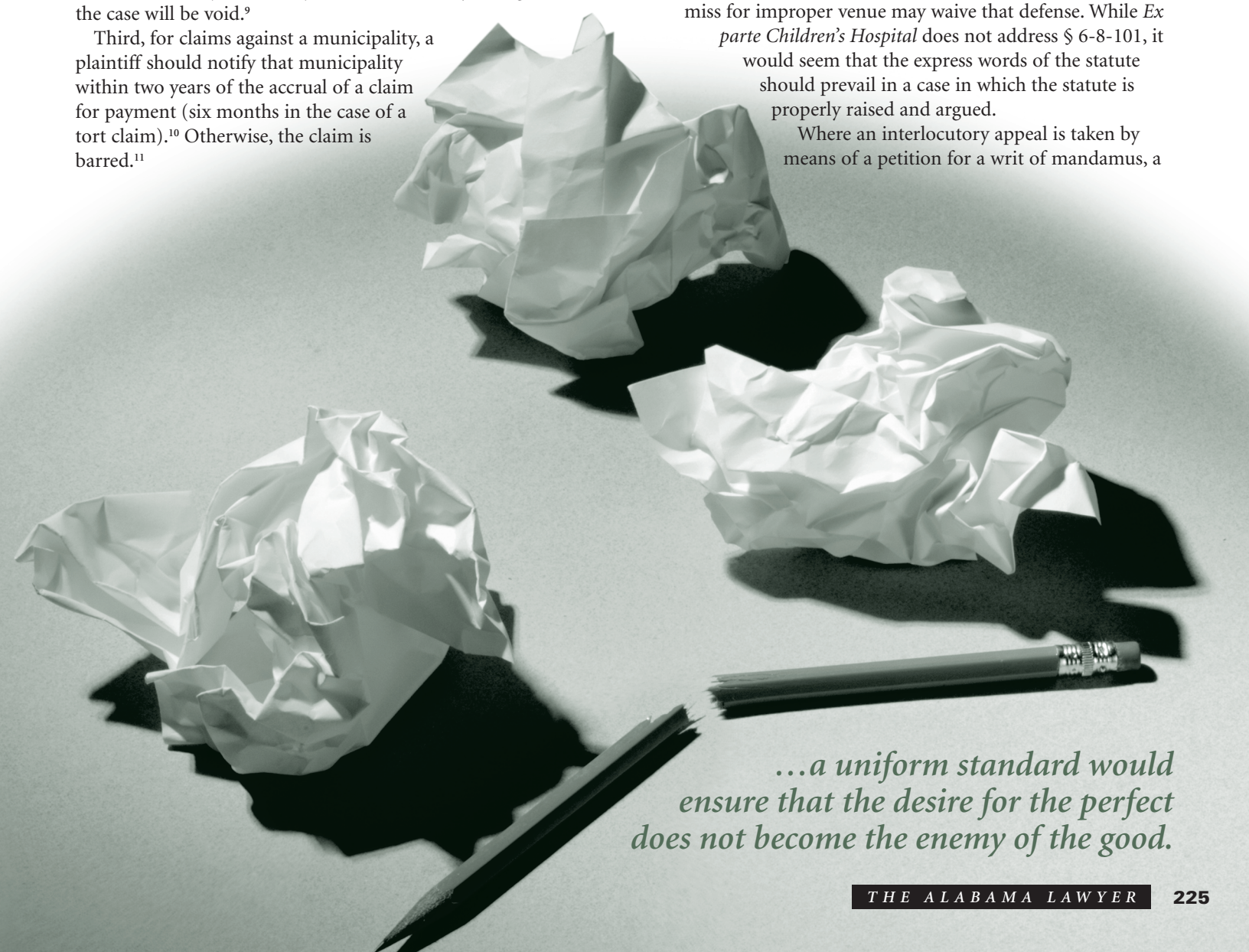
Motion to Dismiss

Under *Alabama Rule of Civil Procedure* 12(b), as a general rule, certain defenses (*i.e.*, lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service) generally should be raised in a motion to dismiss.[12] If that defense is made by motion, it must be made before any responsive pleading.[13] If a motion to dismiss based on lack of personal jurisdiction is denied and mandamus relief is sought and denied, there is nothing to prevent a subsequent challenge to personal jurisdiction on appeal.[14]

Interlocutory Appeals

The failure to file an interlocutory appeal generally does not result in waiver of an issue in a subsequent appeal from a final judgment.[15] The Supreme Court of Alabama has held that the failure to file a petition for a writ of mandamus does not waive the right to challenge the denial of a trial by jury.[16] With respect to the defense of improper venue, however, Alabama law is not settled. On the one hand, *Alabama Code* § 6-8-101 expressly provides that this defense can be appealed after a final judgment. On the other hand, *Ex parte Children's Hospital of Alabama*, 721 So. 2d 184, 191 n.10 (Ala. 1998), states that a failure to seek interlocutory review of a denial of a motion to dismiss for improper venue may waive that defense. While *Ex parte Children's Hospital* does not address § 6-8-101, it would seem that the express words of the statute should prevail in a case in which the statute is properly raised and argued.

Where an interlocutory appeal is taken by means of a petition for a writ of mandamus, a



…a uniform standard would ensure that the desire for the perfect does not become the enemy of the good.

statement of good cause should be included if the petition is not filed within 42 days of the ruling or order that is the subject of the petition.[17] Otherwise, the right to petition for relief is waived.[18]

Answer

"Typically, if a party fails to plead an affirmative defense, that defense is waived."[19] The Supreme Court of Alabama has explained:

> Once an answer is filed, if an affirmative defense is not pleaded, it is waived. *Robinson v.* [*Morse*], 352 So. 2d 1355, 1357 (Ala.1977). The defense may be revived if the adverse party offers no objection (*Bechtel v. Crown* [*Cent.*] *Petroleum Corp.*, 451 So. 2d 793, 796 (Ala. 1984)); or if the party who should have pleaded it is allowed to amend his pleading (*Piersol v. ITT* [*Phillips*] *Drill Division, Inc.*, 445 So. 2d 559, 561 (Ala. 1984)); or if the defense appears on the face of the complaint (*cf.*, *Sims v. Lewis*, 374 So. 2d 298, 302 (Ala. 1979); and *Williams v. McMillan*, 352 So. 2d 1347, 1349 (Ala. 1977)). *See, also*, 2A J. Moore, Federal Practice § 8.27[3] at 8-251 (3d ed. 1984). But, specifically, a defendant "cannot revive [the waived affirmative defense] in a memorandum in support of a motion for summary judgment." *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 96 (5th Cir. 1976).[20]

In addition to pleading affirmative defenses, counsel should remember to deny factual allegations in his answer.

Further, counsel must be specific in identifying the affirmative defense. In *Pinigis v. Regions Bank*, No. 1041905, 2006 WL 1304938, at *5-*7 (Ala. May 12, 2006), for example, the supreme court held that a party had waived an affirmative defense by pleading the "statute of limitations" instead of the more precise term "statute of repose."

In addition to pleading affirmative defenses, counsel should remember to deny factual allegations in his answer. *Failure to do so could result in an effective waiver of a defense.* For example, in *Matthews v. Alabama Agricultural and Mechanical University*, 787 So. 2d 691, 697-98 (Ala. 2000), state university defendants did not file an answer or any other pleading denying the allegations in the plaintiff's complaint. The plaintiff had alleged that the defendants had acted willfully, maliciously, fraudulently and beyond their authority, and the defendants presented no evidence that they were exercising a discretionary function. *Id.* Because the university defendants relied solely on the pleadings, the burden never shifted to the plaintiff to show that immunity did not apply. *Id.* The supreme court held that the defendants were not entitled to sovereign immunity or to discretionary-function immunity. *Id.*

Nonetheless, where an affirmative defense is argued at trial and the opposing party is not prejudiced, the supreme court has held that the defense was not waived by a failure to include it in the answer.[21] Instead, the trial court was allowed to rule that the pleadings were amended to conform to the evidence under Rule 15.[22]

Summary Judgment

At the summary judgment stage, waiver principles turn on whether the argument is raised by the winner or loser in the trial court and how the argument was made in that trial court. The loser at summary judgment can raise on appeal only those arguments that he made to the trial court.[23] By contrast, the winner at summary judgment can raise new arguments on appeal. As the supreme court explained with respect to affirming trial courts generally:

> [T]his Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court. This rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment, or where a summary-judgment movant has not asserted before the trial court a failure of the non-movant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element . . . .[24]

In addition, counsel must take care how he makes his argument to the trial court. If he intends to argue that a critical piece of evidence supporting his opponent's summary judgment motion was not authenticated, counsel must object in the trial court on that ground, or the objection is waived, absent a gross miscarriage of justice.[25]

Further, the motion for summary judgment must be supported by a narrative statement of the facts that includes specific citations to the evidence in the record before the trial court. Failure to comply with the specific citation rule may result in the reversal of the summary judgment.[26]

Moreover, an argument to the trial court consisting of just one sentence may not be sufficient to preserve an argument for appellate review.[27]

Challenges to Jurors' Qualifications to Serve

A party must question jurors about their qualifications because failure to do so may constitute invited error, and the challenge based on qualifications will be waived on appeal.[28]

Objections to Evidence

Evidentiary objections can be made by a motion *in limine* or during the trial itself. When the trial court denies a motion *in limine* to exclude evidence, the disappointed movant must object again at trial to preserve his objection for appeal.[29] When the trial court grants a motion *in limine*, the disappointed non-movant must attempt to offer his evidence again at trial, making a proffer to preserve the exclusion ruling for appeal.[30] Dean Gamble

has explained, however, that when a ruling on a motion *in limine* is "prohibitive" (*i.e.*, prohibits the party opposing the motion from offering or mentioning the evidence at trial without obtaining permission from the judge), a proffer of evidence at trial will not be required.[31]

An objection made at trial must be timely, state specific grounds, result in a ruling and affect a substantial right of the appellant to preserve the objection for appellate review.[32] In addition, where the trial court excludes evidence, the party who wishes to present that evidence must make a proffer of that evidence on the record and state the purpose for which it is offered so that the appellate court will be able to assess the admissibility of the evidence on appeal.[33] Whatever grounds are stated in support of the objection or the admission of evidence in the trial court are the grounds upon which the appellate court will review the merits of the objection; the appellate court will not consider grounds raised for the first time on appeal.[34]

Motion for a Judgment as a Matter of Law during Trial

Usually challenges to the sufficiency of the evidence must be made twice—once at the close of evidence and again post-judgment.[35] If, however, a defendant moves for judgment as a matter of law ("JML") at the close of the plaintiff's case and that motion is denied, and then the defendant elects to offer evidence as part of its defense, the defendant waives any argument that the trial court erred in denying the motion for JML at the close of the plaintiff's evidence.[36] Instead, the appellate court will review the record as of the close of all of the evidence.[37]

Rule 50(a)(2) of the *Alabama Rules of Civil Procedure* provides that a motion for JML "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

Jury Instructions

Submitting jury instructions is not enough to preserve error in the trial court's failure to give those instructions.[38] Rule 51 of the *Alabama Rules of Civil Procedure* provides:

> No party may assign as error the giving [of] or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless [1] that party objects thereto before the jury retires to consider its verdict, [2] stating the matter objected to and the grounds for the objection.

