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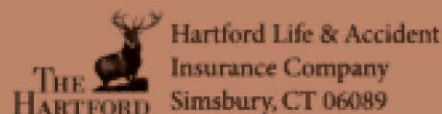
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<sup>1</sup>Social Security Administration, Fact Sheet January 31, 2007

<sup>2</sup>The 2007 CDA Long-Term Disability Claims Survey

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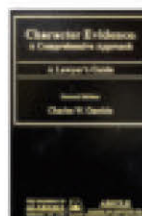
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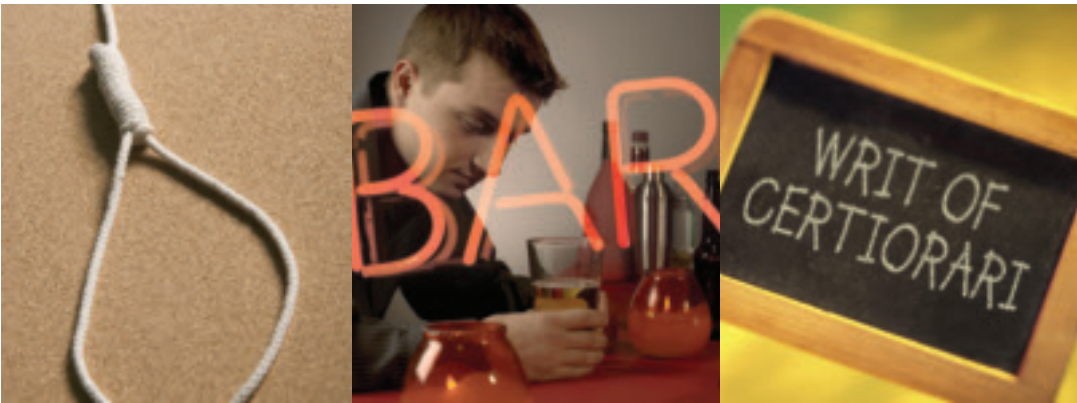
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An early-morning view of the Grand Hotel Marriott Resort cannon, with beautiful Mobile Bay in the background. This year's annual meeting will be held at the Grand Hotel July 15th-18th. Registration forms are inside this issue and also at [www.alabar.org](http://www.alabar.org).

Photograph by Grey Brennan, courtesy of the Alabama Tourism Department

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MARK WHITE

*The Alabama Lawyer* editor, Robert Huffaker, managed to corral ASB President (and road warrior) Mark White between speaking engagements for a few minutes of dialogue. In this interview Mark recounts the accomplishments of his administration, gives a preview of the upcoming annual meeting and addresses the challenges that lie ahead for our profession.



## Turbulent Political and Economic Times— The Bar Will Respond

**Robert A. Huffaker, editor:** Mark, one of your New Year's resolutions was judicial campaign reform. How have you fared on that?

**Mark White, president:** For decades, the Alabama State Bar has advocated merit selection. The current status of judicial campaign reform is that there are some bills in the legislature. Unfortunately, I don't think there is any realistic chance of those bills getting passed or even receiving honest consideration in this session of the legislature. We have had more movement on how we, as the bar, are confronting the issue of third parties dragging the name of the ASB into judicial campaigns. Last fall, we made a complaint to the attorney general and asked him to investigate whether the Fair Campaign Practice Act had been violated. We were forced to do that by the unacceptable conduct of these third parties.

## PRESIDENT'S PAGE Continued from page 163



**RAH:** That was in connection with the supreme court seat in the last election?

**MW:** Right. We had some third parties using push polls where they would call citizens and say, "Are you aware that the state bar has given an 'F' to some candidates?" Those representations were just false. The problem for the state bar is that because we're a mandatory bar, we can't endorse candidates. We don't give grades to candidates. We don't evaluate judges. Yet, the representation was made in the push polls, and then later in some radio ads, that the bar had "negatively endorsed" a candidate, for lack of a better term. Notwithstanding the fact that some people think I'm too active, when I got the first couple of complaints I didn't respond. I continued to receive complaints, including one from a lawyer in my building. He had caller I.D. and so he knew where the call came from, and it was obviously a third-party group. I went to that group's Web site and found that they advertise that they do that sort of activity. If our name had never been mentioned there would have been no need for the state bar to say anything other than what we were doing in support of the Judicial Campaign Oversight Committee. Those two candidates for the supreme court, as you may remember, came to the state bar's annual meeting and got a standing ovation for signing the Campaign Conduct Pledge, which was a great day for our bar and our state. And I think they're both fine people—I



*Mark White, 2008-09 president, Alabama State Bar*

still do—and I have no criticism of them personally. I think the process is tainted and that's unfortunate. But as far as the judicial campaign process, I think you will see a number of legislative activities going on this session, although they will not be specifically sponsored by the ASB. There is one bill in this session where a judicial circuit is trying to be able to "opt out" of the partisan judicial election system, meaning its judges could decide to run non-partisan. This process of moving toward merit selection is going to occur in stages.

**RAH:** You mentioned that we are, of course, an integrated bar. How do you respond to the criticism by the segment of the bar who disagrees with some of the positions that the bar is taking? One example would be whether we should have merit selection of judges or election of judges through partisan elections?

**MW:** I think the most important thing about our association is that those voices are heard. The action of the Board of Bar Commissioners in support of merit selection is the official position of the state bar. As I said, we, as the bar, would not have said anything about the campaign process if the bar hadn't been falsely portrayed in the campaign. It's not unusual in an association to have a difference of opinion. In fact, it's very healthy and it's very positive. Same thing in the judges group—I would think that there are a lot of people, a lot of members who are very comfortable with





the present system of electing judges at the circuit level. By and large, circuit judges know the citizens, the citizens know them and that process works. Unfortunately, it's when you get to the statewide level where you start to see the process and the amount of money compromising our profession and the appearance of justice. I think that directly relates to the unfortunate statistic that almost 80 percent of the people in this country believe there is a correlation between campaign contributions and results in the courtroom. Worse yet is that 49 percent of trial judges in this country share the same belief.

**RAH:** Is the method by which we select judges—that is via partisan politics or by some sort of merit system—a political issue in which our bar should be involved?

**MW:** I don't think we have a choice. The process has gotten so foul and it's so tainted that it compromises the integrity or at least the perception of the integrity of our judicial system. I get a lot more complaints asking, "Why isn't the bar doing more?" than complaints from people asking why we are involved in this tackling this issue. In fact, I drove here for this interview after speaking to a bar association in south Alabama, and after I made my speech a person came up to me and said, "You're not doing enough for non-partisan elections." Frankly, it would probably surprise some people that I have only had two complaints about what we filed with the attorney general after the supreme court election. Interestingly enough, I had more members mad at me because I suggested they should sign the Attorney Professionalism Pledge. I don't know how that shakes out in the great world of math, but

there have not been large mathematical numbers of complaints about the bar's position and actions on this issue.

**RAH:** I've had the same dialogue with at least five or six of your predecessors about moving toward a better way to elect state judges, and you say you don't think we're going

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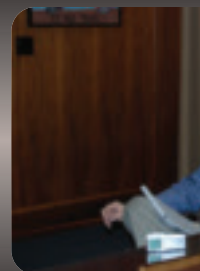
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## PRESIDENT'S PAGE Continued from page 165



to get anywhere (legislatively) this time. Are we going to live to see it?

**MW:** That's a good question. In my opinion, just the impact of the numbers of dollars spent in these judicial elections on public opinion is going to precipitate a change. I think you could probably win a poll or a vote for non-partisan elections. The other thing that's happened is that in pockets of Alabama there's been a shift like you saw happen in Dallas and Houston. When you're a one-party state, then everybody is a Democrat. Then you become a two-party state, and then it begins to shift and everybody becomes a Republican. Now there are places, such as in Texas, where there has been a shift back in the other direction: Dallas had 53 incumbent Republican trial judges who were all recently defeated. In Jefferson County, both Republican judges who ran last time were defeated. I don't think a judge should be elected based on partisan politics, and I don't think a judge should be defeated based on partisan politics. We lose very good judges because of that and I think that what we're going to see is people are tired of the partisan process. The fact is that we have very good judges, some of whom are Democrats and some of whom are Republicans. The average person who goes to court and sees the amount of money that is contributed to statewide campaigns doesn't trust the system. If the public doesn't believe the system is working, then we've got a problem. So, I think the bar has absolutely got to be active in this problem. We have no choice. Obviously the bar doesn't endorse candidates. I don't know what the answer ultimately will be but I would encourage anybody who says they've got a better idea to come forward and voice it.



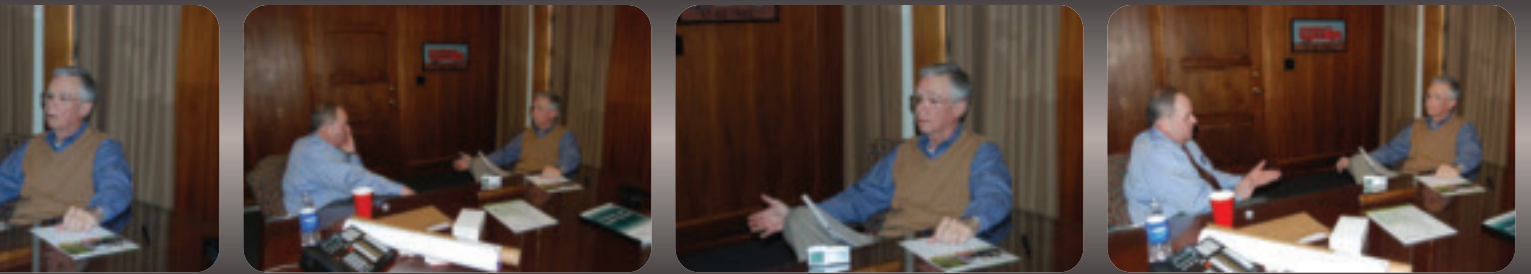
*At the 2008 Annual Meeting, Mark White's well-wishers included (left to right) Leon Ashford, Dean Charles Gamble, Chief Justice Sue Bell Cobb, Justice Gorman Houston, and Judge U.W. Clemon.*

**RAH:** What's on your agenda for the remainder of your term?

**MW:** Two years ago, Sam Crosby and I decided that we were going to try to improve the bar's relationship with the legislature. We have spent a good bit of time talking to the stakeholders, talking to the legislators and considering what resources the bar could provide. We also wanted to give additional resources to our members. So, two things have come out of that. First, you can now track any bill from our state bar Web site at [www.alabar.org](http://www.alabar.org) (thanks to our legislative counsel Kim Adams and Susie Edwards who put this together with Brad Carr's assistance). You can see where that bill is in the legislative process.

**RAH:** What's the second?

**MW:** The second thing was to put together a panel of neutrals. We established this panel as a resource for the legislature, and we sent all the legislators a Christmas stocking the week before Christmas announcing this panel to them. The



members of the initial panel of neutrals are former Governor Brewer, former Governor Patterson, Delores Boyd, former Congressman Ronnie Flipppo, former Congressman Jack Edwards, Butch Ellis, and Scottie McAllen (the former head of UAB). They are there not to be advocates but simply to be a resource for the legislators. It can be a dispute caused by personalities, it can be that they just need generic neutral information about something—we put the panel out there because there was an indication that the legislature needed it. I was prepared to never get a call for the panel's assistance. However, the response has been overwhelming. Probably one of the reasons I get criticized, with some even saying I am controversial, is that I did decide and do believe that over 16,000 lawyers in Alabama should have a seat at the table when decisions are made that affect the rule of law, that affect our justice system, that affect how citizens are treated by our courts and that we have a duty to participate in that process. I think that seat is perhaps not as a traditional advocate, and in this case the panel we appointed serves as a resource. And the response has not only been specific and direct—walking through the state house, dealing with the administration, dealing with the chief justice in the supreme court—but there's also a renewed sense of respect for the bar. I think that perhaps we are more appreciated. Lawyers always feel like they're underappreciated, but my sense over the last several months is that we are getting genuine expressions of appreciation for being willing and available to help our government.

**RAH:** During these difficult economic times, has the downturn in the economy affected the bar operations in any way that you can see?

**MW:** Voluntarily, the bar made some cutbacks in our expenses, particularly expenses related to in-state travel. We also implemented a hiring freeze. Because our funding comes from membership dues, we don't get a mandatory cut even though it goes through the State of Alabama. Nevertheless, we made a conscious decision that we are going to be faithful stewards of our resources.

**RAH:** What else have you seen happening to our profession during these lean times?

**MW:** On the horizon, there are some interesting numbers and some interesting things that I think could have an impact on the operation of the bar. Law school applications are down 26 to 28 percent. LSAT applications are down about the same percentage. Typically, in difficult economic times they're up. So, where in the past you would have seen people turning to the law in tough economic times, we're not seeing that. On the national scale, there are predictions that we're going to lose as much as 6 percent to 8 percent of our total number of lawyers in the next few years. We're going to be down by that much. Additionally, when you look at the age demographics of our bar, you see that a substantial number of our lawyers are 50-plus. That's a healthy majority. A lot of people think there are too many lawyers, but I think we are facing a future with fewer lawyers, not more.

**RAH:** Do you see the ASB implementing any programs to provide assistance to lawyers in these economic times?

**MW:** Absolutely. In fact, we're already talking about those programs. Our first outreach was Tom Methvin's program for Alabamians who are facing foreclosure. Just in the last few

## PRESIDENT'S PAGE Continued from page 166



Getting some well-deserved advice as he begins his term, Mark White listens to Dean John Carroll (middle) and Tony McLain.

months, we've served the needs of over 1,200 people who were going to be evicted from their homes. Tom put that together quickly. What our state bar should do is first respond to our clients, but at the same time look at ourselves. Obviously in these economic times, unemployment is up nationally. We're sitting here today and two weeks ago 700 lawyers in six major law firms got laid off across the country. We're seeing big law firms in Alabama only paying the basic bar dues, not paying for the extra sections or things that the bar puts on top of the basic dues. We're seeing a huge increase in calls to our Lawyer Assistance Program. Nationwide, we're seeing an increase in suicide among lawyers. So the economy is absolutely having a traumatic impact on our profession. What we're in the early planning stages of thinking about is how can the bar be a resource? For example, can we put together a job bank? Should we be teaching CLE courses on how to write a resume? Can we get a win-win situation because we've got *pro bono* needs at the same time we've got lawyers looking for work, and can a lawyer beef up his resume, his skills and his practice by doing *pro bono* work in some of the areas where we so desperately need those talents? There are a lot of things we can do but we're in a revolution. The whole country is in an economic revolution. It affects not only our association but also our practice. Now I'm sure there will be some criticism. I'm sure people will say wait a minute, what business do you have trying to provide job banks or resume writing or things like that? But I think when you look at this association's goals, it fits like a glove.

**RAH:** Give us a preview of the upcoming annual meeting.

**MW:** Well I'm sitting here today hoping that by the time you have to actually put this to ink I can give you an announcement about some different things. We've got a great program that the Diversity Task Force has put together, with the general counsel for Miller Coors coming as the keynote speaker. He tells an amazing story that essentially translates that lawyers should recognize that practicing diversity can increase your income. There's an economic incentive in addition to the fact that it's just the right thing to do. We've got the lawyer who represented President Bush in the Florida *Bush vs. Gore* case coming to make a presentation. It is a fascinating tale about the historical expansion of executive power—of power in the Executive Branch without regard to whether it was Democrats or Republicans. We are absolutely, totally committed to this meeting being kid-friendly and young lawyer-friendly. We have taken the needs of spouses into consideration. We're also going to reach out to minority lawyers. For solo practitioners and small firm lawyers in rural areas to come to Point Clear for the annual meeting is a pretty good economic hit. So, we're going to give scholarships to some of those lawyers. We've created and are continuing to increase the amount of a scholarship fund that will specifically give lawyers, who probably have never come to an annual meeting, the opportunity to be there, and we've had some major firms step up to provide funds for those scholarships.

**RAH:** I got the IOLTA certification last week. What do I need to do about that?

**MW:** One of the things you never anticipate as president of the bar is that there are so many logistical things that go on that you didn't create, that you didn't have anything to do with, that you should be thankful to the good Lord everyday get done without your interference. The IOLTA certification has created some confusion, but Tracy Daniel is wading through that and handling it. It runs the whole gamut. We still have some people at one end of the spectrum who didn't realize they were supposed to have IOLTA accounts. I'm hopeful that we can handle that administratively. Then, on the other hand, we've got some issues regarding whether



*Hailing from all points in the state are (left to right) 2008-09 President-elect Tom Methvin from Montgomery, '08-'09 President Mark White of Birmingham and Immediate Past President Sam Crosby from Daphne.*

accounts have been properly designated. I know everybody received their certification, and they should look at it like a "revival." It's designed to rejuvenate your IOLTA commitment.

**RAH:** This is your show—what else you want to touch on?

**MW:** It's more than passing strange to be doing this interview in *The Alabama Lawyer* because, as you know, I do have a selfish interest in this publication and in you. Since I was there and agreed when we redid this publication that you should be the first and only editor, don't you think I ought to be interviewing you? Bobby Segall has given me some questions that he wants me to ask you.

**RAH:** You can't turn the tables. That's an editor's prerogative.

**MW:** I want to mention something that's been a good result too and it was controversial. We brought more of our bar's communications/public relations functions in-house with a professional staff, not related to principles or goals or Law Day or things like that. We felt there was a need for the state bar to be able to respond quickly when we get inquiries from the media. We had to adapt to the speed of technology and Brad Carr and his staff, Margaret Murphy and everybody have been able to respond in amazing fashion. By way of example, you think you anticipate everything. Then, within hours of becoming ASB president, the issue comes up about a person who's on death row and there's a petition for a stay before the supreme court and the classic situation where there hadn't been any DNA testing and the bar is getting calls for a

response. The response was measured, and it was based on the idea that it takes courage to issue a stay in this day and time. Our response was also an important response, because by the time we gave it the court had issued the stay. We've been talking about the political process of electing our judges and part of the problem is they do get instant criticism when they make tough calls. The nice thing about the communications aspect of the bar is that we were able to put out a statement explaining the process, that a stay means the process is working, it doesn't mean the process is failing. It means the court is carrying out its constitutionally-required duty. We got out our response after getting notice of the stay with a 17-minute deadline. Now that's where I'm really proud of our staff and our internal folks. The fact that our staff had the ability to get out the word is significant. We were called upon for our position, and the last thing I think the bar needs to say is "no comment" or "we're not interested." The fact that they were able to turn that around looking at a 17-minute deadline is commendable in any organization.