"By failing to object before the jury retires to deliberate, a party waives any error in the court's instructions."[39] With respect to the specificity of the grounds given, "Rule 51 does not contemplate that the objecting party, in order to preserve for appellate review an erroneous instruction, deliver a discourse on the applicable law of the case."[40] On the other hand, a general objection based on "not giving the requested charges" is insufficient.[41]

Post-Judgment Motions

To challenge the evidence supporting a judgment, the conduct of trial, the legality of the judgment or the entry of a default judgment, counsel must file a post-judgment motion. When a party fails to file a timely motion with the trial court to set aside the dismissal of its action, for example, an appellate court may consider related issues to be interlocutory in character and therefore unreviewable on appeal.[42] The supreme court has explained:

> The rationale behind . . . the general rules regarding the necessity for post-trial motions is that, ordinarily, issues not raised before the trial court may not be raised for the first time on appeal. This principle assures proper development of the record in the court below and places the primary responsibility on the trial judge to determine whether the sanction of dismissal for failure to comply with discovery orders is merited. The procedure affords the trial court, which has a feel of the case, an opportunity to correct its own errors and prevent the hardships of an appeal.[43]

In addition, Rule 50(b) of the *Alabama Rules of Civil Procedure* provides that to challenge the sufficiency of the evidence for sending a claim to the jury, a party must file a renewed motion for JML after the judgment is entered. In general, there must be a JML made at the close of the plaintiff's evidence and a renewed JML motion after judgment that makes the same arguments in order to avoid waiving the arguments.[44] There are two exceptions to this two-motion requirement. First, a post-judgment JML motion that challenges the sufficiency of evidence supporting an award of punitive damages does not require a JML motion at the close of the evidence.[45] Second, a post-judgment JML motion made regarding a pure question of law does not require a JML motion at the close of all the evidence.[46]

While the original JML motion can be made orally, Rule 50(b) specifies that for a post-judgment JML motion, there must be "service and filing." Where the renewed JML motion fails to challenge the sufficiency of the evidence, such challenge is waived for appellate review.[47] A challenge such as the "evidence is insufficient to support [the] plaintiff's alleged claims that the defendants, separately or severally, wrongfully interfered with any business [or contractual] relationship the plaintiff, Cellulink, Inc., had with Wal-Mart," has been held sufficient because it "challenged the sufficiency of the evidence as to each element of the tortious-interference claim."[48] Justice Lyons has recommended:

> [C]aution dictates that defendant's motion for JML assert that there is no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff on each count of the complaint, on each claim, on each element of each claim, on each material factual allegation, and on each item of damages sought. The motion should further assert that the evidence establishes each of the defendant's affirmative defenses and each element thereof. The motion should also cite supporting legal authority where appropriate.[49]

However, "when the trial court has made no written findings of fact in a non-jury trial, a party must move for a new trial in order to preserve for review a question relating to the sufficiency or weight of the evidence."[50]

To challenge error made in the conduct or result of trial, a motion for a new trial must be made after the judgment. A request for remittitur (*i.e.*, to accept a lower damages amount or a new trial),[51] an argument regarding juror misconduct,[52] an argument that jury instructions were improper,[53] etc. should be made via a timely filed Rule 59 motion.

Rule 50(c)(1) provides that "[i]f the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, ... In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial." Where the trial court fails to make the conditional ruling on the new trial motion:

> [T]he movant [should] point out that error to the trial court and/or to the appellate court, and the failure to do so would constitute a waiver of the motion for a new trial. . . . Alabama caselaw also provides for an exception to the rule stated above, an exception that allows an appellate court on its own motion to remand the action for the trial court to rule on the motion for a new trial if the movant has argued the merits of the motion at trial and on appeal.[54]

In other instances, for example, where the trial court grants a new trial on one ground, and does not rule on alternative grounds for new trial, Rule 50(c) does not require the trial court to rule on the alternative grounds for new trial.

Post-judgment motions also may present a second chance to raise a new legal argument. A trial judge has the discretion to consider a new argument in a post-judgment motion, but is not required to do so.[55]

Notice of Appeal

In federal court, mentioning one issue or one order in the notice of appeal may result in the exclusion of other issues and orders.[56] Under the *Alabama Rules of Appellate Procedure,* however, the designation of a particular order from which the appeal is taken does not limit the scope of appellate review.[57]

Record on Appeal

The appellant generally has the obligation to show in the record that an issue was preserved and that evidence supports a finding of error.[58] Exceptions may exist if the appellee argues that there is no record support for the appellant's contentions, and the appellant subsequently files a transcript supplementing its position.[59] Similarly, if the appellee cites to exhibits not contained in the record, the burden shifts to the appellee to supplement the record with the exhibits on which he relies.[60]

Federal Rule of Appellate Procedure 10(c), (d) and (e) and *Alabama Rule of Appellate Procedure* 10(d), (e) and (f) generally provide that where a transcript or portion of the record is lost, the aggrieved party may file a motion to supplement or correct the record.[61] If the other party objects, however, the trial court will rule on whether any supplement or correction is warranted.[62] If your opponent and the trial judge fail to remember your cross-examination of the key witness the way you remember it, your case, like the record, may be lost.

Acceptance of Payment/Benefit of Judgment on Appeal

Acceptance of the benefits of a judgment may also waive the right to appeal, or cross-appeal, adverse portions of that judgment.[63] This "acceptance of benefits" doctrine does not apply "when the party voluntarily pays the judgment [or] the opposing party will suffer no injury."[64] This rule "prevents a party from drawing a judgment into question to the prejudice of his adversary after he has coerced its execution or accepted its benefits."[65]

Cross-Appeal

If the error asserted by the appellee challenges the trial court's judgment, the appellee generally must cross-appeal.[66] If there is dissatisfaction with any part of the judgment as entered, it may be wise to bring a cross-appeal.[67] No cross-appeal is required, however, if the judgment is "not really adverse to" the appellee.[68] Thus, for example, no cross-appeal is required where "a defendant prevails at trial and on appeal argues that the trial court improperly denied it a directed verdict."[69]

Brief on Appeal

Although an appellate court will not review the trial court's judgment on a ground not raised below, an appellee can defend the trial court's ruling based on argument that was not raised in that court.[70] The court of appeals may affirm if the trial court's judgment is based on any valid legal ground.[71] Also, the appellate court will assume that the trial court made findings of fact necessary to support its judgment, even if there is an absence of specific findings of fact.[72] A corollary to that rule is that an argument not raised before an intermediate appellate court cannot be raised to a supreme court.[73] The issue of subject matter jurisdiction–the power of the court to hear the case–may, unlike other issues, be raised for the first time on appeal.[74]

Even if counsel preserves an argument or issue at the trial level, he must take several additional steps to preserve error on appeal. First, he must comply with Rule 28 of the *Alabama Rules of Appellate Procedure*. In drafting the statement of facts in the brief, Rule 28(a)(7) requires "[a] full statement of the facts relevant to the issues presented for review, with appropriate references to the record . . . ." Rule 28(a)(10) requires that the argument section of the brief contain "citations to the cases, statutes, other authorities and parts of the record relied on. . . . Citations shall reference the specific page number(s) that relate to the proposition for which the case is cited." And Rule 28(g) provides: "If reference is made to evidence, it shall be made to the pages of the clerk's record or reporter's transcript at which the evidence was identified, offered, and received or rejected."

The supreme court has stated: "[Appellant], in his brief, has failed to include any citations to authorities or reference to the record in support of this argument as required by Rule 28(a)[10],… Consequently, we will not consider this issue."[75] The supreme court has reminded counsel that "it is neither this Court's duty nor its function to perform all the legal research for an appellant."[76]

In addition, Rule 28(k) allows an appellant to adopt by reference an argument contained in the brief of his co-appellant. The appellant, of course, must have made that argument below.[77] Incorporation into an appellate brief of arguments made in a trial brief, however, is not allowed.[78]

Some federal authority holds that in an appellate brief, an argument must be raised in the statement of issues, or it will be deemed waived.[79] The Supreme Court of Alabama has held that when a party made an assertion about a contested issue in its statement of facts, but did not mention–much less cite any authority for–that issue in the issue or argument sections of its initial appellate brief or its reply brief, it waived that argument.[80]

Second, the argument in the brief must adequately connect the legal rule to the facts of the case. An argument is sufficient when counsel clearly explains how the facts of his case are connected to the rule of law cited in support of the argument. Failure to be exact may result in waiver of the argument. For example, under the Alabama Medical Liability Act, a petitioner sought mandamus to change venue from the Bessemer Division to the Birmingham Division, where the acts occurred.[81] However, the supreme court concluded that the argument in the brief was insufficient and thus was waived:

> The hospital and Pszyk do not demonstrate, they only presume, that the requirement of § 6-5-546 that an action under the AMLA be brought "in the county wherein the act or omission . . . actually occurred" likewise requires that the action be brought in the judicial division in which the act or omission actually occurred. Because the hospital and Pszyk have not argued that § 6-5-546 requires that the Bessemer Division be treated as a separate county, they have not demonstrated a clear legal right to relief insofar as they argue that § 6-5-546 requires a transfer of the case to the Birmingham Division.[82]

Similarly, the supreme court found waiver because of an insufficient argument in a case where a party "attempt[ed] in her brief to raise issues relating to due process" and cited a case related to that issue but did "not discuss, in any meaningful way, how [that case] support[ed] her positions on appeal." The court held that a "vague comment" referring to due process issues was not enough to preserve those issues.[83]

In addition to making an argument that connects the legal rule to the facts in the case, if counsel wants the appellate court to overrule precedent, he must ask it to do so.[84] This allows for the parties to argue whether *stare decisis* should apply or not.[85]

Third, the adverse ruling by the trial court must not be harmless to the appellant. Rule 45 of the *Alabama Rules of Appellate Procedure* provides that there will be no reversal in a civil or criminal case unless "the error complained of has probably injuriously affected substantial rights of the parties." Thus, for example, where the admission of testimony was error, but not harmful to the appellant, the appellate court will not reverse.[86]

Reply Brief

If an argument is not raised in the initial brief, generally it cannot be raised in the reply brief.[87] There is authority, however, holding that an appellant can respond in a reply brief to issues raised for the first time in the appellee's brief.[88] In fact, if an appellee does raise an issue for the first time in its brief, failure to respond at all to that issue may result in waiver.[89]

Amicus Briefs

An *amicus* brief may raise only issues raised in the brief of the party that the *amicus* is supporting.[90] Further, because *amicus* briefs are subject to the brief format requirements applicable to the briefs of the parties, they should cite to the law and to the record.[91]

[m]atters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing.