**RAH:** I sense that you are proud of the performance of the bar staff?

**MW:** I think the lawyers of Alabama get magnificent benefit from the bar staff. The staff is extremely efficient, and we don't realize it. Working with the staff has been a great treat. ▲▲▲

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### 2010 ALABAMA STATE BAR SECTION APPLICATION

#### July 1, 2009 – June 30, 2010

Date of Application \_\_\_\_/\_\_\_\_/\_\_\_\_

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<input type="checkbox"/> Family Law	\$50
<input type="checkbox"/> Health Law	\$15
<input type="checkbox"/> Intellectual Prop. Entertain./Sports	\$20
<input type="checkbox"/> International Law	\$30
<input type="checkbox"/> Labor & Employment Law	\$10 (practicing less than 5 years) \$30 (practicing more than 5 years)
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<input type="checkbox"/> Real Property, Probate & Trust	\$10
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<input type="checkbox"/> Workers' Compensation Law	\$30

**If mailing, return entire application with payment to: Alabama State Bar, Attention: Sections c/o Rita Gray, P.O. Box 671, Montgomery 36101-0671; renew online at [www.alabar.org](http://www.alabar.org).**

*Pursuant to the Alabama State Bar's Rules Governing the Election of President-Elect, the following biographical sketch is provided of Alyce Manley Spruell. Spruell was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2009-10 term and she will assume the presidency in July 2010.*

## Alyce Manley Spruell

Tuscaloosa attorney Alyce Manley Spruell currently serves as a bar commissioner for the 6<sup>th</sup> Judicial Circuit, having held that position for two consecutive terms. She was selected to serve on the Executive Committee in 2005, and again in 2007. She also served as a charter member of the bar Leadership Forum Task Force in 2004, and, after serving as co-chair with Pat Graves during the first year of the Leadership Forum program, she went on to chair that committee the next year.

Spruell has held a variety of leadership and service positions in the bar since becoming licensed to practice in Alabama in October 1983, shortly after graduating from the University of Alabama School of Law. She served on the bar's Young Lawyers' Section Executive Committee for three years, and chaired the Admissions Ceremony Committee during her tenure. She served on the initial Supreme Court Commission on Dispute Resolution, and has also served on the Volunteer Lawyers Program Committee and the Task Force on Professionalism, as well as other state bar committees. Locally, Spruell served as the Tuscaloosa County Bar Association president in 1996-97, after serving several terms on the local bar executive committee. Spruell currently serves as a member of the Legal Services Corporation Board of Directors (as a Bar Commission designee), and is also a participant in the Volunteer Lawyers Program. She is a 2008 graduate of the Leadership Alabama program, and has served on a number of community and statewide service organizations.

Spruell is a member of the firm of Spruell & Powell LLC, whose offices are located in historic downtown Northport. The firm's practice centers on small business representation as well as civil trial representation, with an emphasis on business, employment and real estate matters. Spruell and her partner, Joe Powell, also own Main Avenue Title Company. Alternative dispute resolution services are also provided by the firm through Spruell's service as both a mediator and arbitrator in a variety of practice areas. She has served as an adjunct professor at the University of Alabama School of Law in the area of trial advocacy for over 10 years, and also teaches a 9<sup>th</sup>- and 10<sup>th</sup>-grade girls' Sunday school class in the youth department of Calvary Baptist Church.

She has been married to Bruce Spruell for almost 28 years. They have two children: a son, Taylor, a senior majoring in sports management, and a daughter, Cameron, a freshman majoring in special education (both at the University of Alabama). Spruell describes her favorite pastimes as boating on Lake Tuscaloosa, reading and traveling. As an avid sports fan, she is a huge supporter of the Crimson Tide and the Vanderbilt Commodores, her undergraduate alma mater. ▲▼▲



ALYCE MANLEY SPRUELL

## WHY OLD SCHOOL IS ACTUALLY NEW THINKING.



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## Getting Your Money's Worth in These Difficult Times

Economically speaking, these are difficult times—times that most of us have never experienced. Economists, pundits and even Federal Reserve governors paint a bleak picture with few expecting that we will exit this economic morass before next year. In an effort to shore up the nation's faltering economy, President Obama signed a historic \$700 billion economic stimulus bill passed by Congress. Some analysts surmise that a recovery will take far longer despite the collective actions taken by Congress, the Treasury and the Federal Reserve.

Few areas of our nation's economy have been unscathed by this recession. In fact, most of the world's leading economies are sharing our misery. Not only has our nation's industrial sector been hard hit, the service sector is suffering, too. In particular, the legal profession is feeling tremendous pressure as the economy has plummeted. I have spoken with a number of Alabama lawyers, including solo practitioners and members of large and small firms, as well as lawyers who practice in small towns and cities. All the lawyers I spoke to conceded that the economy had taken a toll on their practice.

One way to lessen the economic impact of a tightening economy is to save money by cutting costs. By virtue of purchasing your occupational license to practice law (\$300), or payment of your special membership dues (\$150), you can take advantage of the bar's member benefits, many of which can help you save hundreds of dollars or help you bring clients to your front door. I will highlight four of these benefits.

### **Increase Your Client Base**

Many Alabama citizens need and can afford to pay for the services of a lawyer, but don't know how to locate one. That is where the Alabama State Bar's Lawyer Referral Service (LRS) can help. The LRS can provide you with an excellent means of fee-producing work. Created in 1978, LRS members are lawyers who charge their regular rates. Beyond the initial half-hour consultation fee (maximum of \$50 or at no charge), the fee arrangement is between the lawyer and the client. The fee for the state bar member who joins the LRS is \$100. Panel members are asked to remit five percent of the legal fees they collect on referrals that reach \$1,000 to \$5,000.

# EXECUTIVE DIRECTOR'S REPORT

Continued from page 173

Being a member of the LRS is an ethical and inexpensive method of marketing your practice. Qualified attorneys with malpractice insurance and without an ongoing disciplinary case may choose to list up to 10 areas of legal practice. All referrals are made on a rotating basis, with each sub-panel rotating independently. Since clients select the geographical areas they prefer, there may be minimal rotations within the overall rotation for some sub-panels.

## Make Your Practice More Efficient

The Practice Management Assistance Program (PMAP) serves as a clearinghouse for the collection and dissemination of information about the effective management of the modern law office. This program was created to serve the needs of solo practitioners and lawyers practicing in small firms, and to protect the public from lawyers whose management skills are inadequate to allow them to deliver competent legal services in a timely manner.

Information is distributed through PMAP's lending library containing books and audio and video programs. The program also provides information on management issues such as attorney compensation, billing, business planning, client relations, employee relations, ethics and professionalism, loss prevention, marketing, retirement planning, and technology. PMAP provides this information through on-site visits to law offices, and via telephone and e-mail help lines. PMAP also handles the sale of discounted American Bar Association publications, particularly those of the Law Practice Management Section.

## Use the Free Web Law Library—Casemaker

Casemaker is a free, Internet-based legal research service available to all Alabama State Bar members. In addition to Alabama case law beginning with 1 So.2d, the Alabama Code, constitution, rules of court and *Administrative Code* and regulations, Casemaker also contains a federal database with U.S. Supreme Court cases, case law from federal circuits and many federal district courts, U.S. Bankruptcy court opinions, Federal Court rules, the U.S. Code, and the *Code of Federal Regulations*.


Because Casemaker is the product of a multi-state consortium of bar associations, it also contains cases and statutes from all 50 states. Casemaker is continuously

adding information to its databases, so it's a great method for doing legal research that allows many lawyers and firms to do so without expensive monthly packages from other research providers.

## Save Money with Better Rates on Insurance

The Alabama State Bar endorses eight insurance programs (health, hospital, income, disability, term life, business overhead, comprehensive accident, accidental death and dismemberment, and Medicare supplement) through our administrator, ISI Alabama, a division of Insurance Specialists, Inc. As a benefit of membership in the state bar, these plans offer association-based products through which applicants receive discounted rates and enhanced benefits. These endorsed plans are all available to state bar members, and most are offered to member spouses, employees and eligible family members.

A variety of health insurance options are available for individuals, families and self-employed attorneys including the availability of small business and short-term medical plans and dental insurance. The Aetna Association Medical Plan is the latest addition to the bar's health insurance portfolio.

In addition to the endorsed benefits described above, the state bar provides a host of others that have been especially selected to aid lawyers regardless of their practice type. A complete listing is located on the bar's Web site, [www.alaba.org](http://www.alaba.org), under "Member Central." If you are not a regular user of the bar's member benefits, there is not a better time than now to take full advantage of these benefits. I encourage you to join your colleagues who have found great value in the Alabama State Bar's Member Benefits program. 

## EDUCATION LOAN UPDATE

For the February 2009 bar examination, there were 114 first-time applicants. Of this total, 68 percent had education loans, averaging \$79,141.



## H. POWELL LIPSCOMB, III

Bessemer attorney H. Powell Lipscomb, III died July 1, 2008. He grew up in Bessemer and attended the University of Alabama before earning a law degree from the University of Alabama School of Law.

Mr. Lipscomb spent two years in the Army stationed statewide. After that, he entered law practice with his father, H. P. Lipscomb, Jr., in Bessemer. He practiced in Jefferson County over 50 years.

He was married to the former Carolyn Johnson for 49 years. The couple lived in McCalla. He was a member of the Baptist Church of McAdory where he served as chairman of deacons and a Sunday School teacher. He was a member of the Alabama State Bar and active in local politics, including membership on the Executive Committee of the Democratic Party. He was city attorney for Brownville, Lipscomb, Maytown, Fairfield, and Bessemer and served as president of the Bessemer Bar Association.

For many years, the firm of Lipscomb & Lipscomb hosted the Bessemer Bar Picnic. He was an avid Alabama football fan and a NASCAR enthusiast and was particularly interested in biblical eschatology. In 1992, he started his own firm, Powell Lipscomb & Associates, located in Bessemer.

He is survived by his wife, Carolyn; a brother and former law partner of 30 years, Albert D. Lipscomb, Sr.; a former partner and nephew, Bert Lipscomb of Birmingham; a nephew, Michael Lipscomb of McCalla; a niece, Lee Lipscomb of Nashville; a great-nephew, Alex Lipscomb of Birmingham; and many cousins.

—Neil Clay, president, Bessemer Bar Association

## JACKIE M. MCDUGAL

Jackie M. McDougal, a well-respected and long-time member of the Bessemer Bar Association, died August 14, 2008 at the age of 68. Jackie was reared in the Bessemer area, attended Bessemer public schools and graduated from the University of Alabama with his undergraduate and law degrees.

Jackie managed his law practice in the Bessemer for over 40 years. He was well known throughout Jefferson County as a municipal judge in the cities of Brighton, Lipscomb and Bessemer for many years. He has the distinction and

H. POWELL LIPSCOMB, III

JACKIE M. MCDUGAL

JACK E. PROPST, SR.

# MEMORIALS

Continued from page 175

honor of serving as the longest tenured municipal judge in Alabama, having served 33 years for the City of Bessemer. He was a former president of the Bessemer Bar Association and gave tirelessly of his time and efforts to it.

Jackie was truly a gentleman's lawyer who treated everyone with respect and dignity. He taught many a young lawyer the ropes of a law practice and how to treat other lawyers with courtesy and respect. He is survived by his wife, Nancy; his son, Shannon; his daughter, Jill Benninghoff; and five lovely grandchildren. He will be greatly missed as a husband, father, friend and fellow lawyer.

—Neil Clay, president, Bessemer Bar Association

## JACK E. PROPST, SR.

On September 22, 2008, the Birmingham Bar Association, as well as the Lamar County Bar Association, lost a true gentleman and dear friend. Jack E. Propst, Sr. was born October 31, 1925 in the Palmetto Community of Pickens County. A veteran of the United States Navy serving during World War II, Mr. Propst attended and received



bachelors and master's degrees from the University of Alabama. He graduated from the Birmingham School of Law. He was a member of the Alabama Trial Lawyers Association, the University of Alabama Executive Club and the Alabama State Bar. He served as attorney for the town of Kennedy and was an active member of the Kennedy First Baptist Church.

Mr. Propst was a devoted, loving husband as evidenced by his 65-year marriage to his best friend, Grace Poole Propst, who preceded him in death. He is survived by his three children, Gwendolyn Annette Propst of Gatlinburg, Jack E. Propst, Jr. of Birmingham and Stuart K. Propst of Kennedy.

During his 49-year legal career, Mr. Propst earned the reputation as an excellent trial lawyer. In 1981, Jack returned to Kennedy, Alabama with plans to retire. Within a short time, Mr. Propst's love for the practice of law and for people led him to open an office in Kennedy where he practiced for 27 years. His numerous accomplishments, coupled with his kind heart, earned the loyalty and admiration of the small community where he was commonly referred to as "my lawyer" by his hometown citizens and throughout Lamar County.

Mr. Propst's kindness and warm smile will truly be missed both in and out of the courtroom.

—Ronald H. Strawbridge, Jr., 24<sup>th</sup> Circuit Bar Association

<p><b>Bowers, Quinton Roosevelt</b> Hoover Admitted: 1956 Died: January 29, 2009</p>	<p><b>Lindsey, Wallace Henry III</b> Butler Admitted: 1963 Died: January 11, 2009</p>	<p><b>Nave, Dick Donnelly, Jr.</b> Birmingham Admitted: 1974 Died: January 4, 2009</p>
<p><b>Fawwal, Herbert Jadd</b> Bessemer Admitted: 1976 Died: January 27, 2009</p>	<p><b>McHale, Michael John</b> Port Salerno, FL Admitted: 1986 Died: November 22, 2008</p>	<p><b>Volz, Charles Harvie, Jr.</b> Montgomery Admitted: 1951 Died: February 2, 2009</p>
<p><b>Fuller, Millard Dean</b> Americus, GA Admitted: 1960 Died: February 3, 2009</p>	<p><b>Morris, Larry Denson</b> Alpine Admitted: 1985 Died: January 6, 2009</p>	<p><b>Wassner, Donald Richard</b> Muscle Shoals Admitted: 1963 Died: June 14, 2008</p>



LOCAL BAR AWARD OF ACHIEVEMENT

## Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented July 18 during the Alabama State Bar's 2009 Annual Meeting at the Grand Hotel in Point Clear.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2009. Applications may be downloaded from the ASB Web site at [www.alabar.org](http://www.alabar.org) or by contacting Rita Gray at (334) 269-1515.



## NOTICE

### AMENDED RULE 7.3(B)(1), ALABAMA RULES OF PROFESSIONAL CONDUCT IN THE SUPREME COURT OF ALABAMA

February 19, 2009

#### ORDER

IT IS ORDERED that Rule 7.3(b)(1), *Alabama Rules of Professional Conduct*, is amended to read in accordance with the appendix attached to this order;

IT IS FURTHER ORDERED that this amendment is effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 7.3:

"Note from the reporter of decisions: The order amending Rule 7.3(b)(1), effective February 19, 2009, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 2d."

Cobb, C.J., and Lyons, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur. Woodall, J., dissents.

#### APPENDIX

Rule 7.3(b)(1), *Alabama Rules of Professional Conduct*

##### (b) Written Communication

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or on behalf of a partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(i) the written communication concerns an action for personal injury or wrongful death arising out of, or otherwise related to, an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster giving rise to the cause of action occurred more than thirty (30) days prior to the mailing of the communication;

(ii) the written communication concerns a civil proceeding pending in a state or federal court, unless service of process was obtained on the defendant or other potential client more than seven (7) days prior to the mailing of the communication;

(iii) the written communication concerns a criminal proceeding pending in a state or federal court, unless the defendant or other potential client was served with a warrant or information more than seven (7) days prior to the mailing of the communication;

(iv) the written communication concerns a specific matter, and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(v) it has been made known to the lawyer that the person to whom the communication is addressed does not want to receive the communication;

(vi) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence by the lawyer;

(vii) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 7.1; or

(viii) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or is incompetent, or that the person's physical, emotional, or mental state makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.



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## VLP: Good for You and Me

As a young lawyer, are you interested in making a difference in your community? Are you looking to gain more experience or to handle cases outside your normal practice area? If so, the Alabama State Bar's Volunteer Lawyers Program (VLP) is a great way to use your legal skills to render service to citizens of Alabama. The VLP's purpose is to provide free legal services to low-income Alabamians in civil matters. By conservative estimates, there are over 723,000 persons living below the federal poverty level in Alabama and the numbers increase each year. With limited staff and budgets, federally-funded Legal Services' programs cannot handle all of these Alabamians' legal problems. As a result, many poor persons find themselves waiting for, or even without, legal representation in matters crucial to their well-being.

As a regular member of the Alabama State Bar, you can assist the VLP with this critical problem by voluntarily agreeing to handle not less than two civil case referrals over the next 12 months. If you cannot commit to this level of involvement, or if you hold a special membership in the bar, other options are available through the program to serve low-income Alabamians, such as performing intake and screening at an "advice-only" legal clinic or Legal Services office in your area, or serving as a speaker at a VLP-sponsored training seminar, or even recruiting for this program at bar association functions.

All potential VLP clients are first screened and interviewed for income eligibility by intake professionals. This assures that the client is indeed eligible for free legal assistance. All referrals to volunteer attorneys are made by the VLP director in Montgomery or by local pro bono coordinators (Birmingham, Huntsville, Mobile) based upon the area of law involved in the client's problem. Following a conflicts check and assuming that the case is accepted by the volunteer lawyer, copies of intake information are forwarded to the attorney. The client is advised of the referral by letter from the program and is instructed to call the volunteer attorney immediately to schedule an appointment at a mutually convenient time. If the client fails to contact the attorney within 30 days, the case is closed.

# YOUNG LAWYERS' SECTION

Continued from page 179

All cases are accepted on a *pro bono* basis and the volunteer attorney is expected to handle only the one specific legal problem of the client which was referred by the VLP. The VLP reporting requirements are simple. You are expected to complete cases referred to you. Three months after referral, the VLP director or local *pro bono* coordinator will send you a form to advise the program of the status of the case. You will also be asked to return a case-closing memo at completion advising the VLP of the final disposition of the case and the number of hours of services provided. Malpractice insurance coverage can be made available by the program at no cost to volunteer attorneys for *pro bono* cases handled through the VLP. If you are interested in learning more about the VLP, or if you are ready to enroll, contact **Linda Lund** at the Alabama State Bar. Linda can be reached at (334) 269-1515 or [linda.lund@alabar.org](mailto:linda.lund@alabar.org).

We will have our annual YLS Sandestin seminar this month, May 14-16. Each year, young lawyers from

around the state gather for a weekend of fun and learning at the beach. Our Sandestin seminar is the largest attended event that the YLS organizes each year. Typically, approximately 125 lawyers and their families attend the Sandestin seminar, but this year we hope to increase that number. As always, we will have some great speakers. This CLE seminar offers 6.2 hours of credit (with at least one CLE ethics hour). In addition to the CLE, there will be a variety of networking events planned for the weekend, including a golf tournament, beach parties, a silent auction and a cocktail reception with a band. The Sandestin CLE is made possible by the hard work of **Clay Lanham, David Cain, Shay Lawson, Katie Hammett, Larkin Peters, Brandon Hughey, Clifton Mosteller, and Brad Hicks**. It is not too late to sign up. Feel free to give me a call at (205) 939-0199 and I will send you a registration form. At \$300 (with a reduced fee of \$250 for first-year lawyers) this CLE is a bargain. I strongly encourage your participation this year. ▲▼▲



**It is more important than ever to understand your 401(k) fees.**

401(k) fees can be assessed as explicit out-of-pocket expenses or charged as a percentage of assets. These expenses can be charged to either the sponsoring law firm or the plan's participants. Often they are assessed both ways, in some combination to the firm and its participants.

**HOW IS THE ABA RETIREMENT FUNDS PROGRAM DIFFERENT FROM OTHER PROVIDERS? TWO REASONS:**

1. The ABA Retirement Funds program was created by a not-for-profit organization within the ABA to provide a member benefit, not generate revenue for the ABA.
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LOUIS B. FELD

BRITTIN COLEMAN

M. STEPHEN DAMPIER

JESSICA M. GARRISON

CHRIS J. WILLIAMS

- **Louis B. Feld**, of Feld, Hyde, Wertheimer, Bryant & Stone PC, was elected president of the Alabama Chapter of the International Network of Boutique Law Firms (INBLF). The INBLF is an organization of highly credentialed law firms specializing in specific substantive practice areas.
- **Brittin Coleman**, of Bradley Arant Boult Cummings LLP, has been selected as recipient of the Sam W. Pipes Distinguished Alumnus Award for 2009. The Pipes Award is given to an outstanding alumnus who has distinguished himself or herself through service to the state bar, the University of Alabama or the University's school of law.
- **M. Stephen Dampier**, a member of Vickers, Riis, Murray & Curran LLC, has been appointed by the Secretary of the Interior to serve on the federal Royalty Policy Committee (RPC). The RPC advises the Secretary on issues concerning oil and gas royalties generated from the development of federal lands, both onshore and offshore, throughout the U.S.
- **Jessica M. Garrison**, a partner at Phelps, Jenkins, Gibson & Fowler LLP, was recently appointed by Governor Bob Riley to the Children's Policy Council as a representative of business. State council members include the head of every state agency that affects children, the state's leading children's advocates and political figures.
- **Chris J. Williams**, of Maynard, Cooper & Gale PC, has been recognized by the U.S. Green Building Council (USGBC) as a LEED Accredited Professional (LEED AP). Williams is the only attorney in Alabama currently registered as a LEED AP. The USGBC's Leadership in Energy and Environmental Design (LEED) program promotes "global adoption of sustainable green building and development practices through the creation and implementation of universally understood and accepted tools and performance criteria." 

# Celebrates 10-Year Anniversary

The Intellectual Property, Entertainment and Sports Law Section of the Alabama State Bar celebrated its tenth anniversary November 6, 2008 in Birmingham. The event was hosted by Balch & Bingham LLP. Numerous section members and honorees from across the state attended and were joined by local celebrity **Fabian Sanchez** of the hit ABC television show "Dancing with the Stars." Recently retired Alabama Supreme Court **Justice Harold See** provided keynote remarks. His role in the ten-year anniversary itself reflected the history of the section, as Justice See addressed the section at its first meeting in 1998 at the Alabama Sports Hall of Fame.

## A \$5 trillion stimulus

The anniversary also celebrated the recent integration of the ASB's Entertainment and Sports Task Force into the section. The addition of the task force brings the section's membership to nearly 150 lawyers, all active throughout state in the representation of their clients' patent, trademark, trade secret, entertainment, and sports needs. Recognizing how pervasive intellectual property had become in the daily lives of all individuals, Justice See explained that the value of such intellectual property to today's national economy easily exceeds \$5 trillion.

The event honored a number of key contributors to the success of the section

and the advancements generally made in the field during the past decade. Following a welcome by current section Chair **Kimberly Till Powell**, ASB President **Mark White** recognized the past section chairs, including section founder **Will Hill Tankersley** ('98-'01), **David Vance Lucas** ('01-'03), **Timothy A. Bush** ('03-'05) and **Frank M. Caprio** ('05-'07).

## New award created

Tuscaloosa native **Bruce B. Siegal**, senior vice president and general counsel of IMG College/The Collegiate Licensing Company, was honored with a newly-created award named for him, the Bruce B. Siegal Award for Excellence in Advancing Intellectual Property, Entertainment and Sports in Alabama. The section bestowed it on Siegal in recognition of his many contributions to the intellectual property field, locally and nationally. Among other accomplishments, he has helped colleges and universities throughout the country gain legal control over the use of their images and likenesses. Future individual or corporate recipients of the award will be chosen annually, based upon their outstanding efforts in the fields of intellectual property. A plaque honoring their designation (as well as Siegal's) will be placed at the Alabama State Bar.

The anniversary celebration closed with a jazz cocktail reception, also at Balch & Bingham. ▲▼▲



## Welcome to CLE Express

The CLE Express was developed to provide Alabama State Bar members with complete up-to-date CLE information. The CLE Express provides you two new services.

Sign up for the **BLUE LINE** and we will send you an e-mail every time a seminar that meets your needs is approved for CLE credit. You set the parameters. For example, if you would like to be notified when a seminar on the subject of adoption in Birmingham or Boston (or any city in the U.S.) is approved, we will send you a notification by e-mail the same day the seminar is approved.

Sign up for the **RED LINE** and upon notification by a CLE sponsor of your attendance at an approved seminar, we will update your CLE transcript and notify you by e-mail that your transcript has been updated. The e-mail will contain a copy of your current CLE transcript. Sign up for this service and monitor the year and the number of CLE hours, including ethics hours, which you have earned.



*Bruce Siegal (general counsel, Collegiate Licensing Company) accepting first annual Bruce Siegal IP Award from Mark White (president, Alabama State Bar)*

# We made it.

We have completed the 2008 MCLE Compliance year in pretty good shape. We had fewer attorneys than ever before who were in non-compliant status going into the new year. We had fewer deficiency plans than ever before and more of those than ever have been successfully completed.

But we had a few glitches along the way. Some attorneys who are exempt, and therefore received the **BLUE** form, called to advise us that they were, in fact, exempt. Some attorneys who received the **GREEN** form, indicating that they were compliant for 2008, didn't know where to sign the form before returning it to us. We reminded them, tactfully, I hope, that we have not required the return of green forms for a couple of years. And then there was the attorney who didn't understand why we sent him a **YELLOW** form. (We hadn't; it had been sent to him by Tennessee.)

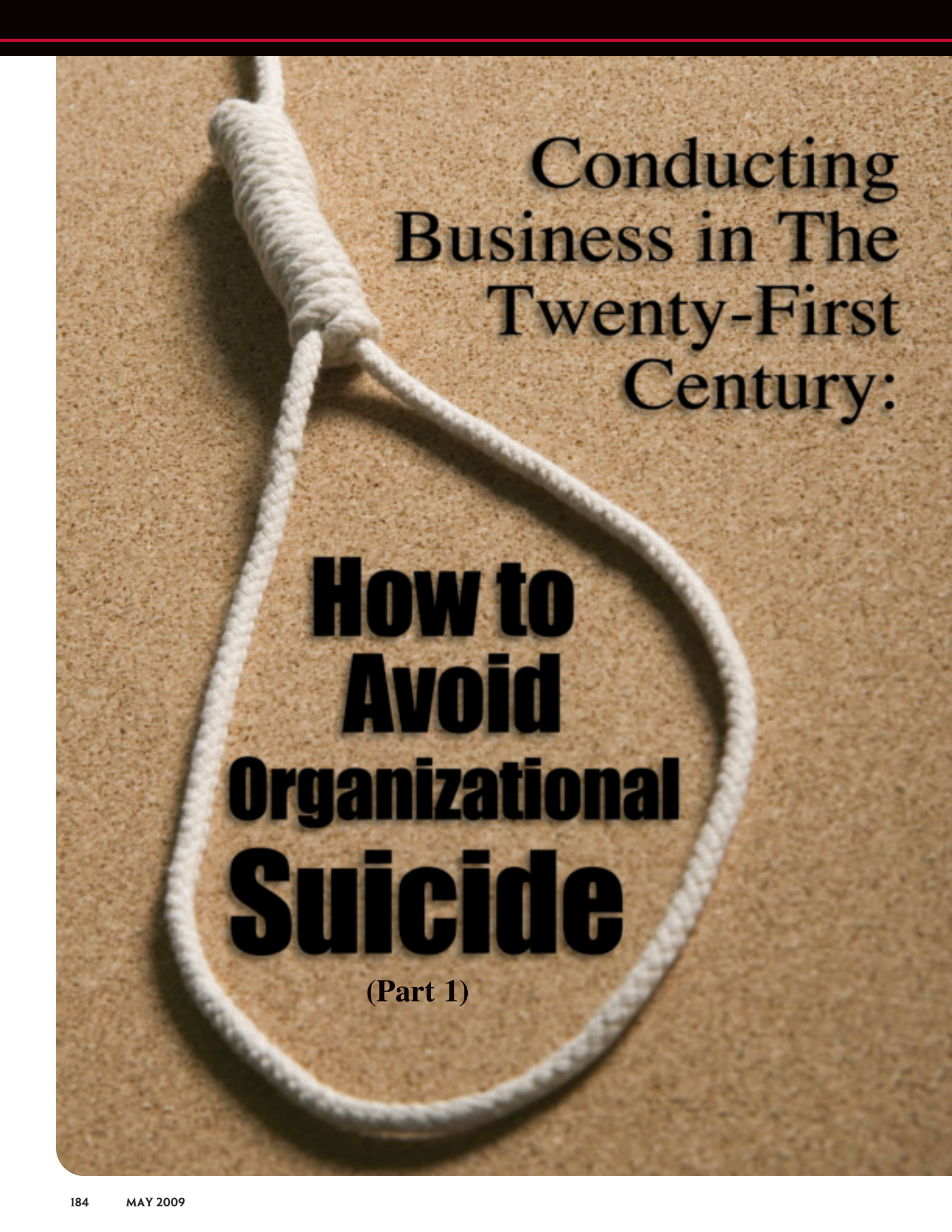
So I am proclaiming 2008 to be a successful MCLE year. Unfortunately, we also had a record number of waiver requests from attorneys who are having financial difficulties in these chaotic economic times. That issue prompts me to deliver this message of more changes that are on the way in 2009, which should make life easier, greener and more cost-effective for all of us.

Next year, only non-compliant attorneys will receive the **PINK** form. Attorneys who are exempt or compliant will not receive a form at all. Instead, they will be required to go online, certify the accuracy of their transcript and affix an electronic signature. They may also download a copy of their transcript, if they desire a paper copy. The layout of the online transcript will be the same as the paper transcript this year, but we will no longer be incurring printing and mailing costs to send paper copies of transcripts to more than 16,000 attorneys. Such an exercise is wasteful and not cost-effective. Besides, we are running out of room to store all that paper.

So make sure that your correct contact information is on file with Membership Services. That way, you will be sure not to miss any e-mail notices about your preliminary or final MCLE Compliance reports in 2009.

Another change will deal with those attorneys who have repeatedly requested deficiency plans. A deficiency plan is a device to help attorneys who are genuinely having personal or business difficulties; however, it has come to be abused by some attorneys who just don't pay enough attention to their MCLE responsibilities. That is why, going forward, repeated requests for deficiency plans will be denied without a showing of good cause. So start forming good MCLE habits now, and don't wait until the afternoon of December 31, 2009 to start looking for online MCLE courses, because if you have requested a deficiency plan during the past three years, a request for another one will be subject to very high scrutiny and likely be denied.

As always, we appreciate hearing your comments and suggestions about how to make the MCLE Department work better for you. We hope to see you at the Annual Meeting in July; you get MCLE credit for that, you know. ▲▼▲

A white rope knot is positioned on the left side of the page, extending from the top left towards the bottom right. The rope is thick and braided, forming a loop that frames the main title. The background is a textured, light brown surface, possibly cork or a similar material. The overall composition is simple and focused on the text and the symbolic rope knot.

Conducting  
Business in The  
Twenty-First  
Century:

**How to  
Avoid  
Organizational  
Suicide**

(Part 1)



## “[I]t is organizational suicide not to have a corporate compliance plan.”

This was not true two decades ago. It is today for every business, from large, publicly-owned companies, to small, closely-held family businesses. Among other things, this means that any lawyer who advises a business client without ensuring that the client has an effective, updated, corporate compliance plan risks committing legal malpractice.

This is the first in a series of three articles addressing corporate compliance. This article discusses how and why corporate compliance is important in today’s commercial world. The second article reviews the components of an effective corporate compliance plan.<sup>2</sup> The third focuses on responding to a problem of non-compliance.<sup>3</sup>

The combined impact of the following six events over the past 20 years have made effective corporate compliance a necessary part of the duty of due care: (1) promulgation of the *Federal Guidelines for Sentencing Organizations* by the United States Sentencing Commission; (2) the focus on corporate compliance by the United States Department of Justice when deciding whether to charge a business entity with a crime; (3) passage of Sarbanes-Oxley; (4) court decisions holding directors personally liable for failing

to ensure that a business has an effective corporate compliance plan; (5) amendments to, and passage of, civil statutes such as federal and state False Claims acts, which significantly reduce damages and penalties when a defendant exercises “good” corporate citizenship; and (6) market responses to the exercise of “good” and “bad” corporate compliance. Together, these events make an effective corporate compliance program essential for every business.

## Recent Events Making Effective Corporate Compliance a Key Part of the Exercise of “Due Care”

In 1986, the United States Sentencing Commission,<sup>4</sup> an agency within the federal judiciary branch, began drafting guidelines for sentencing businesses which had been convicted of crimes. By 1991, the Commission had promulgated the *Federal Guidelines for Sentencing Organizations*.<sup>5</sup> These Sentencing Guidelines make a strong statement about corporate compliance. They provide a steep reduction in the sentence (potentially up to 95 percent) for any

**By Pamela H. Bucy and  
Anthony A. Joseph**

organization that had in place at the time of the offense an effective compliance and ethics program.<sup>6</sup> The Sentencing Guidelines also provide considerable detail about what constitutes an effective compliance plan, including: “standards and procedures to prevent and detect criminal conduct;” ensuring that “[h]igh-level personnel [have] overall responsibility for the compliance and ethics program,” providing “effective training programs,” supplying anonymous and confidential mechanisms for reporting of suspected violations of the law; establishing regular monitoring and evaluation procedures to assess the effectiveness of a compliance program.<sup>7</sup>

At the same time the U.S. Sentencing Commission was developing its sentencing guidelines, the U.S. Department of Justice was drafting guidelines for its prosecutors to determine whether to criminally charge a corporation, partnership or other fictional entity. These guidelines, known as the *Principles of Federal Prosecution of Business Organizations*,<sup>8</sup> also focus on corporate compliance programs. Revised most recently in 2008, they direct federal prosecutors to consider, before indicting a business, the “existence and effectiveness of the corporation’s pre-existing compliance program.”<sup>9</sup> Like the Sentencing Guidelines, the *Principles of Prosecution* provide detail about effective corporate compliance, essentially identifying the same components as the Sentencing Guidelines.<sup>10</sup>

Because of these developments by prosecutors and the sentencing commission, a

business now may be able to avoid indictment altogether, negotiate lesser charges or receive a lesser sentence if convicted, simply by having an effective corporate compliance program in place at the time a criminal offense may have occurred. This is important because the existing standard for imposing criminal liability on fictional entities is so broad, essentially imposing strict liability on businesses. Under federal law and most state law, fictional entities are subject to criminal liability under an expansive “respondeat superior” standard which provides that entities “may be held criminally liable for the acts of any of its agents [who] (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation.”<sup>11</sup>

The third key development regarding corporate compliance came from Congress. Following the lead of the Sentencing Commission and the Department of Justice, Congress highlighted the importance of corporate compliance programs by enacting, in 2002, Sarbanes-Oxley (“SOX”).<sup>12</sup> Among other things, SOX imposes civil and criminal liability for failure to ensure that a business has an effective corporate compliance program. Many of SOX’s provisions apply only to publicly-held companies. For example, SOX requires the CEO and CFO of a publicly listed company to certify that the company has effective internal controls for financial reporting in place.<sup>13</sup> Criminal penalties of up to 20 years in prison attach to false certifications.<sup>14</sup> SOX also requires external auditors of publicly listed companies to issue annual assessments of the effective-

ness of a company’s internal controls over financial reporting.<sup>15</sup> As one might imagine, one response to these SOX provisions has been a greater emphasis by business leaders to the effectiveness of internal controls. Effective internal controls are at the heart of any corporate compliance plan.

Privately-held companies are also affected by SOX. Some of SOX’s broadest provisions, the new obstruction of justice offense,<sup>16</sup> for example, apply to every business, private and public, small and large. Section 802 of SOX makes it a crime, punishable by imprisonment up to 20 years, to alter, destroy, conceal, cover up, falsify, or make a “false entry in any record, document...with the intent to...obstruct or influence the investigation...of any matter within the jurisdiction of any department or agency of the United States...or in relation to or contemplation of any such matter or case....” (emphasis added)<sup>17</sup>. Section 1102 of SOX makes it a crime, punishable by imprisonment up to 10 years, for “hinder[ing], delaying[ing] or prevent[ing] the communication to a law enforcement officer...of information relating to the...possible commission of a federal offense.”<sup>18</sup> Both of these provisions are exceptionally broad, applying before there is even an investigation (“in relation to or contemplation of...an investigation”<sup>19</sup> and to “the possible commission of a federal offense”<sup>20</sup>).

The fourth key development has been by the courts in business litigation matters. Over the past 20 years, various courts have begun emphasizing duties of corporate compliance. For example, the Delaware Chancery Court, one of the most signifi-

The Sentencing Guidelines also provide considerable detail about what constitutes an effective compliance plan, including: **“standards and procedures to prevent and detect criminal conduct;”** ensuring that **“[h]igh-level personnel [have] overall responsibility for the compliance and ethics program,”** providing **“effective training programs,”** supplying anonymous and confidential mechanisms for reporting of suspected violations of the law; establishing regular monitoring and evaluation procedures to assess the effectiveness of a compliance program.

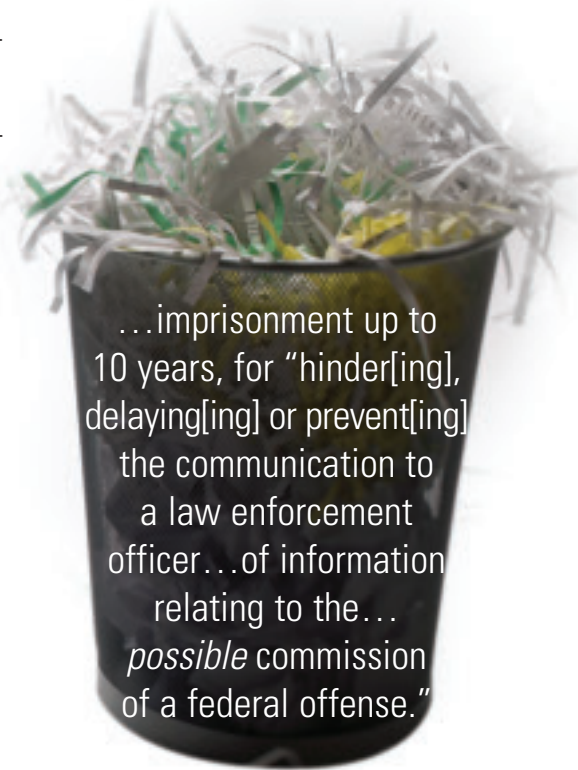
cant courts in corporate matters, held in *In re Caremark International Inc. Derivative Litigation*,<sup>21</sup> a shareholder derivative action, that “a director’s obligation includes a duty to...assure that a corporate information and reporting system...exists, and that failure to do so...may...render a director liable for losses caused....”<sup>22</sup> Thus, officers and directors now face “*Caremark*” liability for failure to ensure that their company has an effective corporate compliance program in place.