Application for Rehearing

The seminal case regarding the limitations of arguments that can be made in an application for rehearing is Justice Harwood's opinion in *Birmingham News Co. V. Horn*, 901 So. 2d 27 (Ala. 2004). In that opinion, the Supreme Court of Alabama stated the general rule that "[m]atters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing." *Id.* At 77. Further, matters raised in the application for rehearing must be "reiterated and adequately argued" in the brief in support of the application or "they are deemed waived." *Id.*

While new arguments generally cannot be raised in an application for rehearing, the Alabama Supreme Court has addressed an argument that an appellate decision should be applied prospectively.[92] In addition, if the court bases its ruling on law not argued in the parties' briefs on appeal, the application for rehearing will be the only place that an argument against that legal principle can be made.

Petition for Certiorari–Alabama

Issues must be set forth in the petition for certiorari and, if granted, argued in the supporting brief.[93] If conflict with a prior opinion is the grounds for the petition, the petitioner should quote the excerpts from the court of appeals' opinion that conflict with another prior opinion or should state that Rule 39(a)(1)(D)2 of the *Alabama Rules of Appellate Procedure* applies and should explain with particularity how the decision at issue conflicts with a prior opinion.[94]

Petition to Certiorari—United States Supreme Court

The Supreme Court of the United States has explained that "[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . By citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'"[95] Failure to do so can result in a waiver of review.[96]

Law of the Case

Once a trial court has ruled on a matter adversely to a party, counsel for that party should appeal that ruling if his client is not prepared to live with it throughout the litigation. "[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time."[97] Further, if a judgment is vacated on

appeal without addressing an argument raised in a party's brief, counsel for that party should raise the issue again on remand to avoid waiver in any subsequent appeal.[98]

Conclusion

To avoid waiver of an argument or issue, counsel should review the general principles above as well as special rules that may apply to the particular argument or issue advanced given the procedural posture of the case. Counsel should present an argument with citations to the record evidence and supporting law and should do so in time for opposing counsel to respond and the court to rule.

For its part, a court should employ a uniform standard in deciding waiver issues to ensure due process for litigants and restraint by the judiciary. On one hand, the less "perfect" the form of an argument, the more difficult it is for a court to analyze and rule on it. On the other hand, it is "good" policy to decide a case "on its merits"[99] and the hectic give-and-take of trial does not often lend itself to perfection. As long as an adequate, though imperfect, argument is timely made and not abandoned, a uniform standard should lean toward the good policy of addressing the merits. Such a uniform standard would ensure that the desire for the perfect does not become the enemy of the good. ■

Endnotes

1. This article owes much to the outstanding outline prepared by Associate Justice Bernard Harwood of the Supreme Court of Alabama. J. Bernard Harwood, *Preserving Error in Civil Cases*, CLE Outline (Dec. 17, 2004) [hereinafter "*Harwood*"], and to the assistance of Kristin Henson, an associate at Balch & Bingham LLP.
2. *See, e.g.*, National *Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 625-29 (1st Cir. 1995) (listing considerations that might affect the general rules of waiver).
3. *See Ex parte Elba Gen. Hosp.*, 828 So. 2d 308, 314 (Ala. 2001) (internal quotations omitted) ("[F]airness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond . . . ."); *Harwood*, at 1-2.
4. *See, e.g., Selma Med. Ctr., Inc. v. Fontenot*, 824 So. 2d 668, 693 (Ala. 2001) (Woodall, J., dissenting) (stating that "the Hospital did not present a flow-of-commerce argument to the trial court," where the majority ruled on that issue).
5. *See generally Crutcher v. Wendy's of North Ala., Inc.*, 857 So. 2d 82, 97 (Ala. 2003).
6. *See, e.g., Byrd v. Lamar*, 846 So. 2d 334, 341 (Ala. 2002) ("Because Byrd did not properly allege a fraudulent-misrepresentation claim in his complaint, we affirm the summary judgment . . . .").
7. *See Ammons v. Tesker Mfg. Corp.*, 853 So. 2d 210, 216-18 (Ala. 2002) (affirming trial court's allowance of amendment of pleadings).
8. *See* Ala. Code § 6-6-227 (2005).
9. *See Terry v. City of Decatur*, 601 So. 2d 949, 950-51 (Ala. 1992).
10. *See* Ala. Code § 11-47-23 (1992).
11. *See Birmingham v. Davis*, 613 So. 2d 1222, 1224 (Ala. 1992) ("The Davis's claims are barred because the City of Birmingham was not given notice within six months of the accrual of those claims.").
12. *See Foster v. Foster*, 709 So. 2d 1301, 1302 (Ala. Civ. App. 1998) (addressing the defense of lack of personal jurisdiction).
13. *Id.*
14. *See Ex parte McInnis*, 820 So. 2d 795, 798 (Ala. 2001).
15. *See Ex parte Puccio*, 923 So. 2d 1069, 1077 (Ala. 2005) (denying mandamus relief to defendant on a challenge to personal jurisdiction, but noting that defendant could try again if further discovery demonstrated that personal jurisdiction did not exist).
16. *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So. 2d 759, 765 (Ala. 2004) (stating that "review by a petition for a writ of mandamus is not the sole means of review available to a party whose jury demand has been denied").
17. Rule 21(a)(3), Ala. R. App. P. ("If a petition is filed outside this presumptively reasonable time [*i.e.*, generally 42 days], it shall include a state of circumstances constituting good cause for the appellate court to consider the petition . . . .").
18. *See Ex parte Troutman Sanders, LLP*, 866 So. 2d 547, 549-50 (Ala. 2003).
19. *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 777 (Ala. 2004).
20. *Wallace v. Alabama Ass'n of Classified Sch. Employees*, 463 So. 2d 135, 136-37 (Ala. 1984).
21. *See Winkleblack v. Murphy*, 811 So. 2d 521, 530 (Ala. 2001).
22. *Id.*
23. *See Turner v. Westhampton Court, LLC*, 903 So. 2d 82, 88 (Ala. 2004) ("Because the [appellants] failed to raise before the trial court [at the summary judgment stage] the only argument that they raise on appeal . . . they have waived that argument, and we will not address it.").
24. *Liberty Nat'l. Life Ins. Co. v. Univ. of Alab. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003) (citations omitted).
25. *See Kelly v. Panther Creek Plantation, LLC*, 934 So. 2d 1049, 1053 (Ala. 2006).
26. *See Stokes v. Ferguson*, No. 1031956, 2006 WL 2383249, at *2 (Aug. 18, 2006).
27. *See TFT, Inc. v. Warning Sys., Inc.*, 751 So. 2d 1238, 1243 (Ala. 1999) (holding that one-sentence assertion in trial brief was insufficient to preserve argument for appeal).
28. *See Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).
29. *See Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 52 (Ala. 2001).
30. *Owens-Corning Fiberglass Corp. v. James*, 646 So. 2d 669, 673 (Ala. 1994); *see also Stamp v. Jackson*, 887 So. 2d 274, 279 (Ala. Civ. App. 2003) (same); *Harwood*, at 2-6.
31. Charles Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age*, 33 Ala. L. Rev. 1, 16 (1981). *See Harwood*, at 10-13 (quoting *Boros v. Baxley*, 621 So. 2d 240, 244 n.3 (Ala.) (quoting, in turn, Gamble), *cert. denied*, 510 U.S. 997, 114 S. Ct. 536 (1993)); *see also Ex parte Sysco Food Servs. of Jackson, LLC*, 901 So. 2d 671, 674 (Ala. 2004).
32. *See, e.g., Bostrom Seating, Inc. v. Adderhold*, 852 So. 2d 784, 797-98 (Ala. Civ. App. 2002) ("The failure of a party to make an objection at trial waives that objection."); *Harwood*, at 2-6.
33. *See Evans v. Fruehauf Corp.*, 647 So. 2d 718, 719-20 (Ala. 1994) (holding that a party must offer contested evidence at trial "and obtain a specific adverse ruling in order to preserve the issue for appellate review").
34. *Nichols v. Southeast Prop. Mgmt., Inc.*, 576 So. 2d 660, 662 (Ala. 1991).
35. *See Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 774 (Ala. 2004).
36. *See Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 561 (Ala. 2002).
37. *Id.*
38. *See Regions Bank v. Plott*, 897 So. 2d 239, 246 (Ala. 2004).
39. *Adriatic Ins. Co. v. Willingham*, 567 So. 2d 1282, 1282 (Ala. 1990) (citations omitted).
40. *Ware v. Timmons*, No. 1030488, 2006 WL 1195870 (Ala. May 5, 2006). *See* Rule 51, Ala. R. Civ. P. cmt. ("Grounds must be stated in other than general terms but the requirement of 'distinctly' stating grounds as is required by the federal rule, has not been preserved. The word 'distinctly' has been deleted not for the purpose of opening the door for general objections, but rather, to avert undue requirements of specificity under an unnecessarily technical appellate construction of the word 'distinctly.'").
41. *Northeast Ala. Reg'l Med. Ctr v. Owens*, 584 So. 2d 1360, 1364 (Ala. 1991).
42. *See Green v. Taylor*, 437 So. 2d 1259, 1260 (Ala. 1983) (stating that "[b]ecause the Greens did not timely file a motion to set aside the dismissal of their action, the question of whether the trial court erred in that regard is not properly before us" and holding that "other issues presented for our review cannot be considered because they are of an interlocutory character").
43. *See id.*
44. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2357, at 344-45 (2d ed. 1995).
45. *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1032 (Ala. 1993), *cert. denied*, 511 U.S. 1128, 114 S. Ct. 2135 (1994).
46. *A.T. Stephens Enters., Inc. v. Johns*, 757 So. 2d 416, 419 (Ala. 2000) (allowing a ruling on a JML motion made at the close of the plaintiff's evidence where there was not a JML motion made at the close of all the evidence and stating "issues relating to the sufficiency of the evidence require a motion at the conclusion of all the evidence, but issues relating to pure questions of law do not").
47. *Harris*, 630 So. 2d at 1027.
48. *BellSouth Mobility, Inc. v. Cellulink, Inc.*, 814 So. 2d 203, 213 (Ala. 2001).
49. Justice Champ Lyons, Jr. & Deborah Alley Smith, *Post-Judgment Motions*, CLE