The fifth key development affecting corporate compliance has been the passage, or amendment to, “aggressive civil” statutes, such as the federal<sup>23</sup> and state<sup>24</sup> False Claims acts (FCAs). These statutes create a cause of action on the part of any person, as well as governmental entities, against anyone who submits false claims for payment to federal or state governments. These statutes also carry significant damages and penalties,<sup>1</sup> with recent cases settling for amounts such as \$900,000,<sup>26</sup> \$731,400<sup>27</sup> and \$650,000.<sup>28</sup>

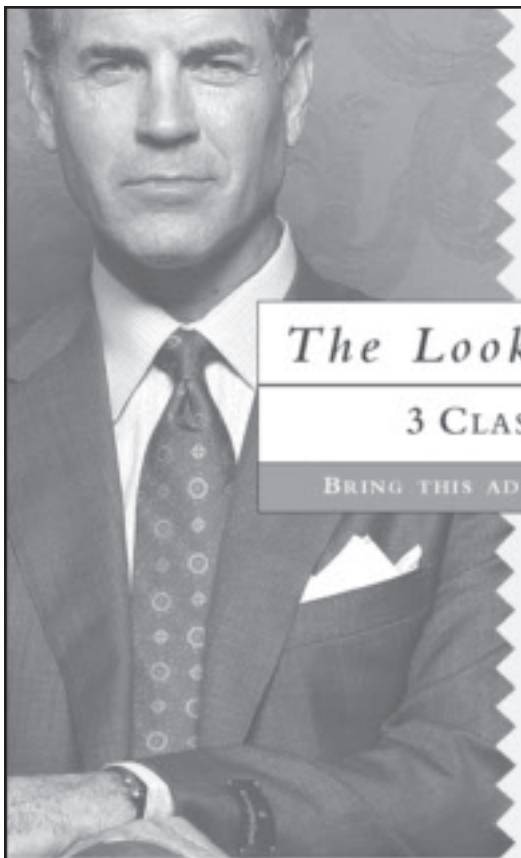
There are two provisions in the federal and state FCAs that encourage businesses to implement and maintain effective corporate compliance plans. The first and most

significant incentive is possible prevention of an FCA lawsuit altogether. The federal, and virtually all state, FCAs include a *qui tam* provision that permits any person, known as a “*qui tam* relator,” to file a complaint under the statute. Because historically most relators are current or former employees,<sup>29</sup> an effective corporate compliance plan is one of the best ways to preempt these individuals from filing cases as relators. Here’s why: a corporate compliance plan should require employees to report internally their suspicions of false claims or fraud.<sup>30</sup> The company then has notice of the fraud, can conduct an internal investigation and make necessary disclosure of the problem to authorities. It is this disclosure that preempts the false claim lawsuit by individuals because once the government knows of the fraud, private individuals are “jurisdictionally barred” from filing suit under the FCAs.<sup>31</sup>

The second incentive in FCAs for businesses to implement effective corporate compliance plans is reduction in the otherwise mandatory damages and penalties for companies that exercise “good” corporate compliance. The FCAs provide that treble damages shall be reduced to double dam-



...imprisonment up to 10 years, for “hinder[ing], delaying[ing] or prevent[ing] the communication to a law enforcement officer...of information relating to the... possible commission of a federal offense.”



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ages and that all penalties can be avoided if a defendant discloses to authorities, prior to official discovery of any false or fraudulent claims, that the statute may have been violated.<sup>32</sup> Again, since internal investigations and disclosure to authorities are key components of any effective corporate compliance plan, FCAs encourage businesses to implement and maintain plans and make disclosures pursuant to them.

The reaction of the market is the final event that solidifies the need for every business to implement an effective corporate compliance plan. The market rewards “good” corporate citizenship and punishes “bad” corporate behavior. The New York Stock Exchange and NASDAQ, for example, require that companies have effective corporate compliance plans.<sup>33</sup> Directors’ and officers’ insurance policies assess the effectiveness of a company’s corporate compliance plan as part of their underwriting process.<sup>34</sup> Merger and acquisition due diligence now includes an assessment of a target company’s corporate compliance plan. Stock prices react to exercises of good, or bad, corporate behavior. To take one example, beginning in 2004, Marsh & McLennan, one of the largest financial brokerage companies<sup>35</sup> was investigated (and ultimately settled a civil suit) for accounting fraud.<sup>36</sup> On October 14, 2005, the day New York Attorney General Eliot Spitzer announced that his office was investigating Marsh Inc. and that the company was not cooperating with investigators, the price of Marsh’s stock dropped 24 percent. Over the next two days, as Marsh leadership stonewalled (announcing it had confidence in the current leadership and cancelling a scheduled investor conference call), the company stock sank another 18 percent. Two days later, the company did an about-face. Its independent directors announced that the company had fired the presumptively culpable executives, was conducting an internal investigation and would cooperate with the attorney general’s investigation. Immediately, the company’s stock jumped 20.4 percent. As this example shows, for better or worse, candor about possible compliance problems and cooperation with authorities is viewed by the investing public as “good” corporate citizenship while stonewalling is viewed as “bad” corporate behavior.<sup>37</sup> Such candor and cooperation are facilitated by an effective corporate compliance plan.


## What These Events Mean for Businesses Today

There are four notable features about this activity regarding corporate compliance by the Sentencing Commission, the Department of Justice, Congress, the states, private industry, and the market. First, the emphasis on effective corporate compliance has been increasing for more than 20 years. It is not a temporary trend that will ebb and flow. Good corporate compliance is now entrenched as good business basics.

Second, the emphasis on good corporate compliance has become mainstreamed. What started as a factor relevant in the fairly narrow world of white collar crime and criminal sentencing and charging decisions, has permeated every aspect of business, including insurance rates, stock prices, company value and personal liability of directors and officers.

Third, criminal and “aggressive civil” prosecutions of businesses are almost certainly to increase. The glut of fraud in the financial services industry, the attention such fraud is getting from law enforcement and the plaintiffs’ bar, and the existing prosecutorial infrastructure, all make criminal corporate prosecutions and plaintiffs’ fraud suits more, not less, likely. Thus, it is all the more crucial for businesses to protect themselves from such liability. Maintaining an effective corporate compliance plan is a viable way to do so.

Fourth, because the emphasis on corporate compliance has permeated every aspect of the business world, developing an effective corporate compliance plan is a multi-faceted endeavor, requiring a variety of legal expertise: employment law, corporate financing, corporate governance and criminal law and procedure.

For all of these reasons, effective corporate compliance plans are now a necessity for every business. 

### Endnotes

1. Pamela H. Bucy, HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE § 9.01 (Law Journal Seminars Press, with authors Robert Fabrikant, Paul E. Kalb, M.D. and Mark D. Hopson) quoting Karen Morrisette, deputy chief, Fraud Section Criminal Division, United States Department of Justice.

2. Pamela H. Bucy and Anthony A. Joseph, *Creating an Effective Corporate Compliance Plan*, \_\_\_ ALA. LAW. \_\_\_ (\_\_\_).
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4. The United States Sentencing Commission (U.S.S.G.) was created under the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-998.
5. U.S.S.C., United States Sentencing Guidelines (U.S.S.G.), Chapter 8
6. U.S.S.C., Chapter Eight, Introductory Commentary.
7. U.S.S.G. §8B2.1.
8. UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9.28.000 *et seq.* [hereinafter *Principles of Federal Prosecution*]
9. *Id.* at § 9.28.300.
10. *Id.* at § 9.28.800.
11. *Developments in the Law—Corporate Crime: Regulation Corporate Behavior Through Criminal Sanctions*, 82 HARV. L. REV. 1127, 1247 (1979), discussed in Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).
12. Public Company Accounting Reform and Investor Protection Act of 2002, known as Sarbanes-Oxley (SOX), Pub. L. 107-204, 116 Stat. 745 (July 30, 2002).
13. SOX § 302 codified at 15 U.S.C. § 7241(a)(4) and SOX § 906 codified at 18 U.S.C. § 1350; SEC Final Rule 33-8124.
14. 18 U.S.C. § 1350.
15. SOX § 404 codified at 15 U.S.C. § 7262; Public Company Accounting Oversight Board (PCAOB) Auditing Standard No. 5; SEC Interpretative Guidance.
16. 18 U.S.C. §§ 1512 (a)(1)(C); 1519.
17. 18 U.S.C. § 1519.
18. 18 U.S.C. § 1512(a)(2)(C).
19. 18 U.S.C. § 1519.
20. 18 U.S.C. § 1512(a)(2)(C).
21. 698 A.2d 959 (De. Ch. 1996).
22. *Id.* at 970.
23. 31 U.S.C. §§ 3729-3733.
24. *See, e.g.* CAL. GOV’T CODE §§ 12650-12655 (1992); FLA. STAT. § 68.081 (2007) *et seq.*; TENN. CODE ANN. § 4-18-101 (2001). The Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat 4 *amending* the Social Security Act, 42 U.S.C. § 1396(h)(b) (enacted Feb. 8, 2006).
25. *See, e.g.* 31 U.S.C. §§ 3730.
26. Tenet Healthcare, 2006, TAXPAYERS AGAINST FRAUD, [HTTP://WWW.TAF.ORG](http://www.taf.org).
27. HCA (The Healthcare Company, formerly known as Columbia/HCA), TAXPAYERS AGAINST FRAUD, [HTTP://WWW.TAF.ORG](http://www.taf.org).
28. Merck, 2008, TAXPAYERS AGAINST FRAUD, [HTTP://WWW.TAF.ORG](http://www.taf.org).
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30. *See, e.g.* *Principles of Federal Prosecution of Business Organizations*, U.S. ATTY’S MANUAL § 9.28.000; *Federal Guidelines for Sentencing Organizations*, U.S.S.G. § 8B2.1(b)(5)(C).



31. Such disclosure prevents anyone, employee or otherwise, from serving as a *qui tam* relator under the "jurisdictional bar" provision of the federal and state FCAs. This provision essentially precludes the relator from going forward with an FCA case if the allegations in the complaint have been made public, unless the relator is the "original source" of the information. 31 U.S.C. § 3730(e)(4)(A).
32. See, e.g. 31 U.S.C. §§ 3729(a) & (A-C).
33. SR-NYSE-2002-03; SR-NASD-2002-141; SR-NASD 2002-77; SR-NASD 2002-80; SR-NASD-2002-138; SR-NASD-2002-139 ("The Commission believes that requiring listed issuers to adopt a code of conduct should help to foster the ethical behavior of directors, officers, and employees...") SEC Release 34-48745 (Nov. 4, 2003).
34. IAN YOUNGMAN, DIRECTORS' AND OFFICERS' LIABILITY INSURANCE: A GUIDE TO INTERNATIONAL PRACTICE, 2D ED. (1999 Woodhead Publishing Ltd.) Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes*, 24 IND. L. REV. 279 (1991).
35. Ian McDonald, *Moving the Market: Marsh & McLennan, Squeezed by Charges, Will Lay Off 3,000*, WALL. ST. J. C3 (Nov. 10, 2004).
36. Laim Plevin and Joann S. Lublin, *Marsh Ousts Chief Executive; Investors Cheer*, WALL. ST. J. B1 (Dec. 22, 2007).
37. Pamela H. Bucy, *What is Corporate Compliance and Why Does it Matter?* (forthcoming, 2009) (data on file with author).



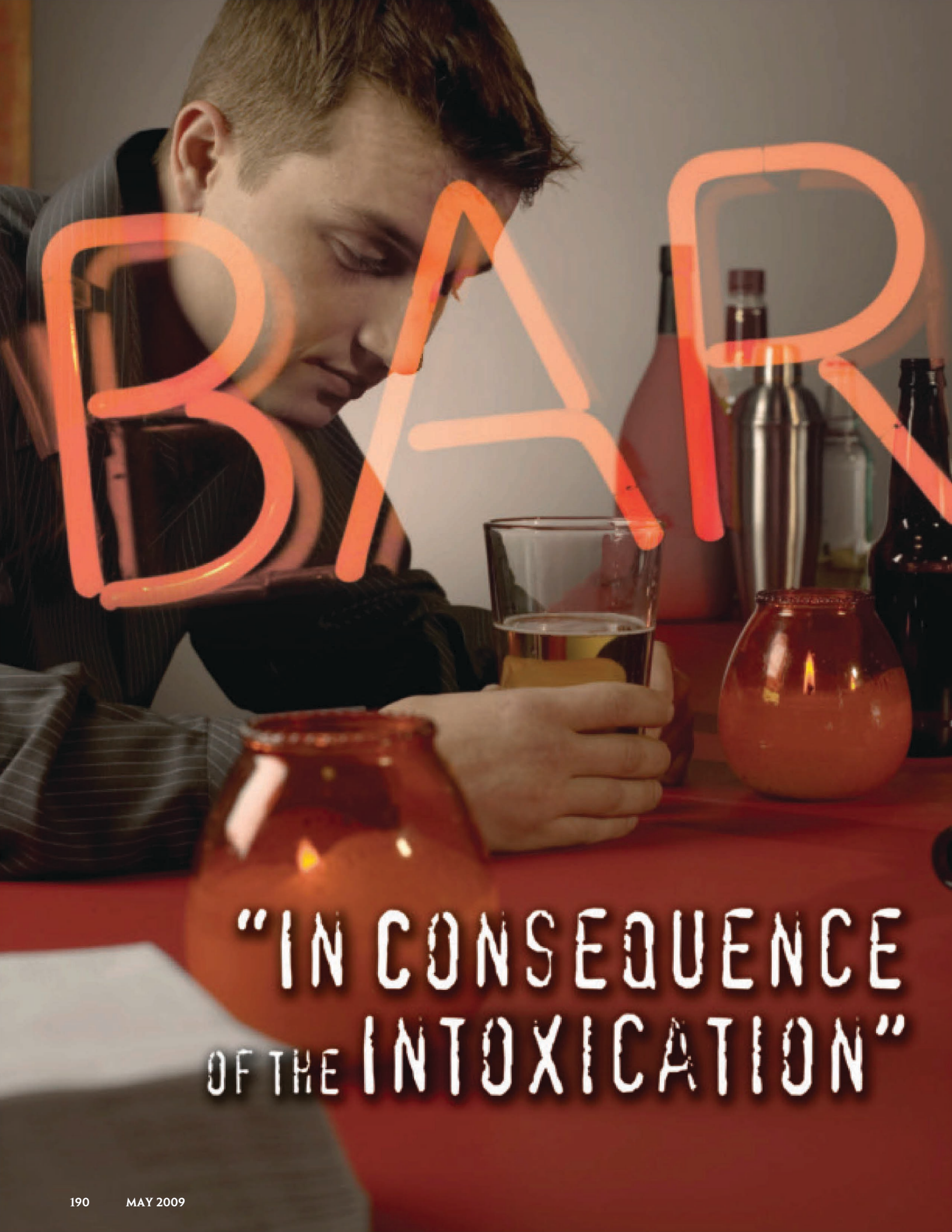
*Pamela H. Bucy is the Bainbridge-Mims Professor of Law at the University of Alabama School of Law. She also serves of counsel for Maynard Cooper & Gale PC in Birmingham.*



*Anthony A. Joseph is a shareholder in the firm of Maynard, Cooper & Gale PC in Birmingham. He is a graduate of Vanderbilt University (B.A. 1975), Howard University (M.C.P. 1977), Cumberland School of Law (J.D. 1980) and the FBI Academy (1983). Joseph also serves as adjunct professor at the Cumberland School of Law. He is the past vice president and a member of the Executive Committee of the Alabama State Bar, a current ASB Commissioner and a member of the council of the Alabama State Bar's Criminal Justice Section. He is the 2008-2009 chair of the American Bar Association's Criminal Justice Section, and is a member of its White Collar Crime Committee. Joseph was the 2007 president of the Birmingham Bar Association. He was formerly employed as an assistant district attorney, a special agent with the FBI and an assistant United States Attorney. His practice is concentrated in white collar criminal defense and general civil litigation.*

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# BAR

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# SELLER BEWARE

*By Brian A. Wahl*

### *Two guys walk into a bar...*

Ryan and Jason start off their Friday evening with a pitcher of beer, wings and a few games of pool at McWhorter's Bar & Grill. A couple of hours pass by and a few more pitchers are consumed, mostly by Ryan. Jason starts drinking water after he and the bartender notice that Ryan is slurring his speech and having a bit too much fun. Recognizing that Ryan is intoxicated and increasingly belligerent, McWhorter's trusted bartender asks Jason to drive Ryan home, and Jason, responsible as always, obliges.

An hour after making their way a few miles down Highway 280, Jason and Ryan arrive at Ryan's apartment where Leila, Ryan's wife, is cooking dinner. Feeling a little feisty after having consumed a bottle of chardonnay while waiting on her dinner guests, Leila decides to spar with Ryan over some insignificant family matter. Ryan, still ornery and slurring, takes the bait and a lively verbal exchange ensues which focuses on Leila's spending proclivities. Unfortunately for Jason, Ryan's and Leila's exchange escalates into grabbing

and shouting. Attempting to separate the tussling spouses, Jason horse-collars Ryan and pulls him away from Leila. Ryan stumbles, falls and cracks his skull on the sharp glass corner of the dining room table. Despite the valiant efforts of Leila, Jason and the responding paramedics, Ryan dies.

As a pure matter of causation, does Leila have a viable dram shop claim against McWhorter's? It was just a freakish accident that was too far removed from any act or omission of the bartender, who by the way, was responsible enough to ask Jason to drive. There is no chance Leila could recover. Right?

While the lead-in fact pattern probably seems fanciful and bar exam-like to most of you, it is actually analogous to and less bizarre than a dram shop case I recently defended, and the sobering truth is that restaurants, bars and other purveyors of alcoholic beverages would be foolish to laugh off the potential for dram shop liability on non-routine facts. This article addresses "in consequence of the intoxication" liability under the Dram Shop Act and focuses specifically on the standard of causation applicable to such cases.



The formulation of Alabama’s dram shop statute allows two avenues of recovery: one for damages caused **“by any intoxicated person,”** and another for damages suffered **“in consequence of the intoxication of any person.”**

## ALA. CODE § 6-5-71— THE DRAM SHOP STATUTE

Alabama’s Dram Shop Act appears at Section 6-5-71 of the *Alabama Code* (1975) and reads as follows:

- (a) Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or ***in consequence of the intoxication*** of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.  
...
- (c) The party injured, or his legal representative, may commence a joint or separate action against the person

intoxicated or the person who furnished the liquor, and all such claims shall be by civil action in any court having jurisdiction thereof.