Outline, at 6-7 (Feb. 2005).

50. *Ex parte James*, 764 So. 2d 557, 559 (Ala. 1999).
51. Rule 59 (f), Ala. R. Civ. P.
52. *See Keibler-Thompson Corp. v. Steading*, 907 So. 2d 435, 443 (Ala. 2005).
53. *See Parker Bldg. Serv. Co., Inc. v. Lightsey*, 925 So. 2d 927, 933 (Ala. 2005).
54. *Johns*, 757 So. 2d at 421.
55. *See Green Tree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366, 1369-70 (Ala. 1988).
56. *See, e.g., Pope v. MCI Telecomm. Corp.*, 937 F.2d 258, 266 (5th Cir. 1991) ("[W]hen an appellant chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.") (internal quotations marks omitted), *cert. denied*, 504 U.S. 916, 112 S. Ct. 1956 (1992).
57. *See* Rule 3(c), Ala. R. App. P. ("The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Such designation of judgment or order shall not, however, limit the scope of appellate review."); *see also Clements v. Webster*, 425 So. 2d 1058 (Ala. 1982) (stating that notice of appeal did not limit appeal to either final judgment or order denying new trial).
58. *See Empiregas, Inc. of Ardmore v. Hardy*, 487 So. 2d 244, 251 (Ala. 1985) ("[T]his Court will not assume error, and the burden is on the appellant to affirmatively demonstrate from the record that an error was committed by the trial court.") (Internal quotations omitted), *cert. denied*, 476 U.S. 1116, 106 S. Ct. 1973 (1986).
59. *See Smith v. Village of Maywood*, 970 F.2d 397, 399 (7th Cir. 1992) (after court of appeals denied appellee's motion to dismiss appeal for appellant's late filing of transcript, appellee had burden to supplement record to support her position).
60. *United States v. Coveney*, 995 F.2d 578, 586-88 (5th Cir. 1993).
61. *See Perkins v. Perkins*, 465 So. 2d 414, 415 (Ala. Civ. App. 1984) ("When the official record is unavailable, reconstructions of the record on appeal by the parties is an accepted procedure.").
62. *See* Rule 10(c), Fed. R. App. P.; Rule 10(d), Ala. R. App. P.; *Pickett v. Pickett*, 792 So. 2d 1124, 1126 (Ala. Civ. App. 2001) ("No Alabama caselaw addresses whether a party to an appeal may challenge a trial court's approved statement of the evidence.").
63. *Bentley Sys., Inc. v. Intergraph Corp.*, 922 So. 2d 61, 70 (Ala. 2005).
64. *Id.*
65. *Rice v. State Farm Fire & Cas. Co.*, 578 So. 2d 1064, 1064-65 (Ala. 1991).
66. *See* 19 Moore's Federal Practice § 205.04[2] (3d ed. 2004) ("If an appellee argues error below that calls into question the merits of the judgment, that claim must be made by cross-appeal; if an appellee merely urges affirmance of the judgment, even though based on arguments made in the alternative or rejected or ignored below, no cross-appeal is necessary."); *see also El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479, 119 S. Ct. 1430, 1435 (1999).
67. *See id.* 19 *Moore's Federal Practice* § 205.04[2] (3d ed. 2004).
68. *Compare Hawkins v. League*, 398 So. 2d 232, 235 (Ala. 1981) (holding that a cross-appeal was not required of an issue "not really adverse to" the appellee), *with Hitt v. State of Ala. Pers. Bd.*, 873 So. 2d 1080, 1088 (Ala. 2003).
69. *Williams v. BIC Corp.*, 771 So. 2d 441, 445 (Ala. 2000).
70. *Smith v. Equifax Servs., Inc.*, 537 So. 2d 463, 465 (Ala. 1988).
71. *Id.*
72. *Hinds v. Hinds*, 887 So. 2d 267, 272 n.2 (Ala. Civ. App. 2003).
73. *See Harris v. State*, 23 So. 2d 514 (Ala. 1945); *see also Keith v. City of Birmingham*, 49 So. 2d 227 (Ala. 1950); 5 Am Jur. 2d *Appellate Review* § 616 (1995); *cf.* United States National Institute of Trial Advocacy commentary Fed. R. App. P. 28 ("An issue not raised in appellant's opening brief may be deemed waived—mentioning it in a footnote is not enough!").
74. *Reynolds v. Colonial Bank*, 874 So. 2d 497, 503 (Ala. 2003) (holding that the absence of subject matter jurisdiction may be raised for the first time on appeal); *see also Bowdoin v. State*, 884 So. 2d 865, 867 (Ala. Civ. App. 2003) ("While no party on appeal raised this issue to this court, issues of jurisdiction are of such magnitude that this court can consider them *ex mero motu*"). *But see Jefferson County Comm'n v. ECO Preservation Servs., L.L.C.*, 788 So. 2d 121, 127 (Ala. 2000) (overruling application for rehearing and reasoning that "[t]his lack-of-jurisdiction argument was not raised before the trial court or before this Court on original submission").
75. *Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251, 1253 (Ala. 1983). *See Totten v. Lighting & Supply, Inc.*, 507 So. 2d 502, 503 (Ala. 1987) ("[T]his Court is not under a duty to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to an appeal.").
76. *Kyser v. Harrison*, 908 So. 2d 914, 917 (Ala. 2005) (internal quotations omitted).
77. *See Alabama Power Co. v. Talmadge*, 207 Ala. 86, 94, 93 So. 548, 555 (1921) ("The plumbing company's defense was conducted separately, and these appellants have no right to the benefit of an objection taken [o]n behalf of the plumbing company only.")
78. *Bentley Sys., Inc.*, 922 So. 2d at 85.
79. *See, e.g., Adams-Arapahoe Joint Sch. Dist. v. Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) ("An issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal.").
80. *See Callaway v. Whittenton*, 892 So. 2d 852, 858 (Ala. 2003).
81. *Ex parte Children's Hosp. of Ala.*, 931 So. 2d 1, 8 (Ala. 2005).
82. *Id.*
83. *Spradlin v. Spradlin*, 601 So. 2d 76, 78-79 (Ala. 1992).
84. *See Ex parte Hanna Steel Corp.,* 905 So. 2d 805, 808 (Ala. 2004).
85. *Id.* at 810 (Lyons, J., concurring in result).
86. *See Chandler v. State*, 910 So. 2d 108, 112 (Ala. Civ. App. 2004) (holding in condemnation of land case, "we conclude that the trial court's admission of Clemmons's testimony amounted to harmless error and that, therefore, the judgment based on the jury's verdict is due to be affirmed").
87. *Giambrone v. Douglas*, 874 So. 2d 1046, 1057 (Ala. 2003) ("[I]t is well-settled that [an appellant] may not raise an issue for the first time in a reply brief filed on appeal.").
88. *See Jackson v. Nicholson*, No. 04-7116, 2005 WL 466065, *3-*4 (Fed. Cir. Mar. 1, 2005); Charles Alan Wright, *et al.*, 16A Federal Practice & Procedure § 3974.3 (3d ed. 1999) ("[A] reply brief is allowed . . . to address new issues raised in the appellee's brief . . . .").
89. *See Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (holding appellant waived argument where its reply brief failed to respond to appellee's contrary assertions and did not otherwise point to any evidence disputing those assertions).
90. *See Anderson v. Smith*, 148 So. 2d 243, 245 (Ala. 1962) (because "[a]n amicus curiae is limited to the issues made by the parties to a suit," an issue waived by aggrieved party "cannot be injected" by amicus into appellate proceedings).
91. Rule 29, Ala. R. App. P. ("The [amicus] brief shall follow the form prescribed for the brief of an appellee.").
92. *See Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347, 351-52 (Ala. 1997).
93. *Kelley v. Osborn*, 113 So. 2d 192, 192 (Ala. 1959); Rule 39(b)(4), Ala. R. App. P.
94. *See* 39(a)(1)(D), Ala. R. App. P.
95. *Howell v. Mississippi*, 543 U.S. 440, 444, 125 S. Ct. 856, 859 (2005).
96. *Id.*
97. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). *See Yates v. El Bethel Primitive Baptist Church*, 847 So. 2d 331, 333 (Ala. 2002). *But see Ex parte Third Generation, Inc.*, 855 So. 2d 489, 491 n.4 (Ala. 2003) ("[O]ne of the difficulties with TGI's law-of-the-case argument is Ala. Code 1975, § 12-2-13, which appears to negate any binding effect of the 'law-of-the-case' doctrine as it applies to this Court. . . .").
98. *United States v. Smith*, 401 F.3d 497, 498-99 (D.C. Cir. 2005) (stating that the defendant's "election not to re-raise the challenge below means that he has failed to preserve it for appellate review.").
99. *See* Rule 1, Ala. R. App. P., cmt. ("As is the case with the ARCP, it is the policy of these rules to disregard technicality and form in order that a just, speedy and inexpensive determination of every appellate proceeding *on its merits* may be obtained.") (Emphasis added.)