*Id.* (emphasis added). The supreme court has held that a sale that violates the rules and regulations of the Alabama Alcoholic Beverage Control Board (“ABC Board”) constitutes selling alcohol “contrary to the provisions of law.” See *Ward v. Rhodes, Hammonds & Beck, Inc.*, 511 So.2d 159, 160 (Ala. 1987). The section of the ABC Board’s regulations relied upon by most plaintiffs reads as follows:

... No ABC Board on-premises licensee, employee or agent thereof shall serve any person alcoholic beverages if **such person appears, considering the totality of the circumstances, to be intoxicated.**

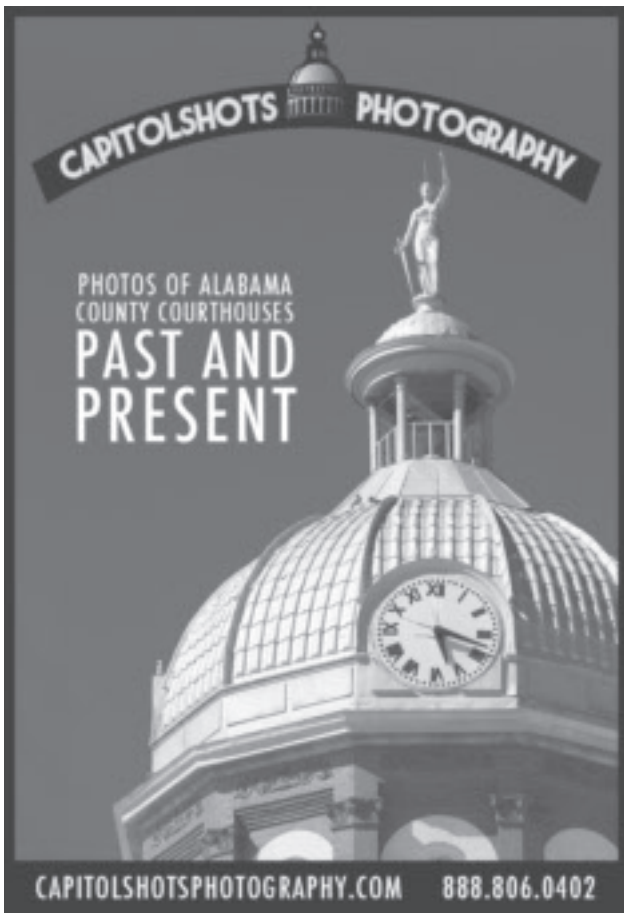
*Ala. Admin. Code* § 20-X-6-.02(4) (emphasis added).

The formulation of Alabama’s dram shop statute allows two avenues of recovery: one for damages caused “by any intoxicated person,” and another for damages suffered “in consequence of the intoxication of any person.” See *Ala. Code* § 6-5-71(a). On our facts, Leila would be seeking means of support damages she suffered “in consequence of the intoxication of ... [Ryan].” *Id.*

## PLAINTIFFS’ BURDEN OF PROOF: CAUSATION

### Traditional Proximate Causation

While the “in consequence of the intoxication” language of section 6-5-71 obviously requires a causal nexus between the intoxication and the injury complained of, neither the statute nor the case law specifically defines the statutory language. Many reported opinions appear to presume that the traditional tort standard of proximate cause applies.<sup>1</sup> See, e.g., *Ward v. Rhodes, Hammonds, and Beck, Inc.*, 511 So. 2d 159, 164 (Ala. 1987) (discussing Alabama’s original and current dram shop acts in terms of proximate causation); *Parker v. Miller Brewing Co.*, 560 So. 2d 1030 (Ala. 1990) (defining the category of potential claimants under the dram shop act as being as “broad as proof of proximate cause will permit.”); *McGough v. G&A, Inc.*, No. 2060145, --- So. 2d ---, 2007 WL 2333028 at \* 10, (Ala. Civ. App. Aug. 17, 2007) (“By the plain terms of the statute ... the ... [claimants] ... have a right to jury trial on their dram-shop claim if substantial evidence shows that the appellees sold, gave or disposed of alcoholic beverages to ... [their son] ... and that his intoxication from such alcoholic beverages proximately caused his accident.”).



## “Relaxed” Causation

Other Alabama dram shop cases, which grew out of *dicta* in a 1951 court of civil appeals opinion, suggest, with little explanation, that dram shop claimants are “not held to the usual standards of proof of causal connection between the illegal sale of the beverages and the injury.” *Phillips v. Derrick*, 54 So. 2d 320, 321 (Ala. Civ. App. 1951) (citing *Bistline v. Ney Bros.*, 111 N.W. 422 (Iowa 1907) for this proposition). The *Phillips* causation language was picked up by the Alabama Supreme Court in 1989 when it decided *Laymon v. Braddock*, 544 So. 2d 900 (Ala. 1989). *Laymon* involved a challenge to jury instructions used in the trial court involving the standard of causation in a dram shop claim. Those jury instructions read as follows:

...Before there could be a verdict in favor of ... [the dram shop claimants] ... and against ... the defendants ... the damages complained of must again be *in consequence of* the intoxication of the person ... Now, this term ‘*in consequence of the intoxication of a person*’ is not a phrase that is used often in the law... [N]ormally, liability will be imposed only when the wrong is the proximate cause of an injury. That’s not the terminology or the language that we have in this statute. *Our statute says there shall be a right of action for the particular persons when in consequence of the intoxication of any person one is wrongfully or contrary to law so disposed or given alcoholic beverages, and caused the intoxication of such person to the damage of the person who can sue.... A person selling alcoholic beverages is not responsible for all remote or possible consequences which may result from such a sale.* And before there could be a verdict in favor of the plaintiffs and against the defendant, *the damages complained of must again be in consequence of the intoxication of the person....*

*Id.* at 903. In upholding the charge, the Alabama Supreme Court did not adopt the reasoning of *Phillips*, it merely found that the charge “sufficiently complied” with the proposition of law espoused in *Phillips*. *Id.*

In *Attalla Golf & Country Club, Inc. v. Harris*, 601 So. 2d 965 (Ala. 1992), the supreme court approvingly referenced both *Laymon* and *Phillips* and stated that liability under the Dram Shop Act is imposed when the injury is “in consequence” of the illegal sale. *Id.* at 970. Significantly, the *Attalla* opinion reiterated that “a person selling alcoholic beverages is not responsible for all remote consequences that may result from an illegal sale.” *Id.*

## Other Jurisdictions

The seeming disparity in causation standards between the lines of Alabama cases could be reasonably reconciled by referencing case law from other jurisdictions. States with similar dram shop statutes often allow a less stringent standard of causation in cases where claimants seek to recover for damages caused “by” the intoxicated individual. *See, e.g., King v. Partridge*, 157 N.W. 2d 417 (Mich. 1968); *McDonald v. Risch*, 242 N.E. 2d 245 (Ill. 1968). This is so because the damages covered by this portion of the dram shop statute are, by definition, sustained as a result of the direct, affirmative actions of the intoxicated person.

By contrast, many jurisdictions allow for recovery of damages suffered “in consequence of” or “resulting from” the intoxication of any person, only upon proof of proximate causation. *See, e.g., Pierce v. Albanese*, 129 A.2d 606 (Conn. 1957); *Shugart v. Egan*, 83 Ill. 56 (Ill. 1876). The application of the normal standard of proximate cause<sup>2</sup> for damages suffered “in consequence of the intoxication” is logical because the statutory language itself relaxes the relationship required between the damages alleged and the intoxicated person. Applying this line of authority, a claimant such as Leila, who was not directly harmed by the intoxicated person, would be required to show that her injury was proximately related to the intoxication of some person, here Ryan, as she would be proceeding under the “in consequence of the intoxication” prong of the Alabama statute. Such an interpretation of the Alabama statute would be consistent with *Phillip* and its progeny because all of those cases involved allegations of damages caused *by the intoxicated person*. *See Phillip*, 54 So. 2d at 321 (car damaged by intoxicated person); *Laymon*, 544 So. 2d at 900-01 (plaintiffs’ decedent killed while driving intoxicated); *Attalla*, 601 So. 2d at 967 (passenger injured by intoxicated driver). Nevertheless, the standard of causation in “in consequence of the intoxication” dram shop cases in Alabama remains unclear.

## Current State of the Law

Plaintiffs argue for “relaxed” causation and defendants argue for proximate causation. Both sides have valid arguments, and both sides will have strengths and weaknesses. The most substantial problem with what I have called “relaxed” causation is

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that it is ill-defined by the courts and the legislature; we only know that it is more forgiving to claimants than proximate causation, but that it will not allow for the imposition of dram shop liability against a defendant for "...all remote consequences that may result from an illegal sale." *Attalla*, 601 So. 2d at 970. Presumably, "relaxed" causation would allow for the imposition of liability for *some* remote consequences, but we have no meaningful guidance as to how to distinguish between the remote consequences that are actionable and those that are not. This absence of guidance also supports a construction of "in consequence of the intoxication" causation based on standard principles of proximate causation for which there is a substantial body of settled case law.

## NON-VEHICULAR DRAM SHOP CASES

The vast majority of reported Alabama dram shop cases involve injuries relating to vehicular accidents. *See, e.g., Liao v. Harry's Bar*, 574 So. 2d 775, 776-77 (Ala. 1990) (parent of an automobile accident victim sued bar that served alcohol to the at-fault driver). Causation is fairly straightforward in such cases where the driver is shown to be impaired as a result of his or her consumption of alcohol. The few reported dram shop cases not involving vehicular accidents instead involve criminal acts and assaults. In *Duckett v. Wilson Hotel Mgmt. Co.*, 669 So. 2d 977 (Ala. Civ. App. 1995), plaintiff's decedent was shot and killed outside a Birmingham lounge. *Id.* at 978. The plaintiff sued the owners of the lounge under the Dram Shop Act where there was evidence that the gunman had been served while visibly intoxicated. *Id.* The court of civil appeals concluded that the criminal conduct of the intoxicated gunman was "conduct that the Dram Shop Act was designed to protect against..." *Id.* at 989-90. In *Ward v. Rhodes, Hammonds, & Beck, Inc.*, 511 So. 2d 159 (Ala. 1987), the plaintiff was at defendant's bar when he was struck in the face by another patron who was allegedly intoxicated. *Id.* at 160. The court allowed the plaintiff to pursue his dram shop claim because (1) he was a member of the class of persons the Dram Shop Act was designed to protect; (2) he was injured in person; (3) by an intoxicated person; and (4) his injury was allegedly the result of an illegal sale by the defendant bar. *Id.* at 164.

*Ward* and *Duckett* both involve facts where there is a direct causal connection between the claimant's injury and the criminal act of the intoxicated patron. Both cases also involve criminal acts that took place at or near the alcohol purveyor's place of business. In *Duckett*, the intoxicated patron shot the plaintiff's decedent outside the lounge, and in *Ward*, the allegedly intoxicated patron assaulted another patron at the bar.

## EX PARTE WILD WILD WEST

There are no reported Alabama dram shop cases which involve facts analogous to those outlined at the beginning of this article, but one case, *Ex parte Wild Wild West Social Club, Inc.*,

is instructive. In *Wild Wild West*, 806 So. 2d 1235 (Ala. 2001), the plaintiff brought a personal injury claim against a bar where he had been drinking. *Id.* The plaintiff alleged he was thrown out of the bar and then assaulted by an independent security guard in the parking lot outside of the bar. *Id.* at 1237-38. The evidence was that the plaintiff pushed the security guard and made a comment to him before the security guard struck the plaintiff. *Id.* at 1238. The plaintiff's theory was that his ultimate injury should be attributed to the bar because the bar ejected the plaintiff leading to the events occurring thereafter. *Id.* at 1240. A jury verdict was entered in favor of the plaintiff. *Id.* The verdict was reversed and rendered on appeal. *Id.* at 1242.

In finding for the defendant, the supreme court stated that "in order to recover against a defendant for harm caused by the criminal actions of a third party, the plaintiff must establish that the defendant knew or had reason to know of a probability of conduct by third persons that would endanger the plaintiff." *Id.* at 1240 (citation omitted). The supreme court also relied upon the following language from the *Restatement of the Law of Torts*, quoted in one of its prior opinions:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created and that a third person might avail himself of the opportunity to commit such a tort or crime.

*Id.* (citing *Restatement of the Law of Torts* § 448 (1934)) (quotation marks and citation to case law omitted). Framing its discussion in terms of foreseeability, the supreme court concluded that the bar in *Wild Wild West* could not have known that an ejected bar patron might be attacked by an independent security guard off of the premises. As a matter of law, the security guard's attack on the ejected patron was deemed to be unforeseeable. *Id.* at 1241.

## ANALOGOUS FOREIGN CASES

Reported cases from other jurisdictions have addressed similar factual allegations under other dram shop acts and have frequently denied recovery against the purveyor of alcohol where the injury in question was caused by the act of a third person who was not shown to have been intoxicated. These cases uniformly discuss this issue in terms of proximate causation, foreseeability and intervening/superseding causation.

In *Shugart v. Egan*, 83 Ill. 56 (Ill. 1876), it was claimed that the plaintiff's husband, while in a state of intoxication caused by the illegal service of the dram shop, insulted or menaced another individual, who thereafter stabbed and killed the husband. *Id.* In reversing the lower court's opinion in favor of the widow, the



The few reported dram shop cases not involving **vehicular accidents** instead involve **criminal acts and assaults**.

...it is possible if not probable that the application of **standard proximate causation** principles would support summary judgment for McWhorter's while application of the **"relaxed" causation standard** would not.



Illinois Supreme Court found that the husband's death did not result from intoxication, but "solely from the direct and willful act of ...[the assailant]..." even though he had been provoked by the husband. *Id.* The *Shugart* opinion, written over 130 years ago, provides this useful guidance:

It cannot be said that ...[the dram shop owner]...should have foreseen that his letting the deceased have liquor would lead to his death or bodily harm, at the hands of ...[the assailant]..., or by violence from any source, because this was an exceptional and not a natural or probable consequence. It is a natural and probable consequence of letting a drunkard have liquor that he shall become intoxicated, and, by reason thereof, suffer mental and physical impairment, waste his means, and do violent, absurd and silly acts, for experience proves that these results, in general, in greater or lesser degree follow. But it is the exception that a drunkard is slain or violently assaulted, while in a state of intoxication, for words spoken or acts done by him while in that condition....

*Id.*; see also *State ex rel. Brough v. Terheide*, 78 N.E. 195 (Ind. 1906) (sustaining dismissal where illegally served patron was assaulted by a third party where no connection between the unlawful sale of liquor and the injury sustained as a result of the assault was alleged and where there was no allegation that the assailant was intoxicated as a result of an illegal sale); *Schulte v. Schleeper*, 71 N.E. 325 (Ill. 1904) ("Where the disability ...[of]... an intoxicated person results, not from the intoxication, or from anything consequent upon that intoxication, but from the independent act of a third party, which is the direct and immediate cause of that disability there can be no recovery against the dram shop.").

Other reported opinions follow similar logic and reach similar conclusions. See, e.g., *Shea v. Slezak*, 129 A.2d 233 (Conn. Super. 1956) (denying plaintiff's motion to set aside defense verdict where plaintiff's decedent, who was served while visibly intoxicated, was shot and killed by an individual who had not been served by the defendant); *Gage v. Harvey*, 48 S.W. 898 (Ark. 1898) (individual whose money was stolen while he was in a drunken stupor cannot maintain an action against the saloon-keeper as the theft was an intervening act of a third person); *Rogalski v. Tavernier*, 527 N.W. 2d 73 (Mich. Ct. App. 1995) (summary disposition for defendants affirmed on social host liability claim where a minor was stabbed and killed after he and his assailant were illegally served at a private birthday party); *Hebert v. Club 37 Bar*, 701 P.2d 847 (Ariz. App 1985) (even assuming that the bar owners and bartenders were negligent, the murder of the plaintiff's decedent in the bar's parking lot by a bar patron was unforeseeable and extraordinary, and patron's act in murdering victim was a superseding, intervening cause as a matter of law, which relieved bar owner's and bartender of any

liability). There are reported cases to the contrary, see, e.g., *Healey v. Cady*, 161 A. 151 (Vt. 1932) and *Bedore v. Newton*, 54 N.H. 117 (N.H. 1873).

## "RELAXED" CAUSATION VS. PROXIMATE CAUSATION: LEILA V. MCWHORTER'S BAR & GRILL

In many cases it would not matter what standard of causation was applied to a plaintiff's claim for "in consequence of the intoxication" liability under the Dram Shop Act. For example, if Ryan had driven home instead of Jason and had struck a pedestrian in McWhorter's parking lot, the facts would support liability under either theory of causation because a clear causal chain would exist between the over-service of Ryan and the consequential injury to the pedestrian. Establishing dram shop causation in our hypothetical accidental death case is more difficult,

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however. Indeed, it is possible if not probable that the application of standard proximate causation principles would support summary judgment for McWhorter's while application of the "relaxed" causation standard would not.

## Proximate Causation— Summary Judgment for McWhorter's

Relying on the concept of foreseeability discussed in *Wild Wild West* and elsewhere, as well as intervening/superseding cause and remoteness jurisprudence, McWhorter's counsel should be able to convincingly argue that the bartender's original negligence was simply too far removed from Leila's injury (i.e., Ryan's death).

Purveyors of alcoholic beverages are not responsible for all remote consequences which might result from illegal sales. *Attalla Golf & Country Club, Inc. v. Harris*, 601 So. 2d 965, 970 (Ala. 1992). "A well established principle of Alabama law is that, to recover in tort, a plaintiff must establish that the defendant's misconduct was the 'proximate cause'—and not just the 'remote cause' of the plaintiff's injuries." *United Food & Comm. Workers Union Employers Health & Welfare fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1273 (11<sup>th</sup> Cir. 2000) (collecting cases). The Alabama Supreme Court has explained:

The law cannot undertake to trace back the chain of causation indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom—in fact,

infinite in their scope. It therefore stops at the first link in the chain of causation, and looks only to the person who is the proximate cause of the injury. The general rule is that the damage to be recovered must be the natural and proximate consequence of the act complained of. It is not enough if it be the natural consequence; it must be both natural and proximate.

*Birmingham Ry., Light & Power Co. v. Ely*, 62 So. 816, 819 (Ala. 1913) (citations omitted). Regardless of McWhorter's culpability vis-à-vis service to Ryan, it can credibly maintain that it is due summary judgment because Ryan's, Jason's and Leila's subsequent unforeseeable acts caused or resulted in Ryan's death. McWhorter's original negligence was too remote to be a cause of Leila's injury.


McWhorter's should also argue that Jason's intervention into the marital dispute between Ryan and Leila was an intervening cause as was Leila's assertiveness and intoxication. An intervening cause is one which occurs after an act committed by a tortfeasor and which relieves it of its liability by breaking the chain of causation between its act and the resulting injury. *Gilmore v. Shell Oil Co.*, 613 So. 2d 1272, 1275 (Ala. 1993). To be an intervening cause, the act or event must occur between the time of the negligence of the defendant and the injury's occurrence. *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1195 (Ala. 1985). Not all acts or events occurring after the negligence of the defendant are intervening causes. To be an intervening cause the act or event "must have been unforeseeable and must have been sufficient in and of itself to have been the sole 'cause in fact' of the injury." *Id.*

To summarize, the *Leila v. McWhorter's Bar & Grill* facts raise a host of proximate cause issues for Leila, and McWhorter's counsel is likely to obtain a summary judgment for his client under the traditional causation standard if he puts as much distance as possible between the bartender's negligence and Ryan's death. This can be done by focusing on the following undisputed facts: (1) Ryan was safely driven home by Jason; (2) the accident occurred in Ryan's apartment over one hour after he left McWhorter's; (3) the fight was instigated by Leila who was intoxicated and who was not served by McWhorter's; and (4) Ryan's death was the result of a bizarre accident which was caused by Jason's intervention into a marital dispute.

## "Relaxed" Causation— A Jury Question for Leila

The "relaxed" causation standard, on the other hand, probably gets Leila to the jury for several reasons. First, the *Attalla*, *Laymon* and *Phillips* cases provide plaintiffs' counsel with strong grist for the mill and contain language explicitly stating that dram shop claimants are not to be held to usual standards of causal proof. Second, there is very little judicial gloss on the "in consequence of the intoxication" language in the Dram Shop Act, and a trial court is going to be more likely to leave that determination of what that language means to the fact-finder, especially when several of the reported cases and the pattern jury instructions clearly are placing a thumb on the plaintiffs' side of the causation scale. Finally, plaintiffs can argue that defenses based upon intervening/superseding causation, remoteness and foreseeability are not properly raised in response to an "in consequence of the intoxication" claim because it does not

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...proprietors should be mindful that **dram shop liability** extends further, and perhaps **much further**, than they would prefer.



require proof of proximate causation. In *Leila v. McWhorter Bar & Grill*, these defenses are very persuasive as a legal matter, and the argument that they don't apply to "relaxed" causation analysis, which is difficult to refute in the absence of authority, increases the likelihood that Leila will get her case to the jury.

## CONCLUSION

The purpose of this article is to raise awareness of the competing case law and argument supporting two different theories of causation under the "in consequence of the intoxication" provision of Alabama's Dram Shop Act. The issue is significant, especially in dram shop cases involving non-routine facts, because the "relaxed" causation standard espoused by plaintiffs' counsel explicitly allows proof of causation beyond the normal boundaries of proximate causation. How far beyond, we do not know, but the *Attalla* opinion states that what I have described herein as "relaxed" causation could extend to some, but not all, remote causes.

If "relaxed" causation is the proper standard, we can only hope for greater clarity in future legislation or from the supreme court. In the meantime, proprietors should be mindful that dram shop liability extends further, and perhaps much further, than they would prefer. ▲▼▲

## Endnotes

1. Several Alabama Dram Shop Act cases discuss the issue of standing in terms of proximate causation. I do not mean to confuse or conflate the separate subjects of standing and causation. However, the use of proximate cause terminology by the supreme court in discussing the zone of potential claimants for purpose of standing tends to support the argument that a traditional proximate cause standard should be applied to causation analysis, at least in cases involving "in consequence of the intoxication" causation.
2. The Alabama doctrine of proximate cause requires "an act or omission that in a natural and continuous sequence, unbroken by any new and independent causes, produces the injury and without which the injury would not have occurred." 1 Michael L. Roberts & Gregory S. Cusimano, *Alabama Tort Law* § 1.03 (4th ed. 2004). The proximate cause of an injury is "the direct cause" of the injury. *Hicks v. Vulcan Eng'g Co.*, 749 So. 2d 417, 424 (Ala. 1999). To show proximate cause, the plaintiff must establish both factual causation and foreseeability. *Springer v. Jefferson County*, 595 So. 2d 1381, 1383 (Ala. 1992).



*Brian A. Wahl is a partner in the Birmingham office of Bradley Arant Boult Cummings LLP, where his general litigation practice involves the representation of corporate defendants. Prior to entering private practice, he was a law clerk for the Honorable William Harold Albritton, III, U.S. District Court Judge for the Middle District of Alabama. Wahl is a graduate of Georgetown University and the University of Texas School of Law.*



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A wooden-framed chalkboard is shown at an angle, tilted towards the bottom right. The board is black and has the words "WRIT OF CERTIORARI" written in white chalk. The text is arranged in two lines: "WRIT OF" on the top line and "CERTIORARI" on the bottom line. The chalkboard is set against a background that transitions from a light green on the left to a bright yellow on the right.

WRIT OF  
CERTIORARI



# Basics of Certiorari Practice in the Alabama Supreme Court

**By Marc James Ayers and  
Andrew L. Brasher**

**T**he writ of certiorari (in Latin, “to be more fully informed”) is an extraordinary writ available to the Alabama Supreme Court by which the Court can “pull up” for review a decision of the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals. While it is a commonly sought writ, there is, at times, some confusion about the writ. Seeking appellate review from the Alabama Supreme Court by way of a writ of certiorari is not like bringing a direct appeal, and should not be thought of as such. Instead, the writ provides a limited avenue by which the Alabama Supreme Court—solely upon its discretion—can decide one or more issues in a case originally within the jurisdiction of one of the lower appellate courts (or that had been “deflected” to the court of civil appeals). *See Ala. R. App. P. 39(a)* (“Certiorari review is not a matter of right, but of judicial discretion.”).

Maintaining a proper view of the nature and operation of the writ is important, and can increase one’s chances of success in petitioning for the writ. In cases falling within the jurisdiction of the lower appellate courts, there has been a tendency to consider review by the intermediate courts as a kind of “first step” of the appellate process, with the second

being review by the Alabama Supreme Court. This viewpoint is inaccurate, and can lead to mistakes in petitioning for certiorari review. It is more accurate (and safer) to view the relationship between Alabama’s lower appellate courts and the Alabama Supreme Court like the relationship between a federal circuit court of appeal and the United States Supreme Court. While the chances of obtaining certiorari review from the Alabama Supreme Court might be better than it would be before the United States Supreme Court, the nature of the relationship is essentially the same. Nobody considers an appeal to the Eleventh Circuit, for example, as merely a “first step” on their way to the United States Supreme Court. Accordingly, where a direct appeal is to one of Alabama’s lower appellate courts, that court is *the* appellate court for that matter; further review by a writ of certiorari is available with regard only to certain specific issues and extraordinary circumstances.

Not surprisingly, the Alabama Supreme Court grants only a small percentage of certiorari petitions, and it is the petitioner’s job to convince the court that there are “special and important reasons for the issuance of the writ” in his case. *Ala. R. App. P. 39(a)*. Many petitions are summarily denied



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because they are procedurally noncompliant. Therefore, the easiest and best way to increase your chances of having issues reviewed by the Alabama Supreme Court on a writ of certiorari is to survive the court’s initial procedural review by closely following the directions of Rule 39, *Ala. R. App. P.* A clearly-presented, procedurally compliant certiorari petition tends to stand out from the crowd even before the merits of the petition have been examined.

## Filing an Application for Rehearing before Seeking Certiorari Review

When you receive a decision from one of the lower appellate courts, the first question is not whether one should petition for certiorari review, but whether to file an application for rehearing. The answer is easy with regard to decisions from the Alabama Court of Criminal Appeals, because an application for rehearing is a jurisdictional prerequisite for certiorari review of that court’s decisions, with some narrow exceptions. *Ala. R. App. P.* 39(c), 40(d)(1). However, an application for rehearing is *not* a prerequisite with regard to decisions by the Alabama Court of Civil Appeals. *Ala. R. App. P.* 39(b), 40(d)(2). Applications for rehearing typically must be filed within 14 days of the decision. *See Ala. R. App. P.* 40(c).

Applications for rehearing can serve various purposes beyond simply attempting to get the deciding court to change its mind. A party may want to correct ambiguous or incorrect factual statements in the court’s opinion or clarify the court’s ruling. As discussed below, an application for rehearing can be particularly helpful if a party believes that the court’s reasoning conflicts with a decision of one of the lower appellate courts, the Supreme Court of Alabama, or the United States Supreme Court—as such a conflict provides a proper ground for certiorari review—but the opinion does not discuss the applicable precedent.

## The Form of the Petition for a Writ of Certiorari

Under Rule 39(d), *Ala. R. App. P.*, a petition for a writ of certiorari must contain the following elements:

- The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal and the name of the court of appeals to which the petition for certiorari is directed;
- The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;
- A concise statement of the grounds (see discussion below);
- A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit;
- a concise statement of the facts, if needed (see discussion below); and
- A direct and concise argument amplifying the grounds relied on for allowance of the writ.

Caution should be exercised when using a “form petition,” *i.e.*, any previously-filed or “blank” petition. Ensure that the form petition satisfies the current rules, and that the petition does not contain information from some earlier-filed petition (this error is not uncommon). Changes to the appellate rules are posted on the Alabama Supreme Court Web site at <http://www.judicial.state.al.us/rules.cfm>.

## Page Limitations

Petitions for writs of certiorari are limited to 15 pages, with the exception of death penalty cases, which have no page limit. *Ala. R. App. P.* 39(d). If a statement of facts (discussed below) is attached to the petition it is not counted against the page limit. *See* Committee Comments to Amendment to Rule 39 Effective June 1, 2005.

## Color of Cover

Sometimes determining the proper cover color for appellate filings is confusing. This is not so with certiorari petitions: the cover of the petition should be white, *see* Ala. R. App. P. 28(d), 32(b)(3), and briefs filed upon the grant of a petition for a writ of certiorari follow the standard blue-red-gray format, *see* Ala. R. App. P. 28(d).

## Docket Fee

The current docket fee for a petition for a writ of certiorari from a decision of the court of civil appeals is \$50. *Ala. R. App. P. 35A(a)(3), 39(b)(2)*. There is no docket fee for a petition from a decision of the court of criminal appeals. *See Ala. R. App. P. 35A(b)*.

The fee should accompany the petition, and should be made out to the clerk of the Alabama Supreme Court. Failure to file a docket fee is not a jurisdictional defect, but that failure can result in dismissal of the petition for noncompliance. *Accord H.C. Schmieding Produce Co. v. Cagle*, 529 So. 2d 243, 249 (Ala. 1988).

## Briefs

Under a 2005 amendment to Rule 39, no briefs are to be filed—by the petitioner or the respondent—unless the court grants the petition. Rule 39(b)(4), *Ala. R. App. P.*, *see* Committee Comments to Amendment to Rule 39 Effective June 1, 2005. The court will determine whether to pull the case up for review solely on the basis of the petition (the court will not have the record on appeal unless and until it grants the writ). If the petition is granted, the petitioner and the respondent will file briefs according to the time frame discussed below. *See Ala. R. App. P. 39(g)*. Briefs should follow the standard brief format found in rules 28 and 32(a), *Ala. R. App. P. See Ala. R. App. P. 39(g)*.

## Time Requirements

The time for filing a petition is 14 days from the date of the decision of the lower appellate court, or, if rehearing is sought, 14 days from the date of the decision on rehearing. *Ala. R. App. P. 39(b)(3)*. This

14-day time period is jurisdictional and cannot be enlarged except in death penalty cases. *Ala. R. App. P. 2(b), 39(a)(2)(C)*.

If the petition is granted, the petitioner has 14 days to file a brief on the merits of the specific grounds upon which the petition was granted. *Ala. R. App. P. 39(g)(1)*. However, the petitioner can waive the right to file an opening brief. *Id.* The respondent has 14 days to file a responsive brief, and then the petitioner's reply brief is due 14 days later. *Ala. R. App. P. 39(g)(2)&(3)*. These time periods are shortened to seven days in the case of a pretrial appeal by the state in a criminal case, and in such a case the petitioner does not file a reply brief. *See Ala. R. App. P. 39(g)*.

## Grounds for Certiorari Review

Every petition for certiorari must include a concise statement of the issues and grounds upon which the petition is based. *Ala. R. App. P. 39(d)(3)*. In all civil cases and non-death penalty criminal cases, the supreme court can consider only those petitions for writs of certiorari stemming from the following types of decisions:

- decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the United States Constitution;
- decisions that affect a class of constitutional, state or county officers;
- decisions where a material question requiring decision is one of first impression for the Supreme Court of Alabama (this is the “first impression” ground, discussed further below);
- decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of Criminal Appeals or the Alabama Court of Civil Appeals (this is the “conflict” ground, discussed further below); and
- where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals.

*Ala. R. App. P. 39(a)*.

Every petition for certiorari must include a concise statement of the issues and grounds upon which the petition is based.



## INSURANCE CONSULTATION AND EXPERT TESTIMONY

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The two most frequently-cited grounds for certiorari review are “first impression” and “conflict.”

The supreme court can hear a petition from a death-penalty case in one additional circumstance: if the petitioner alleges that the trial suffered from a prejudicial plain error, even if the error or defect was not brought to the attention of the trial court or court of criminal appeals. *Ala. R. App. P.* 39(a)(2)(B).

Each lower appellate court decision that a petitioner wants to have reviewed by the Alabama Supreme Court *must* fit into one of these specific grounds. Moreover, certiorari review is strictly limited to the issues that were addressed by the lower appellate court, *see, e.g., Ex parte LaCoste*, 733 So. 2d 889, 894 (Ala. 1998), and that are raised in the petition. If the court grants a certiorari petition, the court will address only those grounds upon which it granted the writ (which means it certainly will not review issues not included or properly presented in the petition). *See, e.g., Ex parte Hatfield*, \_\_\_ So. 2d \_\_\_, 2009 WL 153929, at \*6 (Ala. Jan. 23, 2009) (refusing to address issues not raised in the petition); *Ex parte Franklin*, 502 So. 2d 828, 828 (Ala. 1987) (noting that it is well-established that the court can address only those grounds presented in the petition). Therefore, a petitioner should take great care to precisely identify the ground or grounds upon which certiorari review is being sought. The best practice is to cite the specific rule as to which ground is being asserted at the beginning of each issue that the petition raises. Do not be afraid to walk the court through your grounds using “baby steps”—clarity in stating grounds is half the battle. If the court has to guess at either what your grounds are or whether they fit within the list of proper grounds for a writ of certiorari, your petition is in trouble.

noncompliance. If you are relying on first impression grounds, it is vitally important that you tell the court precisely what the question of first impression is (it is also important to be sure that it is indeed a question of first impression). You do not want the court to have to hunt to find the question of first impression you claim is raised by the lower appellate court’s decision.

Similarly, if you are relying on conflict grounds, you must quote the relevant section of the opinion of the lower court and the part of the prior decision with which it conflicts. *Ala. R. App. P.* 39(d)(1). If it is impossible to quote the conflicting text, then you should explicitly say so, cite *Ala. R. App. P.* 39(d)(2), and state with particularity what the conflict is. Either way, explain precisely to the court what you are doing, and make sure to include proper citation to the relevant cases. It is also crucial to remember that not all conflicts count—such as conflicts with a statute, rule or a decision by a federal circuit court of appeals—only conflicts with the U.S. Supreme Court or with one of Alabama’s appellate courts.

Many petitions are denied because they are procedurally noncompliant. *See Ex parte Siebert*, 778 So. 2d 857, 857 (Ala. 2000) (Johnstone, J., concurring specially). Given the limited scope of certiorari review, and the extremely large number of such petitions that are filed with the court, the court rigorously examines petitions to ensure that they comply with the appellate rules. *See, e.g., Ex parte Save Our Streams, Inc.*, 541 So. 2d 549, 550-52 (Ala. 1989); *Ex parte King*, 797 So. 2d 1191 (Ala. 2001) (Brown, J., concurring specially). Such rigorous review is necessary to sort the truly certiorari-worthy petitions from those seeking further appellate review based on grounds outside the limited grounds for which certiorari is available. This rigorous review may result in some petitions being denied for procedural violations that, had they been properly presented, might have raised a certiorari-worthy issue. However, many of the petitions denied as procedurally noncompliant *did* not properly state a ground for certiorari review because they *could* not state a ground. For example, the reason that many petitions fail to quote the allegedly conflicting portions of a decision or explain specifically and “with

## Notes on Asserting “First Impression” and “Conflict” Grounds

The two most frequently-cited grounds for certiorari review are “first impression” and “conflict.” Unfortunately, they are also the grounds most frequently misstated, leading to denial for procedural

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particularity” why a conflict exists is because no true conflict does exist. Again, the Alabama Supreme Court is not a “second court” for direct appeal; if the issues presented do not fit into one of the proper grounds of certiorari review, the court does not review those issues.

## The Statement of Facts

One of the areas in which errors most often occur in petitions for writs of certiorari is with regard to the statement of facts. It is also one of the most important components of a petition, and can even determine whether your petition *can* be granted. Rule 39(k) makes clear that the court will be limited to the facts contained in the decision of the lower appellate court, unless the petitioner has properly included a statement of additional or corrected facts with the petition:

The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5). The scope of review includes the application of the law to the stated facts.

(This scope of review might be modified in death penalty cases where “plain error” is asserted. *See Ala. R. App. P.* 39(a)(2)(D)). Therefore, if you do not properly include a statement of facts when necessary, the court may have no facts with which to analyze your petition and cannot grant it. *See, e.g., Ex parte Winchester*, 544 So. 2d 967, 968 (Ala. 1989); *Ex parte Silas*, 909 So. 2d 190, 190-91 (Ala. 2005) (Harwood, J., concurring specially).

As stated in various sections of Rule 39(d)(5), the rules governing the statement of facts are as follows:

*If you are satisfied with the facts as stated in the lower appellate decision*, then you do not need to include any statement of facts.

*If you want to add or correct facts included in the decision of the court of civil appeals, but did not seek rehearing*, then you “*may* present to the supreme

court, either in the petition or as an attachment to the petition for the writ of certiorari, a proposed additional or corrected statement of facts or the applicant’s own statement of facts, with references to the pertinent portions of the clerk’s record and the reporter’s transcript.” Rule 39(d)(5)(C).

*If you received a “no opinion” affirmation from the court of civil appeals, or an opinion containing no facts, but did not seek rehearing*, then you “*shall* present to the supreme court, either in the petition or as an attachment to the petition for the writ of certiorari, the petitioner’s statement of facts, with references to the pertinent portions of the clerk’s record and the reporter’s transcript.” Rule 39(d)(5)(C) (emphasis added). If you do not present a statement of facts, there will be no facts for the court to review, rendering it impossible to review your petition.

*If you want to add or correct facts included in the decision of the lower appellate court, and, on rehearing before that court, filed a statement of additional or corrected facts that were not included in a later opinion of that court*, then “the proposed statement of additional or corrected facts or the applicant’s own statement of facts presented to the court of appeals in the application for rehearing *must* be copied verbatim and attached to

One of the areas in which errors most often occur in petitions for writs of certiorari is with regard to the statement of facts.



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or included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript," *and* the petitioner "**must include a verification** that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing." *Ala. R. App. P. 39(d)(5)(A)(i)&(ii)* (emphasis added). To "verify" the statement of facts, the best practice is to include a signature line at the bottom of your statement, and, using the language of this rule, state that you are verifying that "this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing." It is better to create a new document—do not simply photocopy your statement of facts submitted in the lower appellate court.

*If you received a "no opinion" affirmation, and, on rehearing before that court, filed a statement of facts that were not included in a later opinion of that court*, then "a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be either included in or presented as an attachment to the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript," *and* that statement of facts must contain a verification as described above. *Ala. R. App. P. 39(d)(5)(B)(i)&(ii)*. If you do not present a properly verified statement of facts, there will be no facts for the court to review, rendering it impossible to review your petition.

*If you are not satisfied with the facts as stated in the main opinion of the lower appellate court, but you agree with some or all of the facts in a special writing or a dissent*, Rule 39(d)(5) now recognizes—in light of recent amendments to that rule—a mechanism by which a petitioner can adopt those facts on rehearing and in a certiorari petition. *See Ala. R. App. P. 39(d)(5)(a)(i)&(iii), 39(d)(5)(C)(i)&(ii)*; Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008.

When preparing a statement of facts, do not forget to include proper citations to the record on appeal, even though the court will not have the record before it unless and until it grants the writ. *Ala. R. App. P. 39(f)*.

## Alabama Supreme Court's Review of Petitions for Writs of Certiorari

Petitions for writs of certiorari are reviewed by the Alabama Supreme Court in essentially the same format as a direct appeal. When a petition is filed, it is assigned to a justice on a rotating basis. The justice and his or her staff will evaluate the petition and draft a memorandum

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We hope you will take the opportunity on May 6<sup>th</sup> to thank the paralegals in your firms and organizations.

Jeanie C. Johnson  
President



for the court with a recommendation to either grant or deny the petition depending upon whether the petition is procedurally compliant and whether the substantive issues presented have a “probability of merit.” *Ala. R. App. P. 39(f)*. If five justices vote to grant the petition, the writ issues; if not, the petition is denied.