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The Best & Brightest

BY ROBERT F. SMITH

Jump on board– we're off and running!

Be part of something special and share in the excitement and enthusiasm exuded by our officers, Executive Committee and committee chairs as we depart on this year's journey with the "The Best & Brightest." That's right, as the theme implies, the goal of the Family Law Section is to seek and find those hidden diamonds in the rough that may lie amongst us, to utilize their talents and to get people across the state actively involved in the section.

Many of you who don't practice family law or represent clients in divorce cases are still familiar with the Family Law Section through our annual CLE seminar, *Divorce on the Beach.* This year will be our 21st seminar, which is set for May 31st through June 2nd at the Sandestin Golf and Beach Resort (download a registration form at the section's Web site *www.alafamlaw.org*). This year we are pulling out all the stops in preparation for our theme, "The Best & Brightest," and calling upon our best and brightest members and judges to assist. We call our seminar your "one-stop" CLE destination because *DOB* offers all 12 hours of continuing legal education, including one hour of mandatory ethics. Plus, this year, in cooperation with the Administrative Office of Courts, we are providing the opportunity for attendees to receive their required two hours of re-certification as guardians *ad litem* while attending *DOB*.

Each year at *DOB* we sponsor a **silent auction** whose proceeds benefit children's charities throughout the state and fund scholarships for each of our in-state law schools. Through the generosity of those in attendance and contributors statewide, we have raised funds that have benefited such charities as Big Oak Ranch, Catholic Children's Charities, National Children's Advocacy Center, Children First, and many others.

This year proceeds from our silent auction will benefit Children First, The National Children's Advocacy Center and Storybook Farm.

Children First began in the mid-1990s by a group of advocates and legislators who wanted to improve the lives of children in

Left to right are Jim Jefferies, Carole Medley, Robert Smith, Wanda Devereaux, Wendy Brooks Crew, Robin Burrell, Noah Funderburg, and Jerry Baxley.

Alabama. Children First is a comprehensive program designed to deal with a multitude of children's issues including dropouts, teen smoking, substance abuse, juvenile crime, violence, delinquency, and other programs targeted to help place children first. The Children First Trust Fund is now set up to receive funds from the "tobacco settlement" in addition to private contributions. Our own **Wendy Brooks Crew** is chair of the board of Children First.

Located in the rich pastures of Opelika, **Storybook Farm, Inc.** offers spiritual nourishment and emotional healing to children with disabilities or life-threatening diseases or those who have suffered a loss. Storybook Farm provides Hope on Horseback for their riders through a unique program of therapeutic horseback riding and creative activity.

The **National Children's Advocacy Center** (NCAC) is a non-profit organization that provides training, prevention, intervention and treatment services to fight child abuse and neglect. Since being established in 1985, the NCAC has trained more than 54,000 professionals from the United States and 20 countries.

Not only are we planning *Divorce on the Beach XXI* but we are hitting the road with section-sponsored CLE seminars which we call "road shows." "The Best & Brightest" road shows have made stops in the Shoals Area and Montgomery. We traveled to Huntsville on Friday, March 30th for another road show at the National Children's Advocacy Center. Huntsville attorneys **Amy Slayden** (past chair) and **Amy Creech** (membership committee chair) are preparing for what will be another fun and rewarding road show.

Our section is making history by taking the "The Best & Brightest" to sea. That's right, we planned our first-ever cruise! We departed from Port Canaveral, Florida April 13th with stops in Nassau, Bahamas and the island of Coco Cay. Section members and their guests enjoyed the comforts and adventures of a world-class cruise together with a unique opportunity to expand their knowledge of family law while at sea. Our plans are to make this an annual event.

Many months of preparation have been dedicated to the theme of bringing together "The Best & Brightest." Thanks to **Sammye Oden Kok** of Birmingham (chair-elect) for her unselfish dedication during this transition. Sam has spent countless hours working side by side with me and others to plan "The Best & Brightest." Sam's husband, **Tony Kok**, has designed this year's logo, the brilliant sun shown "strutting its stuff." Also, thanks go to Wendy Brooks Crew of Birmingham (past chair) for agreeing to join us again as an officer. Wendy is our treasurer and already has our financial affairs in order. She is developing a new accounting system to meet our growing needs. Others

who have made the transition a success are **Noah Funderburg, Michael Hasty, Robin Goode, Rita McClain, Robby Lusk, Charles Dunn,** and many others.

This year we pulled out all the stops and called upon our section's true gems to join our journey. Making an encore appearance are Wendy Brooks Crew, **Judy Crittenden, Sam Rumore** (past chair), **Gordon Bailey** (past chair), **Robin Burrell** (past chair), **Rick Fernambucq** (past chair), Noah Funderburg (past chair), **Judge Brian Huff** (past chair), Robby Lusk, **Dick Bell, Wanda Devereaux, Jerry Baxley,** and others.

We welcome back **Jim Jefferies** (Mobile) as secretary. Jim is an active leader in the section, having served on our Executive Committee and as treasurer. Also, **Julie Palmer** (Birmingham) is returning to the Executive Committee as past chair. Julie did an excellent job directing *Divorce on the Beach* for many years. This year **Candi Brannen Peeples** (Birmingham) is our new director. She has many new and exciting ideas for *Divorce on the Beach XXI*.

Wanda Devereaux (Montgomery) is returning to our Executive Committee. Wanda is a true jewel. She is one of the most courageous people you will ever know. Wanda has agreed to lead us and our efforts in Montgomery and with the legislature. At her side will be her husband, Jerry Baxley. Jerry is our liaison with FAMLAA. FAMLAA (Family Law Association of Alabama) is a new and exciting organization formed by many outstanding members of our section to lobby and inform the legislature of the pros and cons of pending legislation which impacts those of us who practice divorce/family law. FAMLAA has already made a tremendous impact in Montgomery thanks to the efforts of Jerry (executive director), Wanda (president), **Kathy Coxwell**, Monroeville (legislative committee chair) and many others. FAMLAA is separate and independent from the Family Law Section.

Wanda planned and executed our second road show in December in Montgomery. Our entire Executive Committee contributed, along with Robin Burrell, Birmingham (past chair), and **Bill Kelley**, Montgomery (general counsel, Retirement Systems of Alabama). Attorneys from throughout the Montgomery area and lower Alabama attended the Montgomery road show. Everyone enjoyed the section-sponsored reception at Nobles that followed.

Joining our board as new at-large members are **David P. Broome** (Mobile), **Carole Medley** (Florence) and **Charles Dunn** (Birmingham).

David Broome is a welcome addition to our board. He is vice president of the American Academy of Adoption Lawyers.

Carole Medley (Florence) was co-chair of the "Shoals Area Road Show" which took place in October. This was our first road show for "The Best & Brightest." I was honored that our entire board was there to present this CLE in my hometown. They were joined by Judy Crittenden (Birmingham) who graduated high school in Florence and Robby Lusk, assistant general counsel for the ASB. The section took this opportunity to present a "Lifetime Achievement Award" to **Charles E. Carmichael, Jr.** of Tuscumbia. To the delight of those in attendance, **Tom Heflin** (Tuscumbia) entertained the

Wanda Devereaux, a member of the section's Executive Committee and president of FAMLAA, with section President Robert Smith

Wendy Brooks Crew, chair of Children First and section treasurer, with Robin Burrell, past chair of the section

Robert F. Smith
Robert F. Smith of Florence serves as the 2006-07 chair of the ASB Family Law Section, after having been the section's vice chair, treasurer and at-large board member. He is a graduate of the University of North Alabama and Cumberland School of Law, Samford University. Smith has served as the youngest member of the Florence City Council, as well as on the Alabama Housing Finance Authority's Board of Directors and as an Assistant Attorney General. He is also trained as a domestic violence mediator.

conference with antidotes from Mr. Carmichael's colorful law career.

We are fortunate to have Judy Crittenden serving as our ABA Liaison. Judy has distinguished herself nationally. Her talents and contacts will be invaluable to our section.

Robby Lusk is serving as our professional responsibility advisor. He has always given his time and energies for our section whenever asked.

Charles Dunn (Birmingham) is serving as editor of our newsletter. He is off to a great start. This fall, he published our first expanded newsletter, *The Best & Brightest*. Charles has devoted many hours of his time to this project. He brings new ideas and concepts for content, design and distribution. Our goal is to have an expanded quarterly newsletter that is easy to read and has contributions from section members statewide.

This year, Noah Funderburg (Tuscaloosa) has agreed to serve as our past chair advisor. Noah and his wife, Mary, have been the true backbone of the section for many years. Noah's many contributions to the section include our listserve, Web site and newsletter. We appreciate Noah and Mary's continued involvement, support and advice.

Judge Brian Huff (Birmingham) is our judicial advisor. As past chair of the section, Judge Huff was instrumental in involving our judges in section activities. He is committed to helping our section grow and benefit from interaction with our judiciary.

Dick Bell (Birmingham) is serving as our ASB liaison. We are honored to have such a distinguished member of our section coordinating our efforts with the ASB.

Sam Rumore served as our section's past chair and later served as president of the Alabama State Bar. We all know of his contributions to the ASB and his interest in preserving history. Sam has agreed to serve as our historian and chair our Archives and History Committee. This year, we are making a concerted effort to preserve our section's history.

There are many others who are a part of this year's team. You will be learning of their involvement and contributions through the section's newsletters.

In March, our members will receive our first **e-newsletter**. Many hours have been devoted to creating a monthly publication of the section which can be delivered by e-mail. This will allow the section to communicate on a more frequent basis at a fraction of the cost.