After the court “pulls up” a matter from one of the lower appellate courts by granting a writ, the record on appeal and other materials are transmitted to the court from the lower appellate court, *see Ala. R. App. P. 39(f)*, and the matter is reviewed as with other appeals with one exception. In addition to affirming or reversing the lower appellate court, the supreme court can—in its discretion—“quash the writ as improvidentially granted.” *See, e.g., Ex parte State of Alabama Dep’t of Revenue*, 993 So. 2d 898 (Ala. 2008). When this option is exercised, it is often because the court, after receiving full briefing upon granting the writ, determines that the issues presented did not truly fit into a proper ground for certiorari review. Respondents should remember that the

court retains this option, and that all respondents can argue (in their responsive brief) that the writ should be quashed because the issues presented in the petition were not certiorari-worthy. *See* Committee Comments to Amendment to Rule 39 Effective June 1, 2005.

If the writ is denied (by being quashed or otherwise), that is the end of the Alabama Supreme Court’s review. A party may not file an application for rehearing from the denial of a writ. *Ala. R. App. P. 39(1)*.

## Conclusion

Being able to effectively and persuasively present a correctly-tailored petition for a writ of certiorari to the Alabama Supreme Court is an important tool in the arsenal of any Alabama litigator. While the avenue for review is appropriately limited, Rule 39 provides a clear roadmap for maximizing the chance of successfully catching the eye of the court and, accordingly, of obtaining a successful result for your client. ▲▼▲



*Marc James Ayers is a partner with Bradley Arant Boult Cummings LLP and is a member of the firm’s appellate litigation group. He currently serves as chair of the Alabama State Bar’s Appellate Practice Section. Ayers is a 1998 graduate of the Cumberland School of Law and formerly served as clerk and staff attorney to Alabama Supreme Court Justice J. Gorman Houston, Jr.*



*Andrew L. Brasher is an associate in the appellate litigation group of Bradley Arant Boult Cummings LLP. He graduated from Harvard Law School in 2006, where he was an editor of the Harvard Law Review, and then served as a law clerk to Judge William H. Pryor, Jr. of the Eleventh Circuit Court of Appeals. His practice focuses on trial and appellate litigation.*

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# Red Flags for Young Attorneys to Avoid

**By Brandon C. Stone**

*Perhaps the worst thing you can do is hide behind your desk and hope that a mistake will in some way correct itself or that no one will notice it.*

**S**o you have passed the bar exam with flying colors and are ready to embark on your long successful career of practicing law! Congratulations on your accomplishments and beginning what I believe is a profession that is constantly mentally stimulating and rewarding. Unfortunately, as you begin your practice, you will probably find, as I have, that after all the years of studying and preparation, mistakes will be made. They are practically unavoidable.

Even the most successful lawyers will admit that they make mistakes from time to time. In my experience, the manner in which mistakes are handled will determine what overall effect they will have on your litigation. I believe the best course of action is to meet your problem head-on. Reveal the problem to your supervising attorney, admit that you made a mistake and begin exploring possibilities to correct the misstep. As a new attorney, you will be expected to make mistakes. I have found that in taking these proactive steps, I often discover that the mistake was a very minor issue compared to how I perceived it, the mistake was

easily correctable or that the mistake was not a mistake at all.

Perhaps the worst thing you can do is hide behind your desk and hope that a mistake will in some way correct itself or that no one will notice it. Your problem could become worse as time passes and take a real toll on your case.

In my three short years of practice, I have made my share of blunders, and I would like to believe that I have learned from them. I have also tried to learn from the mistakes of others. Below, I have addressed five random examples of statutory law, caselaw and rules of court that in my experience have been stumbling blocks in the course of litigation. Some of these examples are commonly argued and briefed, and others are a little more obscure. My hope is that these “red flags” will help you in your practice, and you will learn from mine and others’ mistakes. I have attempted to discuss these examples in the order of potential for seriousness of consequences (and potential for mental and emotional trauma to you) from least to worst if the errors at issue are made.



## Motions to Dismiss Pursuant to Rule 12(B), Ala. R. Civ. P. Are Not Permitted in District Courts

The defenses listed in rule 12(B), *Ala. R. Civ. P.* obviously arise in cases before district courts as they do in circuit courts. However, in district court actions, those defenses must be asserted in the defendant's answer and not by motion. Rule 12(dc)(2), *Ala. R. Civ. P.* states that "the provisions for the assertion of certain defenses by motion at the option of the pleader in Rule 12 are deleted."

The real danger in incorrectly filing a motion rather than an answer is waiving certain 12(B) defenses. Rule 12(g) of the *Alabama Rules of Civil Procedure* states that "[i]f a party makes a motion under this rule (Rule 12) but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based upon the defense or objection so omitted. . . ." Rule 12(g), *A. R. Civ. P.*

The Alabama Supreme Court commented on this rule in *Couch v. Sutton*, 508 So. 2d 681 (Ala. 1986). The court stated that "the rules do provide that objections to improper venue are waived if not raised in the **first** responsive pleading or **first** motion." Rules 12(g), 12(h)(1), *A.R.Civ.P.*; *Id.* at 681-682. See also *Den-Tal-Eze Manufacturing Co. v. Gosa*, 388 So. 2d 1006 (Ala. Civ. App. 1980).

If an improperly filed motion to dismiss is filed with the district court, an opposing party might argue that the motion should be stricken. If the court rules that the improperly filed motion was your "first responsive pleading" as referenced in *Couch*, it could be grounds for a ruling that your 12(B) defenses are effectively waived. The easy solution to avoid these problems is to simply file an answer to a district court complaint which lists all of the appropriate 12(b) defenses.

Fortunately, the District Court Committee Comments following Rule 12, *Ala. R. Civ. P.* state that "a party will not be deemed in default if he has served an appearance in the form of a motion to dismiss," which references Rule 55(dc)(5), *Ala. R. Civ. P.*



## Equitable Relief Is Generally Not Available in District Court Actions

One mistake commonly made is to seek equitable relief in the district courts, which is only available in circuit courts. *Ala. Code* §12-12-30 states that:

"The original civil jurisdiction of the district court of Alabama shall be uniform throughout the state, concurrent with the circuit court, except as otherwise provided, and shall include all civil actions in which the matter in controversy

does not exceed ten thousand dollars (\$10,000), exclusive of interest and costs, and civil actions based on unlawful detainer; except, that the district court shall not exercise jurisdiction over any of the following matters:

"(1) Actions seeking equitable relief other than:

"a. Equitable questions arising in juvenile cases within the jurisdiction of the district court.

"b. Equitable defenses asserted or compulsory counterclaims filed by any party in any civil action within the jurisdiction of the district court."

While obvious equitable remedies, such as injunctions, are clearly not available in district courts, less obvious ones are perhaps more often sought. For example, claims of unjust enrichment and requests for relief via a theory of quantum meruit, which are commonly pled as alternative counts to breach of contract claims, are both equitable remedies. See *Avis Rent-a-Car Systems, Inc. v. Heilman*, 876 So. 2d 1111, 1123 (Ala. 2003) and *Mantipty v. Mantipty*, 951 So. 2d 638 (Ala. 2006).

These claims made in the circuit court are proper, and are commonly pled in the alternative. However, as *Ala. Code* §12-12-30 states, equitable relief may not be provided by the district courts. If there is a doubt as to whether there was "an offer and an acceptance, consideration, and mutual assent to the terms essential to the formation of the contract" *Strength v. Alabama Dep't of Fin.*, 622 So.2d 1283, 1289 (Ala.1993), district court may not be the best forum to seek your relief. Such requests for equitable relief would be ripe for dismissal in district court, and if the elements of a contract are not present, the equitable claims would be at risk.



## Requests for Admissions Are Automatically Deemed Admitted If No Response Is Served in 30 Days

Requests for admissions, pursuant to Rule 36, *Ala. R. Civ. P.* in my experience are the source of many mistakes and are commonly at issue on the appellate level.

Rule 36(a), *Ala. R. Civ. P.* states

"(E)ach matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or an objection addressed to the matter..."

The plain language of this quoted section of Rule 36 states that the request is "deemed admitted **unless**..." a response is timely served. Some trial courts in my experience have required a motion to have the requests for admissions deemed admitted in order for the requests to be officially admitted. The language

of Rule 36(a), *Ala. R. Civ. P.* does not, on its face, require such a motion. While there are several opinions which reference a motion to have the requests deemed admitted as being filed, none of those opinions expressly require the motion to be filed. See *Ex Parte American Resources Ins. Co., Inc.*, 663 So. 2d 932, 935 (Ala. 1995) and *Leonard v. State for Use and Ben. of Talladega County*, 387 So. 2d 852, 853 (Ala. 1980).

Rule 6(e), *Ala. R. Civ. P.* allows an additional three days to respond if the requests for admissions are served by mail. *Green Tree Acceptance, Inc. v. Doan*, 529 So. 2d 201, 205 (Ala. 1988). Thankfully, Alabama law provides a “safety net” in addition to the mailbox rule for parties responding later than 33 days (using the mailbox rule) of service to a request for admission. Rule 36(d), *Ala. R. Civ. P.* states that:

“Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.”

In *Doan*, the supreme court addressed the issue of late responses to requests for admissions. In this case, the party requesting the admission was served with the defendant’s response three days prior to trial. *Id.* at 205. Green Tree moved to strike the responses, claiming it had been prejudiced in that it had prepared for trial with the assumption that the requests for admissions had indeed been admitted. *Id.* The trial court allowed the untimely responses stating that Green Tree could not identify any specific prejudice. *Id.* The Alabama Supreme Court held that this action was not an abuse of discretion. *Id.*

Note that according to the language of Rule 36 (a) and (d), merely denying a request after the 30 days expires is likely of no effect. Rule 36(d) allows you to withdraw or amend your

admission (which has automatically been entered if late) unless your opposition can show prejudice. Normally, as highlighted in *Doan*, it will be difficult to show the court prejudice, especially if the litigation is in its early stages.



## Children Born out of Wedlock Generally Do Not Inherit from Their Father

The issue of the right of a child born out of wedlock to inherit from his or her father has surfaced in my practice through the litigation of heirship property. Real estate often passes from generation to generation for decades without changing title, and it is normally titled as “the heirs of John Doe” in tax records. Illegitimate children naturally believe that they, like their brothers and sisters, inherit their respective percentage interest in the property, and they pass this belief down to their heirs. Alabama law, however, does not treat children born out wedlock as those who are born of married parents.

*Ala. Code* §43-8-48(b) states that in order for a child born out of wedlock to inherit from his or her father by intestate succession “paternity (must be) established by an adjudication before the death of the father or is established thereafter by clear and convincing proof....”

*Ala. Code* §6-2-33 states, “(T)he following actions must be commenced within 10 years:...(2) Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as otherwise provided in this article.”

These two statutes read in conjunction reveal that Alabama law allows a child born out of wedlock has ten years to have him/herself adjudicated as a child by clear and convincing evidence in order to inherit from his or her father. This reading was recently

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confirmed by the Alabama Supreme Court in 2004 in *Blackmon v. Brazil*, 895 So. 2d 900 (Ala. 2004). The court in *Blackmon* stated:

“to summarize our holding, by authority of §43-8-48(2)(b), we hold that paternity may be established after the death of the father upon clear and convincing proof. The action to establish paternity may be brought within the time allowed by law to establish rights of inheritance in any case.” *Id.* At 906-907.

Unless a child born out of wedlock has him or herself adjudicated as a biological child, the belief that he or she has inherited from his or her father is unfounded. This belief could lead the child born out of wedlock and/or his heirs to sell an interest (or believed interest) in the subject heirship property to family members or third parties, which could easily later be deemed worthless.

As if this treatment of children born out of wedlock is not harsh enough, *Ala. Code* §43-8-48(b) also states that “the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.” *Id.*

This problem is compounded by Alabama’s recognition of common-law marriage. This twist adds the burden of one’s proving that a common-law marriage existed in some cases many decades in the past. Whether one’s parents “held themselves out” as being husband and wife at the time of his birth could possibly be determinative of whether he or his heirs inherit substantial interests in real estate. See *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000).

I have worked on a case affected by this problem in which the child’s father was listed on his birth certificate as the father. He was publicly acknowledged as the father’s child in the community and treated as such by the child’s brothers and sisters. The father had provided financial support for the child throughout his years of minority. These facts were irrelevant because the father’s paternity had not been adjudicated as required in *Ala. Code* §43-8-48(b) and *Blackmon*. Because the child had always been accepted by his father and it was publicly known that he was his father’s child, he had no reason to believe that his paternity was ever in question, and in turn, he had no reason to believe he needed to have his father’s paternity adjudicated.

At least rights have improved for children born out of wedlock in Alabama over the years. As stated in *Stone v. Gulf and American Fire and Cas. Co.*, 554 So. 2d 346 (Ala. 1989),

“(A)t common law, an illegitimate child, who had not been legitimated, was considered the child of no one and could inherit from no one. See *Williams v. Witherspoon*, 171 Ala. 559, 55 So. 132 (1911). The courts considered an illegitimate child “*nullius filius*,” the “heir to nobody,” and thus, the child “ha[d] no ancestor from whom any inheritable blood [could] be derived.” *Lingen v. Lingen*, 45 Ala. 410, 413 (1871) (quoting 1 Wendell’s Blackstone, 459). *Stone*, 554 So. 2d at 363.

The court in *Stone* goes on to discuss the slow progression of Alabama’s view of the rights of children born out of wedlock from its common-law view to its more current stance.

Alabama’s current stance of this issue as held in *Blackmon* will continue to yield unfair results for children born out of wedlock in heirship property cases as well in other situations. The percentage of births out of wedlock in Alabama have steadily risen from 11.6 percent of all births in 1960 to 36.8 percent of all births in 2006. This percentage is projected to continue to increase\* which ensures that this problem will continue to arise. \*Source: Alton D. Stone, Statistical Analysis Division, Center for Health Statistics, Alabama Department of Public Health.



## The Attorney General’s Office Must Be Served with the Complaint in Actions Challenging a Statute’s Constitutionality

*Ala. Code* §6-6-227 states “if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.” The failure to comply with this statute perhaps yields the most damaging consequences of any other addressed in this article. The obvious legislative intent is to provide the state with an opportunity to defend its own statute or law when it is challenged.

The Alabama Court of Civil Appeals has held as follows:

“The record contains no indication that Stringer served the attorney general with notice that he was challenging the constitutionality of the Act. When a party challenging the constitutionality of a state statute fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claim, and any judgment regarding that claim is void.” *Stringer v. State, ex rel. Valeska*, 628 So. 2d 686, 688 (Ala. Civ. App. 1993, quoting *Roszell v. Martin*, 591 So.2d 511 (Ala.Civ.App.1991).

One misconception in relation to this requirement is that since *Ala. Code* §6-6-227 appears in the Declaratory Judgment Act in the *Alabama Code of 1975* such service on the Attorney General is only necessary in suits seeking declaratory judgment. The Alabama Supreme Court has held, however, as follows:

“in a proceeding in which the constitutionality of a state statute is challenged, *Code of 1975*, § 6-6-227, requires that “the attorney general of the state shall also be served with a copy of the proceedings and be entitled to be heard.” This Court has determined that “service on the Attorney General, pursuant to § 6-6-227, is mandatory and jurisdictional,” regardless of whether appellants’ action was brought as a declaratory judgment action.” *Wallace v. State*, 507 So. 2d 466, 468 (Ala. 1987), quoting *Barger v. Barger*, 410 So.2d 17, 19 (Ala.1982).

If you have not served the attorney general in this situation, at least you are not alone. A cursory review of caselaw on this issue will reveal that this obscure requirement is commonly overlooked. Judge Wright voiced his dissent of this requirement

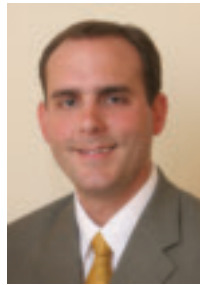
in *Guy v. Southwest Council on Alcoholism*, 475 So. 2d 1190, 1192 (Ala. Civ. App. 1992), stating:

“The majority has directly held that if ‘a party challenges the constitutionality of a state statute and fails to serve the attorney general, the trial court has no jurisdiction to decide the constitutional claims and its decree is void.’ With that holding, the judgments in hundreds of cases in which constitutional defenses or issues were raised and decided, as in this case, without notice to the attorney general, are rendered void. This court has heretofore entertained and decided many of them on appeal. This decision has obvious far-reaching consequences. The attorney general is going to be very busy.” *Guy v. Southwest Council on Alcoholism*, 475 So. 2d 1190, 1192 (Ala. Civ. App. 1992).

Clearly, the failure to serve the attorney general’s office when required in *Ala. Code* §6-6-227 can be harsh. The most ironclad constitutional argument attacking a statute can be rendered meaningless if this requirement is not complied with. It is also important, however, to note what is not contained in *Ala. Code* §6-6-227. This section does not require service on the attorney general for all constitutional arguments, but only those that directly challenge a state law.

## Conclusion

Lessons can be learned from each and every case you litigate. I hope some of these examples of lessons I have learned will be useful to you and will prevent some accelerated heart rates and cold sweats that I have unfortunately already experienced. From one young attorney to another, I encourage you to deal with mistakes aggressively and to learn from them, and I wish you the best in your practice. ▲▼▲



**Brandon C. Stone** is an associate at the Law Office of Regina B. Edwards PC in Wetumpka. He graduated from Auburn University in 2000 with a bachelor’s degree in public administration and earned his J.D. from Jones School of Law in 2004. Stone serves as president of the Elmore County Bar Association and devotes the majority of his practice to the representation of businesses and individuals in civil litigation.

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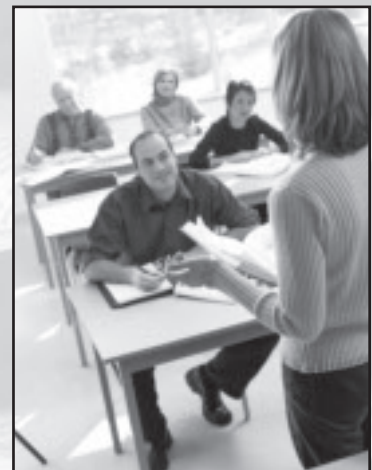
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# THE ALABAMA STATE BAR LEADERSHIP FORUM

## Celebrating Five Years: Reaching out to a New Generation of Servant Leaders

*By Edward M. Patterson*



*Left to right are Cynthia Ransburg-Brown, R. Thomas Warburton, William N. Clark, Ashley E. Swink, and Kimberly T. Powell at the recent Leadership Forum Alumni party in Hoover. Clark was the recipient of a commemorative plaque, honoring his vision, dedication and commitment to the Leadership Forum.*

**O**n a bitterly cold evening on January 15, 2009, it was warm and jovial inside as over 120 attorneys and guests gathered at the second annual Leadership Forum Alumni cocktail party and banquet at Marriott Renaissance Ross Bridge in Hoover to begin year five of the Leadership Forum. Cynthia Ransburg-Brown (Class 4), of Sirote & Permutt, PC, presided over the evening. The event was part of the two-day Class 5 orientation. Popular ‘humorist-at-law’ Sean Carter, of Mesa, Arizona, was the after-dinner speaker. The highlight of the evening was the presentation of a fifth-year milestone commemorative plaque to former Alabama State Bar President

William N. Clark of Birmingham. The presenters, R. Thomas Warburton (Class 4) of Bradley Arant Boult Cummings, LLP, Birmingham, and Ashley E. Swink (Class 4) of Richardson Callahan & Frederick, LLP, Huntsville, recalled Clark’s outstanding vision, dedication and commitment to the ASB Leadership Forum.