Now, with the leadership in place, we are off and running! I am honored to be a part of such a talented and dedicated group of professionals. I challenge you to join us on our journey with "The Best & Brightest" and become an active member of the Family Law Section. ■

THE YEAR OF THE MAYNARD COOPER PRESIDENTS

Wells Nominated for President-elect of the American Bar Association

H. Thomas Wells, Jr.

Maynard, Cooper & Gale PC is setting a new standard for professional leadership. Recently, **H. Thomas Wells, Jr.,** 56, was nominated to be the next president-elect of the American Bar Association, a 413,000-member professional organization for the legal profession. The nomination, which must be approved by the association's House of Delegates in August, puts Wells in line to begin a one-year term as ABA president in August 2008. Wells would be only the ABA's third president from the state of Alabama. One of the other past ABA presidents from Alabama is **N. Lee Cooper**, a founding member of Maynard Cooper, who was president from 1996-97. The other ABA president was **Henry Upson Sims** (1929-30).

However, this is just the tip of the iceberg as far as presidential leadership goes at the firm. In March, The American College of Trust and Estate Counsel (ACTEC) held its annual meeting at which firm shareholder **Daniel H. Markstein, III** became president. Fellows of the College are nominated by other Fellows in their geographic area and then elected by the membership at large. Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching and bar activities.

In addition, Maynard Cooper lawyers **Fournier J. Gale** and **Anthony A. Joseph** already hold current presidential positions in other professional organizations. Gale is the president of the Alabama State Bar and Joseph is the president of the Birmingham Bar Association. ■

N. Lee Cooper

Daniel H. Markstein

Fournier J. Gale

Anthony A. Joseph

Bar Briefs

- **James J. Bushnell** was recently named the new dean of the Birmingham School of Law. Dean Bushnell is a 1981 graduate of the Cumberland School of Law at Samford University. He holds a bachelor of arts degree from the University of Alabama and received a master's of arts in public and private management degree from Birmingham Southern College. Prior to accepting this position, Dean Bushnell enjoyed a 25-year legal career. Judge Hugh Locke began the Birmingham School of Law in 1915. The school's year-round enrollment policy allows students to begin their legal studies in January, May or August. See *www.bsol.com* for more information.

- **U.S. Magistrate Judge William Cassady**, who has served as a magistrate in Mobile for 21 years, has been elected president of the National Association of Federal Magistrate Judges.

- The A.G. Gaston Conference recently announced that Sirote & Permutt attorney **J. Mason Davis** was selected to receive the Oscar Adams Award. The Award is presented to an individual who excels in professional service and is named after the owner of the *Birmingham Reporter*, one of the South's leading black newspapers of the 1920s.

- **Maurice L. Shevin**, a partner in the Birmingham office of Sirote & Permutt PC, was recently elected a Fellow of the American College of Consumer Financial Services Lawyer (ACCFSL). Shevin was inducted into the ACCFSL at the College's meeting in March. ■

SPANISH
LEGAL HOTLINE AVAILABLE

Alabama State Bar and Legal Services Alabama Spanish Legal Hotline meets needs of Alabama's Spanish-speaking population

In partnership with the Alabama State Bar's Spanish Outreach Project, Legal Services Alabama operates a dedicated statewide toll-free legal hotline for Spanish-speaking persons in Alabama. The Spanish Legal Hotline has its own separate toll-free number (888-835-3505) and calls are answered and routed by Spanish-speaking staff members at call centers across the state.

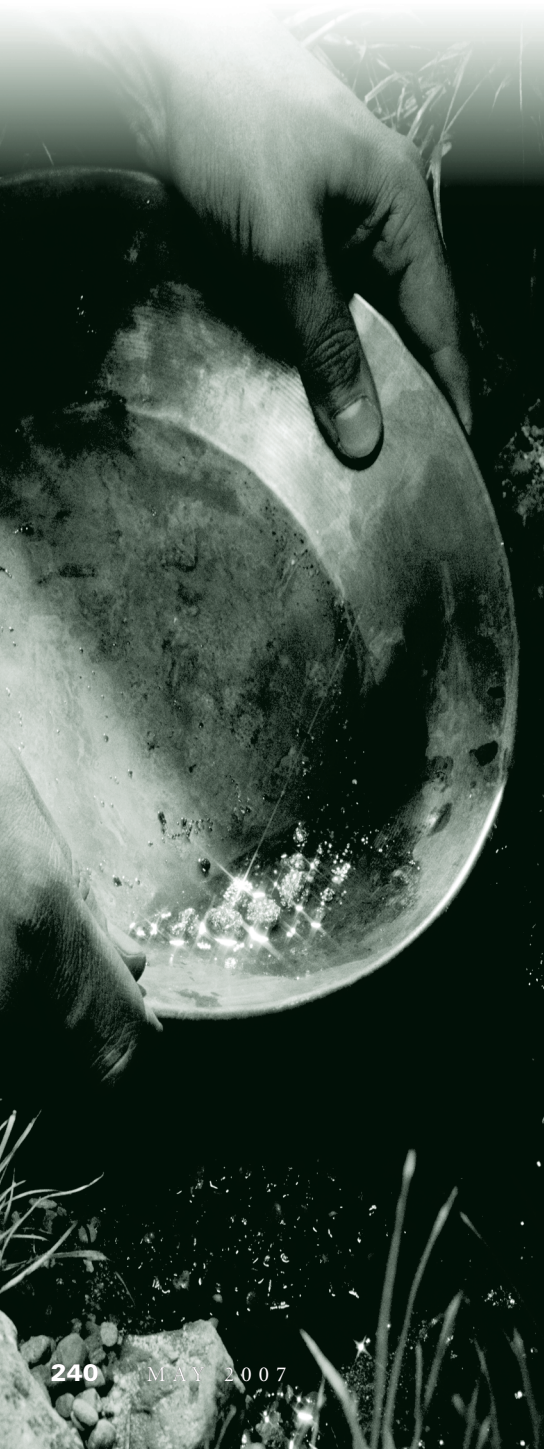
Regular Spanish Legal Hotline network hours are 8:00 a.m. to 8:00 p.m. Monday through Friday and 9 a.m. to noon on Saturdays. If a bilingual staff member is not available or is on another call, a message in Spanish will tell the caller the best time to call back. Based on specific legal needs and guidelines, callers will be referred to Legal Services Alabama, the Volunteer Lawyers Program of the Alabama State Bar or the state bar's Lawyer Referral Service for legal assistance.

Other core partners in this project include the **Alabama Cooperative Extension System; Hispanic Interest Coalition of Alabama (HICA); Alabama Latin American Association; Cumberland School of Law;** and **KPI Latino.**

Spanish Legal Hotline information is available at the state bar's Web site *www.alabar.org*. as well as at the Legal Services Alabama Web site *www.alsp.org*. Brochures are available upon request from the Alabama State Bar or may be picked up at any county Alabama Cooperative Extension System office.

(888) 835-3505

J. Anthony McLain



Ethical Propriety of Mining Metadata

QUESTION #1:

Does an attorney have an affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected from inadvertent or inappropriate production via an electronic document before it is transmitted?

ANSWER:

Lawyers have a duty under Rule 1.6 to use reasonable care when transmitting electronic documents to prevent the disclosure of metadata containing client confidences or secrets.

QUESTION #2:

Is it unethical for an attorney to mine metadata from an electronic document he or she receives from another party?

ANSWER:

Absent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party.

DISCUSSION:

The recent proliferation of electronic discovery, e-filing and use of e-mail has created an ethical dilemma surrounding the disclosure and mining of metadata. For the purposes of this opinion, metadata may be loosely defined as data hidden in documents that is generated during the creation of those documents. Metadata is most often generated by software programs, such as Microsoft Word and Corel WordPerfect. These programs are frequently used by attorneys in the creation and drafting of legal documents.

The act of deliberately seeking out and viewing metadata embedded in a document is most often referred to as "mining" the document. Mining metadata allows a person to learn a variety of information about the history and evolution of an electronic document, including the author, the name of previous document authors, template information and hidden text. By mining an electronic document, a recipient attorney could also view revisions made to the document, comments added by other users who reviewed the document and whether the

document was drafted from a template. The disclosure of metadata contained in an electronic submission to an opposing party could lead to the disclosure of client confidences and secrets, litigation strategy, editorial comments, legal issues raised by the client, and other confidential information.

For example, your firm is filing a motion to summarily dismiss a lawsuit and the motion is electronically distributed among the firm's attorneys for review and comments. In reviewing the motion, the other attorneys insert comments critiquing the firm's position and discussing the strengths and weaknesses of various legal positions. The motion is then electronically transmitted to opposing counsel. If you failed to "scrub" or remove the hidden metadata prior to transmission, the opposing party could mine the document's metadata and discover which attorneys reviewed the motion, the critiques about the viability or strength of certain arguments and the subsequent revisions made to the document.

Another example demonstrating the inherent danger of electronically transmitting documents involves the use of templates. Many attorneys routinely recycle templates for common filings, in which the current client's name is substituted in place of a prior client's name. If the document is later electronically transmitted to the opposing party, the opposing party could mine the document and discover the original client's name and information. Such disclosure of client identity and information could constitute a violation of Rule 1.6, *Alabama Rules of Professional Conduct.* The protection of the confidences and secrets of a client are among the most significant obligations imposed on a lawyer. Rule 1.6, *Ala. R. Prof. C.,* provides that:

> "(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)."

Opinions of the General Counsel

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The Comment to Rule 1.6, *Ala. R. Prof. C.*, states, in pertinent part:

> "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> "Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> "A fundamental principle in the client-lawyer relationship is that the lawyer maintains confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

As such, the Commission believes that an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences.

The determination of whether an attorney exercised reasonable care will vary, of course, according to the circumstances of each case. Factors in determining whether reasonable care was exercised may include steps taken by the attorney to prevent the disclosure of metadata, the nature and scope of the metadata revealed, the subject matter of the document and the intended recipient. For example, an attorney would need to exercise greater care in submitting an electronic document to an opposing party than he or she would if e-filing a pleading with the court. There is simply a much higher likelihood that an adverse party would attempt to mine metadata, than a neutral and detached court.

Just as a sending lawyer has an ethical obligation to reasonably protect the confidences of a client, the receiving lawyer also has an ethical obligation to refrain from mining an electronic document. In N.Y. State Bar Opinion 749, the New York State Bar Association concluded that the use of computer technology to access client confidences and secrets revealed in metadata constitutes "an impermissible intrusion on the attorney-client relationship in violation of the Code." (2001). The Commission agrees that the use of computer technology in the manner described above constitutes an impermissible intrusion on the attorney-client relationship in violation of the *Alabama Rules of Professional Conduct.* As discussed earlier, the protection of the confidences and secrets of a client is a fundamental tenet of the legal profession.

The unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of the *Alabama Rules of Professional Conduct.* Rule 8.4, *Ala. R. Prof. C.*, provides that it is misconduct for an attorney to, among other things:

> "(a) violate or attempt to violate the *Rules of Professional Conduct,* knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice."

In Formal Opinion 749, the New York State Bar Association adroitly observed that "in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit of these Disciplinary Rules." (2001). The Disciplinary Commission agrees. The mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage over an opposing party.

One possible exception to the prohibition against the mining of metadata involves electronic discovery. Recent court decisions indicate that parties may be sanctioned for failing to provide metadata along with electronic discovery submissions. In certain cases, metadata evidence may be relevant and material to the issues at hand. For example, the mining of an e-mail may be vital in determining the original author, everyone who received a copy of the e-mail and when the e-mail was viewed by the recipient. In *Enron*-type litigation, the mining of metadata may be a valuable tool in tracking the history of accounting decisions and financial transactions.

The production of metadata during discovery ordinarily will be a legal matter within the sole discretion of the courts. The Commission advises attorneys, however, to be cognizant of the issue of disclosing metadata during discovery. Both parties should seek direction from the court in determining whether a document's metadata is to be produced during discovery.

This opinion is consistent with Formal Opinions 749 and 782 of the New York State Bar Association and some of the language herein is derived from that opinion. [RO-2007-02] ■

Robert L. McCurley, Jr.

The Alabama Legislature

Special Session

The Alabama legislature was called into special session February 26, 2007 by Governor Riley to consider:

1. A constitutional amendment to increase the total amount of bonding authority granted to the State of Alabama which would allow the state to increase its interest-bearing general obligation bonds as authorized under Amendment 666 of the *Constitution of Alabama* from $350 million to $750 million. HB-10 (Act 2007-5)
2. Letting the legislature authorize and direct the State of Alabama and members of the State Employees' Insurance Board and Public Education Employees' Health Board to create irrevocable trusts for the purposes of holding, investing and distributing assets to be used for certain post-employment benefits to be designated as the Alabama Retired State Employees' Healthcare Trust and the Alabama Retired Education Employees' Health Care Trust. It further would provide powers and responsibilities to the trustees and their management, and investing of the funds in these trusts. SB-3 (Act 2007-16)
3. Passing a constitutional amendment to require the assets, proceeds and income of the Alabama Retired State Employees' Health Trust and the Alabama Retired Education Employees' Health Care Trust to be used exclusively for providing health care benefits to retired state employees and retired education employees, and for no other purposes. SB-4 (Act 2007-7)
4. Passing any local legislation that requires consideration. (A constitutional amendment for Pritchard would establish an Alabama Foreign Trade Investment Zone which authorizes a special tax district for importing duty-free and quota-free articles eligible under the Federal Trade Laws. It also authorizes a special tax district for land and improvements taxed under single-site evaluation systems. SB-2 (ACT 2007-6))

The legislature accomplished these four items in a minimum of five legislative days, adjourning March 2nd, 2007.

Regular Session, 2007

The Regular Session of the Alabama legislature began March 6th and continues until June 18th. In just the first week, 450

bills were introduced. The first bills considered and passed by the house of representatives were bills concerning PAC-to-PAC transfers and other ethics-related legislation.

The **Alabama Law Institute** prepared and introduced the following bills:

- **Apportionment of Estate Taxes** (See March 2007 *AL Lawyer*)
  SB-100 Sponsor: Senator Ted Little
  HB-56 Sponsor: Representative Cam Ward
- **Uniform Residential Mortgage Satisfaction Act** (See March 2007 *AL Lawyer*)
  SB-135 Sponsor: Senator Myron Penn
  HB-11 Sponsor: Representative Mike Hill
- **Redemption from Ad Valorem Tax Sales** (See below)
  SB-74 Sponsor: Senator Wendell Mitchell
  HB-12 Sponsor: Representative Mike Hill
- **Alabama Uniform Environmental Covenants Act** (See below)
  SB-91 Sponsor: Senator Rodger Smitherman
  HB-426 Sponsor: Representative Jeff McLaughlin

Redemption from Ad Valorem Tax Sales

Some years ago, principally out-of-state investors began buying property which was being sold for the nonpayment of ad valorem taxes. A bidder could bid on not only the amount of the taxes due, but an additional amount, or "overbid," and as a result, obtain the 12 percent interest allowed for redemption on both the amount of unpaid taxes and on the overbid.

In an effort to stop some of the abuses of overbidding, Section 40-10-122 was amended in 2002. However, other sections, namely sections 40-10-75, 76, 77, 78, 82, 83, and 120, should have also referenced the limitation of the amount of interest that could be paid on an overbid. As a result, interest of 12 percent is only allowed on an overbid of 15 percent of the fair market value of the property. This bill amends the other sections to clarify and codify the current law concerning the redemption of property from ad valorem tax sales.

Now to redeem, one must pay the amount paid at the tax sale plus interest of 12 percent on taxes paid and 12 percent on the overage bid that is not more than 15 percent of the fair market-value of the property. No interest is now allowed on an overbid above 15 percent of the assessed value of the property.

The bill also clarifies that a person has three years after the tax sale to redeem from the tax collector. There is another three-year period from the date that the purchaser was entitled to a tax deed that the landowner can redeem from the purchaser.

It further codifies the case law that provides an owner who remains in possession after the tax sale can always redeem. Finally, the bill provides a procedure for redemption by the landowner from multiple tax sales.

Uniform Environmental Covenants Act

This Act is for the long-term enforcement of cleanup controls which will be contained in a statutorily-defined agreement known as an "environmental covenant" that is binding on subsequent purchasers of the property and filed in the local land records.

The fundamental purpose of this Act is to remove various legal barriers to the use of environmental restrictions and lessen liability concerns of sellers and lenders associated with the redevelopment and sale of "brownfields." At the same time this requires the Department of Environmental Management's approval of the remediation and control plan and gives notice to surrounding landowners, local governments and other parties in interest. This Act both protects human health and makes it economically feasible to reuse the property.

What the Act Does

The Act provides a legal mechanism for long-term control of use and cleanup that will allow some properties to be safely returned to use so that it may be bought and sold. Current real property law is inadequate. Various common-law doctrines and other legal rules often work against such long-term controls, a situation which undermines the use and marketability of contaminated property. Cleanup, if possible, would often cost much more than the market value.

Creates statutory legal framework called "environmental covenant"

Covenants are a means of creating restrictions on use of land. The Act creates an environmental covenant for the specific purpose of forever controlling the use of contaminated real estate while allowing that real estate to be conveyed from one person to another, subject to those controls. It does not affect the validity of prior recorded mortgages.

An environmental covenant is a specific recordable interest in real estate in response to environmental issues that arise under a federal or state law for the cleanup of the property or closure of a waste management site. No environmental covenant is effective without the Alabama Department of Environmental Management's signature. The covenant recites the controls and remediation requirements imposed upon the property. The rights under the covenant must be granted to a party. The covenant is perpetual unless limited in time within the instrument.

Two principal policies are served by environmental covenants:

A. It ensures that land use restrictions, mandated environmental monitoring requirements and engineering controls designed to control the potential environmental risk of residual contamination will be recorded in the land records and enforced over time.

Legislative Wrap-Up

Continued from page 245

B. It further allows the return of previously contaminated property to the stream of commerce. Currently, these properties do not attract interested buyers and remain vacant, blighted and unproductive. Large numbers of brownfields are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced. This Act should encourage sale of property and re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these instruments which will appear in any title abstract for the property in question.

The Act applies to both federal- and state-led cleanups. It ensures that a covenant will survive despite tax lien foreclosure, adverse possession and marketable title statutes. The Act also provides detailed provisions regarding termination and amendment of covenants, and includes provisions on dealing with recorded interests that have priority over the new covenant. Any party to the covenant and appropriate agencies may enforce the covenant. Further, the Act offers guidance to courts confronted with a proceeding that seeks to terminate a covenant through eminent domain or the doctrine of changed circumstances.

The Act does not supplant or impose substantive cleanup standards, either generally or in a particular case. The Act assumes those standards will have been developed in the prior regulatory process. Despite best efforts, total cleanups of many contaminated sites are not possible, but property may be put to limited uses without risk to others. The Act also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination. Rather, it provides a method for minimizing the exposure of third parties to such risks and for owners to engage in long-term cleanup mechanisms.

For more information, contact Bob McCurley, director, at P.O. Box 861425, Tuscaloosa 35486-0013; fax (205) 348-8411; phone (205) 348-7411; or Web site at *www.ali.state.al.us*. ■

In the March 2007 "Legislative Wrap-Up," Senator Bradley Byrne of Baldwin County and Senator Hank Sanders of Selma were both misidentified. These are two of the outstanding lawyers in the Alabama legislature; we regret this error.

Robert L. McCurley, Jr.
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

Publications Order Form

ALABAMA STATE BAR

The Alabama State Bar is pleased to make available to individual attorneys, firms and bar associations, at cost only, a series of brochures on a variety of legal topics of interest to the general public.

Below is a current listing of public information brochures available for distribution by bar members and local bar associations.

BROCHURES

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. . . Highlights and details of bar public service programs from the TO SERVE THE PUBLIC video presentation.

Law As A Career — $10.00 per 100 — Qty ____ $ _____
. . . Information on the opportunities and challenges of a law career today.

Lawyers and Legal Fees — $10.00 per 100 — Qty ____ $ _____
. . . A summary of basic legal procedures and common legal questions of the general public.

Last Will & Testament — $10.00 per 100 — Qty ____ $ _____
. . . Aspects of estate planning and the importance of having a will.

Legal Aspects of Divorce — $10.00 per 100 — Qty ____ $ _____
. . . Offers options and choices involved in divorce.

Consumer Finance/"Buying On Time" — $10.00 per 100 — Qty ____ $ _____
. . . Outlines important considerations and provides advice on financial matters.

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. . . An overview of the mediation process in question-and-answer form.

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About Members, Among Firms

The Alabama Lawyer ***no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice.***

About Members

Josh Mandell announces the opening of **Capserve Exchange LLC** at 105 Tallapoosa St., Ste. 104, Montgomery 36104. Phone (334) 263-0016.

Philip E. Miles announces the opening of **The Law Office of Philip E. Miles LLC**, at 153 S. 9th St., Gadsden 35901. Phone (256) 543-9777.

Thomas Floyd Worthy announces the opening of **Thomas F. Worthy, Attorney at Law** at 1321 Broad St., Ste. C, Phenix City 36867. Phone (334) 291-7654.

Among Firms

Adams & Reese LLP announces that **Mark L. Gaines** has joined the firm's Birmingham office.

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **W. Patton Hahn** and **Eric L. Pruitt** have become shareholders.

Balch & Bingham LLP announces that **Todd Crawford** has joined the Gulfport, Mississippi office as a partner and **Alan Windham, Jr.** has joined the Jackson, Mississippi office as an associate.

Beasley Allen Crow Methvin Portis & Miles PC announces that **Melissa Prickett** has become a shareholder.

Boardman, Carr & Hutcheson announces that **April B. Danielson** and **E. Dianne Gamble** have become partners.

Burke & Beuoy PC announces that **Clint L. Maze** has become associated with the firm.

Burr & Forman LLP announces that **John Richard Lehman, II** has joined the firm as an associate.

Capell & Howard announces that **Thomas M. Eden, III** has become a member of the firm and **Todd H. Cox** has joined the firm as an associate.

Cole & Associates LLC announces that **Jeremiah M. Hodges** has become a partner and the firm name is now **Cole & Hodges PC.**

The Law Offices of Roianne Houlton Conner announces that **Brooke Killen Poague** has become associated with the firm.

Ford & Harrison LLP announces that **Terry Price** has joined the firm as a partner.

Gordon & Associates LLC announces that **John Dana, Nicole Still, Sam David Knight** and **Jason Gilmore** have become members. The firm has changed its name to **Gordon, Dana, Still, Knight & Gilmore LLC.**

Hand Arendall announces the opening of a new office in Fairhope. Resident attorneys are **Michael C. Niemeyer, David A. Ryan** and **W. Bradley Smith.**

Horton, Maddox & Anderson PLLC of Chattanooga announces that **Bill W. Pemerton** has become associated with the firm.

Lightfoot, Franklin & White LLC announces that **S. Andrew Kelly** and **David R. Pruet, III** have become members.

About Members, Among Firms

Continued from page 249

Morris Haynes & Hornsby announces that **Thomas E. James** has become an associate.

Ogletree Deakins announces that **Christopher W. Deering** and **Christopher A. Mixon** have become shareholders.

Retired Circuit Judge Dale Segrest and **Philip Segrest** announce the opening of **The Segrest Law Firm** with offices at 301 King Street, Tallassee 36078.

Sirote & Permutt announces that **Stephen R. Geisler, David R. Mellon** and **Shaun Ramey** have become shareholders.

E.B. Strong & Associates PC announces that **Andrew D. Perreault** has joined the firm as an associate.

Sutherland Asbill & Brennan LLP announces that **Phillip E. Stano** has become a partner.

Taylor Martino Kuykendall of Mobile announces that **Joseph A. Zarzaur, Jr.** has joined the firm as an associate and opened an office in Pensacola.

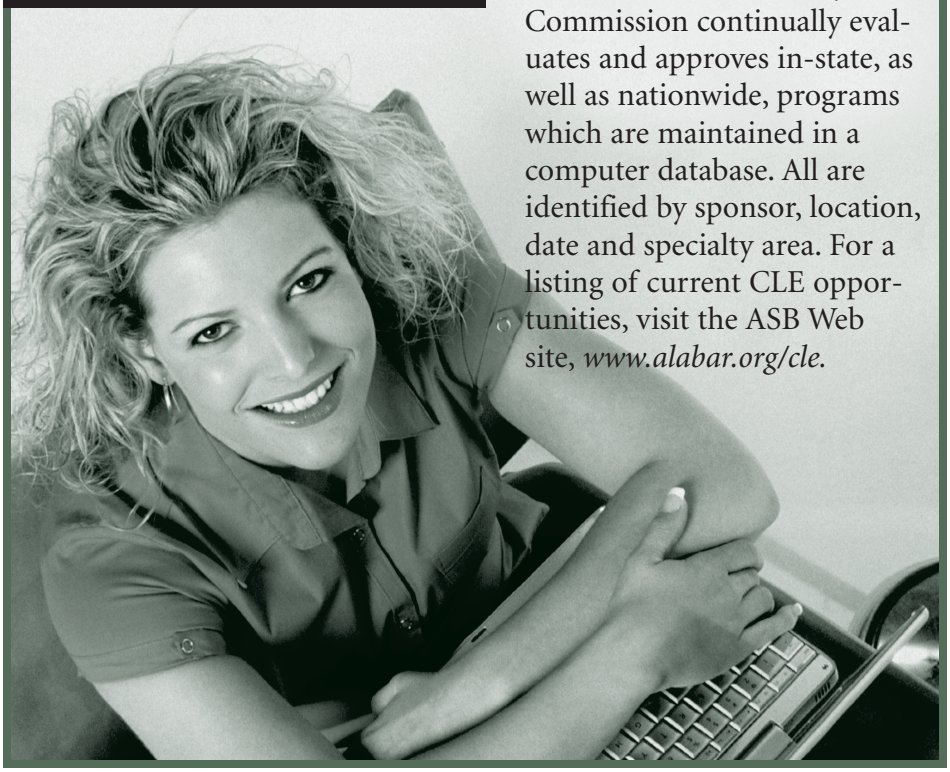
Steve Tipler and **Tom Larkin** announce that **Josh Holden** has joined the firm and they have formed **tiplerlarkintriallawyers**.

The **United States Attorney's Office for the Northern District of Alabama** announces that **Ramona Albin** has joined the office as an assistant United States Attorney in the Appellate Division.

Wolfe, Jones, Boswell, Wolfe, Hancock & Daniel LLC announces that **William M. Hancock** and **Larry O. Daniel, Jr.** have become members. ■

CLE COURSE SEARCH

www.alabar.org/cle



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.*

ASB Lawyer Referral Service

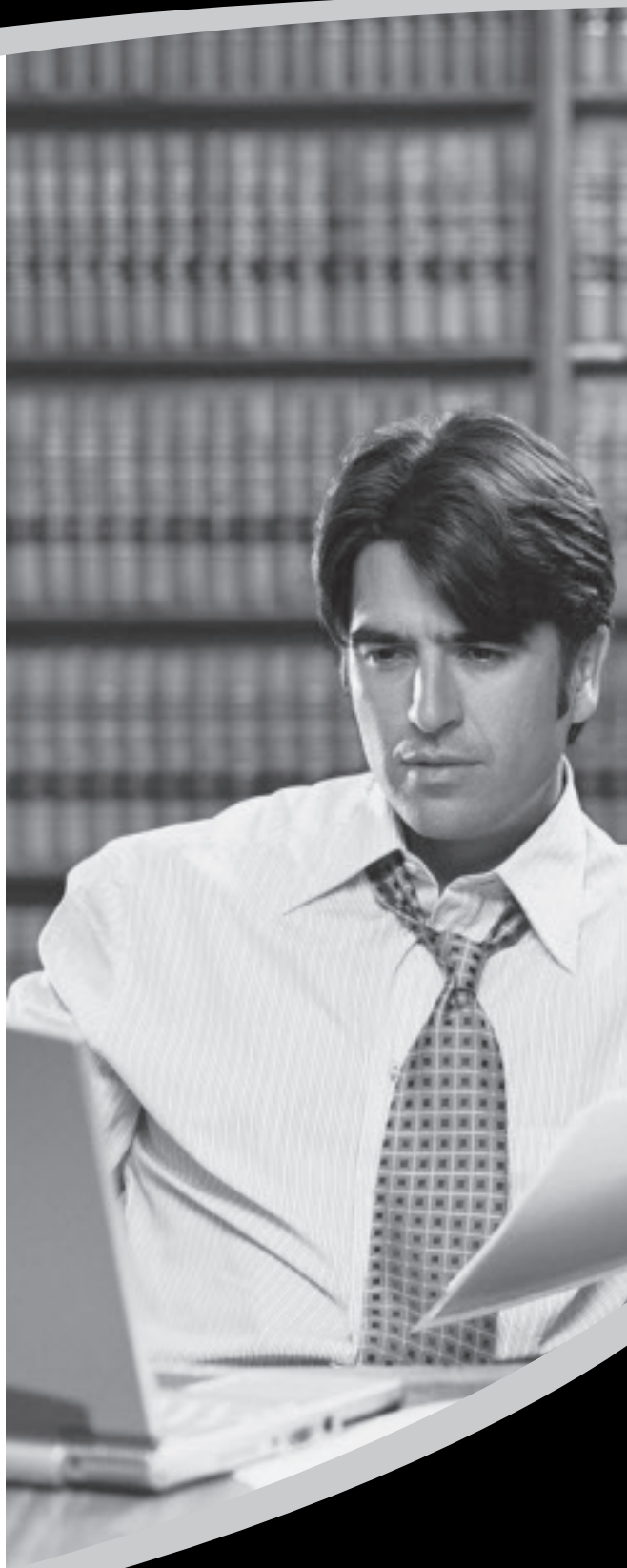
The Alabama State Bar Lawyer Referral Service can provide you with an excellent means of earning a living, so it is hard to believe that only three percent of Alabama attorneys participate in this service! LRS wants you to consider joining.

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than $25 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

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

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

Build your Case on a Solid Business Valuation



Accurate appraisal and analysis form the bedrock of any successful business valuation. You can make sure your case is well-grounded by retaining the right valuation professionals.

Working with a diverse group of industries, companies and private parties, we've built one of the region's strongest valuation practices. Our experience and expertise mean we can swiftly assess the economics of your situation, reducing complex topics to their essence. We present these conslusions in a concise and readily understandable way—to opposing counsel, clients or jurors.

Driving all of this forward is a vigorous commitment to responsive, personalized service, backed by the resources of the largest accounting and advisory firm based in the Southeast. For more on how Dixon Hughes can help you build the strongest case possible, visit us at dixon-hughes.com or call Butch Williams at 205.212.5300.

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