On May 21, 2004, during Clark’s term as president, the Board of Bar Commissioners unanimously adopted the following resolution:

*“Be it Resolved that the Alabama State Bar shall establish a leadership forum to produce committed and involved lawyers willing and able to fill significant leadership*



roles in the local and state bar associations, in communities and in state organizations and to serve as role models in matters of ethics and professionalism with the program to be implemented by the President and Executive Council of the Alabama State Bar with periodic review by the Board of Bar Commissioners.”

The theme of the orientation was “Fundamentals of Leadership and Professionalism.” The class heard from ASB President J. Mark White; former Governor Albert P. Brewer; J. Anthony McLain, state bar general counsel; Robert Holmes, Jr., senior vice president, Alabama Power Company; Dr. Wayne Flynt, professor emeritus, Auburn University; Allison Black Cornelius, founder, BlackBOARD Consulting Company; Honorable William Pryor, U.S. Court of Appeals for the Eleventh Judicial Circuit; and Stephen F. Black, director, Center for Ethics and Social Responsibility at the University of Alabama.

Patrick H. Graves, Jr. of Huntsville and Alyce M. Spruell of Tuscaloosa served as the first co-chairs of the Leadership Forum

Planning Committee. Since that time, Fred M. Haston, III (Class 1), Keith Jackson (Class 2), Kimberly T. Powell (Class 3) and Sam David Knight (Class 4) have served as co-chairs. Today, forum alumni take the major lead in planning the sessions which motivate participants to embrace the concept of “servant leadership.”

Class 5 includes another 30 of the best and brightest young attorneys in the state. The forum boasts 238 applications in five years, 150 attorneys selected to participate and 145 graduates when the five annual sessions conclude in May. From an initial budget of \$13,000 to a present budget of \$42,000, the programs have expanded to add training sessions not only at the state bar building, but at other locations, including Alabama’s Black Belt community, Hyundai Motor Manufacturing facility, the Alabama State Capitol, the Alabama

Education Association building, and Balch & Bingham conference facilities in Birmingham, with orientation sessions held at various RSA Renaissance Marriott conference facilities. Trips include the Rosa Parks Museum, Civil Rights Institute, 16<sup>th</sup> Street Baptist Church, Brown Chapel AME Church, and E.D. Nixon Elementary School. Over 150 attorneys, judges, law and university professors, national leadership consultants, and leaders in the educational, political, business and military community have offered their services as faculty members.

While some state bars have difficulty filling designated places in their leadership programs, Alabama’s forum continues to receive annually an average of 75 applications for 30 positions, and enjoys both prestige and popularity as it remains strategically focused on its original mission. Bill Clark’s vision of “a leadership forum to produce committed and involved lawyers willing and able to fill significant leadership roles” is now an established reality. ▲▼▲



**Edward M. Patterson** is currently the assistant executive director of the Alabama State Bar. He is a graduate of the University of Alabama School of Law and a former law clerk to retired

Associate Justice Hugh Maddox of the Alabama Supreme Court. Patterson served as assistant general counsel of the Alabama State Bar prior to entering private practice for 14 years where he concentrated in real estate, banking and general business law. He is the recipient of the Alabama State Bar Award of Merit for outstanding and constructive service to the legal profession in Alabama.



# Calm, Rational Decisions Work Best in Difficult Times

**By Jeanne Marie Leslie**

## **What Can ALAP Do For Me?**

The Alabama Lawyer Assistance Program (ALAP) is a free *confidential* program of the Alabama State Bar which offers 24-hour assistance to Alabama lawyers, judges and law students. ALAP works to assist members with addiction and other mental health issues. What many are often surprised to learn is that ALAP is also an excellent resource for stress-related problems familiar to most lawyers' daily lives. ALAP receives calls about:

- procrastinating behaviors
- relationship problems
- anger problems
- stress management
- aging parents
- loss and grief
- financial worries
- depression
- addiction and other compulsive behaviors

## **The Best Reason to Call ALAP**

*You recognize that you need to be healthy in order to help others. It is no sur-*

prise to the professionals who treat members of the legal profession that practicing law is stressful. Managing a law practice, and juggling financial and family responsibilities is difficult but many lawyers also take on their clients' problems and make them their own. ALAP understands that lawyers are often the advice-givers and are professionally trained to focus on what other individuals need. However, lawyers, who focus solely on their clients' needs without regard to their own, are particularly susceptible to stress-related illnesses. Stress-related illnesses include high blood pressure, heart disease, migraines, ulcers, and immune-compromised disorders such as cancer and rheumatoid arthritis. When under extraordinary stress, lawyers—like other busy professionals—may perform their obligations at less than satisfactory levels, causing mistakes, lapse of judgment and negligence. Some individuals, in an attempt to cope, self medicate with addictive substances or behaviors. Others may turn to self-defeating thought processes and critical thinking. These types of coping methods can destroy a law career and ultimately a lawyer's life. How you handle stress is not about how strong you are; it is

about how well you learned and implemented stress-reducing techniques. How well you take care of yourself is reflected in everything you do, including practicing law.

Each of us responds to stress in a different way—so what is stressful for one may not be stressful for another. Listening deeply and conscientiously to ourselves and being vigilant about our health during stressful times is most beneficial to our well-being. Our country is experiencing a tough economic time and the legal profession has been hit considerably hard. Media outlets have seized every opportunity to broadcast declining stock markets, mortgage foreclosures and rising unemployment rates. Minute-to-minute updates are available 24 hours a day. With predictions growing more catastrophic by the minute, watching the news can be hazardous to your health. It is important to realize this will not last forever. Stock markets have always fluctuated and measurements according to the S&P 500 grew more than three-fold during the 1990-2007 years. Unemployment rates have been as high as 23.6 percent in 1932 and then reached the lowest in our country's history in April 2007. Many lawyers are struggling to make a living, pay their debts and stay afloat. ALAP calls have not only increased 45 percent from this time last year, but the gravity of caller distress has intensified as well. ALAP can assist you in developing the skills necessary to handle the difficult situations lawyers often confront. Lawyers are leaders in difficult times. Many are already lending resources and time to public service. Remember that colleagues and other members of the legal profession may also be experiencing challenges and a word of encouragement can go a long way.

### Helpful Stress-Reducing Techniques:

- Do not panic. Panic is never helpful. Avoid acting on any sense of urgency in reacting to situations. Instead, make calm, rational decisions.
- If you find the news is increasing your anxiety turn it off.
- Get back to basics—safety is first. What do you need to do to keep you and your family safe?



- Identify your financial concerns and make a plan. Ask for accountability from a trusted friend or family member.
- Stay in the moment. Projecting into the future is often with worst-case scenarios. This type of thinking is anxiety producing and a means to de-focus from the here and now. Stay in the here and now.
- Listen to yourself talk and avoid all-or-nothing thinking.
- Avoid caffeine as it can increase feelings of anxiousness. If you are feeling down then avoid alcohol. Alcohol is a depressant and may intensify feelings of depression.
- Utilize your support systems. Talk to friends and family members. Isolating and keeping concerns to yourself is a sure way to prolong feelings of despair.
- Get enough sleep and exercise and put healthy food on your plate and in your body.
- See a doctor or therapist if feelings of despair and hopelessness persist.

### What Can I Expect When I Call ALAP?

You can expect and will receive complete confidential assistance and support. ALAP offers referral services to address

overall well-being, which may include brief counseling for work-related or personal issues, as well as referrals to professional treatment providers. ALAP has a library of educational resources, peer support mentoring as well as financial assistance for treatment expenses when needed. Lawyers provide services to improve lives. It only makes sense when lawyers are in need of these types of services the same commitment and concern is extended. ALAP is interested not only in the well-being of the profession, but in the well-being of the individual lawyer. Call us today or visit us on the Web under programs at [alabar.org](http://alabar.org).

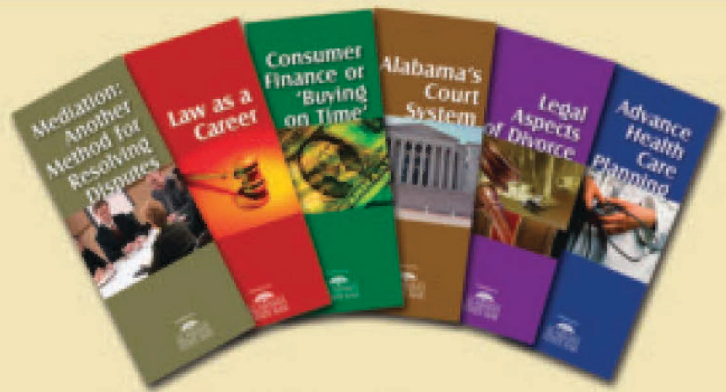
*ALAP has recently hired a new case manager. Shannon Knight started with ALAP last month. She has obtained her master's degree in psychology and is already meeting with clients. Shannon is enthusiastic about working with us and has begun taking over many of our cases. Shannon has worked with members of the legal profession for several years and comes to us from the ASB Lawyer Referral Service. We are so grateful to have her and look forward to working with her for many years to come. ▲▼▲*

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*Jeanne Marie Leslie, RN, M.Ed.* is director of the Alabama Lawyer Assistance Program.

# Alabama State Bar Publications Order Form

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



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J. ANTHONY MCLAIN

## Part-Time Judges, Part-Time Assistant District Attorneys and Imputed Disqualification

### QUESTIONS:

1. May a partner or associate of a part-time municipal court judge represent clients in municipal court provided that the matter is unrelated to any matter presided over by the partner as a part-time municipal court judge?
2. May a partner or associate of a part-time assistant district attorney represent criminal clients within or outside the jurisdiction of the part-time assistant district attorney?

### ANSWERS:

1. Pursuant to Rule 1.10, *Alabama Rules of Professional Conduct*, a partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.
2. A partner or associate of a part-time assistant district attorney may only represent criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by the part-time assistant district attorney.

# OPINIONS OF THE GENERAL COUNSEL Continued from page 217

## DISCUSSION:

The use of part-time municipal court judges and part-time assistant district attorneys is prevalent throughout Alabama, especially in more rural areas of the state. Often, the attorneys who serve in these roles are members of firms in which the firm's other members continue to represent criminal clients. Clearly, attorneys who serve as either a part-time municipal court judge or part-time assistant district attorney are ethically prohibited from representing criminal clients within the jurisdiction in which they serve. In the case of a part-time assistant district attorney, the attorney is also prohibited by statute from representing criminal clients anywhere in the state. The more difficult issue is how other members of the firm are affected by a law partner or associate's service as a part-time municipal court judge or part-time assistant district attorney.

Specifically, the issue before the Disciplinary Commission is whether the disqualification of the part-time judge or part-time assistant district attorney is imputed to the remaining members of the firm pursuant to Rule 1.10(a). Rule 1.10(a), of the *Alabama Rules of Professional Conduct*, provides as follows:

### RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

In RO-1999-03, the Disciplinary Commission held that law partners may represent criminal defendants in municipal court, even though a law partner may serve as a substitute municipal court judge, provided that the matters wherein the law partners represent clients are completely unrelated to those wherein the law partner presided as a substitute judge. In reaching that conclusion, the Disciplinary Commission determined that the conflict of interest that would prevent an attorney from representing a client in a court wherein that attorney serves as a judge is a personal rather than general disqualification. As such, the conflict of interest is not imputed to other members of the attorney's firm under Rule 1.10.

However, in determining that such disqualification was personal rather than general, the Disciplinary Commission

focused on the frequency of the law partner acting as a substitute municipal court judge. Specifically, the Disciplinary Commission noted that:

[T]he frequency of a lawyer as a part-time judge or administrative hearing officer would dictate whether that lawyer or his law partners could represent clients before those same agencies or boards.

The Commission would reference Rule 8.4 which concludes that it is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official. Pursuant to this provision, the Commission obviously considers the frequency of appearance as administrative law judge or hearing officer a primary factor in determining whether the law partners of such a hearing officer or substitute judge could represent clients before the same agency or tribunal.

Absent such frequency, the Commission is of the opinion that your infrequent service as substitute municipal court judge does not prohibit your remaining law partners from handling cases for clients appearing in this same court provided that you are in no way involved in or connected with said proceedings.

In the instant matter, a part-time judge serves on a regular and continuous basis as opposed to a rare or infrequent basis as previously considered in RO-1999-03. Therefore, the issue becomes whether regular and continuous service as a part-time judge by a law partner would constitute a mere personal disqualification or would create a general disqualification that would be subsequently imputed to other members of the part-time judge's law firm.

The Comment to Rule 1.10(a), *Ala. R. Prof. C.*, states in pertinent part that:

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Where an attorney only serves as a municipal court judge on a rare and infrequent basis, loyalty to the criminal client would not be a concern. Such would not be the case where an attorney serves as a judge on a regular basis. In the case at hand, as the part-time municipal court judge, an attorney would have a duty to uphold the laws and ordinances of that municipality. This duty would not be an infrequent one as discussed in RO-1999-03, but rather a continuous one. Such a duty would limit the attorney's ability to attack such laws and ordinances when representing a client in that court. Moreover, while representing a client, an attorney may be required to attack the credibility of a police officer's testimony one week, and be required the next week to consider that same officer's testimony in a separate matter as a non-biased jurist. Such conflicting roles and responsibilities create a conflict of interest for the attorney under Rule 1.7(b).

Rule 1.7(b), *Ala. R. Prof. C.*, provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

\* \* \* \* \*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Disciplinary Commission believes that an attorney serving as a part-time municipal court judge would be prevented from representing clients in that same court under Rule 1.7(b), *Ala. R. Prof. C.* Pursuant to Rule 1.10(a), *Ala. R. Prof. C.*, disqualification would be imputed to the judge's law partners and/or associates by virtue of the Rule 1.7 conflict of interest. As such, a partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.

Likewise, a partner or associate of a part-time assistant district attorney would similarly be precluded both ethically and by statute<sup>1</sup> from representing clients in any court in which the part-time assistant district attorney would have jurisdiction. *Alabama Code* §12-17-195 provides that, "Any assistant district attorney who acts as attorney for, represents or defends any defendant charged with a criminal offense of any kind or character in any court, state, municipal or federal, in this state, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$100.00 nor more than \$1,000.00." As such, a part-time district attorney is prohibited by statute from representing any criminal client in any court in the state. The issue then is whether the other members of the firm would also be precluded from representing criminal clients in other jurisdictions.

It appears to the Disciplinary Commission that the majority of states that have addressed this issue have determined that the disqualification is imputed to other members of the attorney's firm. The reasoning most often expressed is that a part-time assistant district attorney's client is the state and that any representation of a client adverse to the state by a part-time assistant district attorney would constitute a conflict of interest under Rule 1.7(a), *Ala. R. Prof. C.*, which provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

Because the part-time assistant district attorney has a conflict of interest pursuant to Rule 1.7(a), it is necessarily imputed to his law partners under Rule 1.10(a). While such logic is sound, the Disciplinary Commission believes that such an application of Rule 1.7(a) and Rule 1.10(a) is unnecessarily strict and would not serve the true purpose of rules 1.7(a) and 1.10(a), which is the preservation of client loyalty and confidences.

The State of Alabama is not a single individual but rather a large and complex entity comprised of many different

# OPINIONS OF THE GENERAL COUNSEL Continued from page 219

agencies and departments. In RO-89-115, the Disciplinary Commission previously held that a lawyer or law firm may represent an agency of state government in one matter, while simultaneously representing a client adverse to a different state agency in an unrelated matter. To treat the state as a single individual for the purpose of determining conflicts of interests, would be, in the opinion of the Disciplinary Commission, inappropriate and an overbroad application of Rule 1.10(a). In the instant matter, the duty of client loyalty and preservation of client confidences are not imperiled by the representation of the state by one member of the firm and the representation of a criminal client in an unrelated matter in a wholly separate jurisdiction by another member of the firm.


Additionally, the Annotation to the *Annotated Model Rules of Professional Conduct, 6<sup>th</sup> Edition*, notes that:

Amendments made to Model Rule 1.10 in 2000 eliminate the imputation of most "personal-interests" conflicts. Pursuant to these amendments, a disqualification attributable to the lawyer's own interests (rather than those of, for example, other

clients or former clients) will not be imputed absent a significant threat to the representation.

\* \* \* \*

According to Comment [3], this exception recognizes that conflicts should not be imputed "where neither questions of client loyalty nor protection of confidential information are presented . . ."

As such, the Disciplinary Commission finds that the disqualification of a part-time assistant district attorney from representing criminal clients is not imputed to that attorney's law partners as long as the partners are representing criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by that part-time assistant district attorney. [RO 2008-02] 

## Endnotes

1. *Alabama Code* §12-17-196 provides, "Any law partner or partners of any district attorney or assistant district attorney of this state who defend criminal cases of any character, kind or description in any court in this state in which said district attorney or assistant district attorney is the prosecuting officer shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500.00."



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



## Local Legislation

Each year the legislature is called upon to consider approximately 1,500 bills. The majority of the bills that pass will be local bills which generally apply to a particular place as one city or county as distinguished from general bills that apply to the state as a whole. In the 2008 regular session of the legislature, 205 bills passed (86 percent of those bills affected only one agency or local government). Because Alabama's constitution prohibits "home rule," local legislation cannot be passed by a county commission but must be state legislative act, in many instances by constitutional amendment. Because of this, the legislature spends much of its time dealing with issues that apply only to local matters.

The last several years the senate has been stalled over whether to consider gambling bills for facilities in Macon or Greene counties. The issue has been hotly debated over whether this was a "local" bill.

House Rule 39 provides that any bill dealing with pari-mutuel betting, gambling, etc. shall first be assigned to the appropriate local committees; then, upon approval, it will be assigned to the appropriate standing committee to be treated as any other local bill. Senate Rule 18 provides that all bills dealing with pari-mutuel betting or gambling or affecting an existing facility be assigned to the standing committee on "Tourism and Marketing."

# LEGISLATIVE WRAP-UP

Continued from page 221

Section 104 of the Alabama constitution states that the legislature shall not pass a special, private or local law on any of 31 various categories and prohibitions in §105 of the constitution. Local legislation is otherwise fair game.

The Alabama Supreme Court decision in the case of *Peddycoart v. City of Birmingham*, 354 So. 2d 808 (Ala. 1978) radically changed the way previous legislatures had passed local laws. Prior to *Peddycoart*, Alabama lawmakers enacted most local laws by a method termed “legislation by census.” Legislators avoided restrictions on local legislation contained in the 1901 Constitution which required in Article IV, Section 106 that all local bills be advertised for four consecutive weeks in a county-wide newspaper by utilizing census figures as a means of classifying an act. This permitted the legislature to bypass the constitutional requirements for local bills and directly handle detailed arrangements pertaining to local matters. A bill would be described as affecting all counties with population parameters 32,000 and 32,500 according to the prior census. As a result, such an act was considered a general act of local application for purposes of the constitution because the census population designations to which the act was attached were viewed as being prospective in operation and, thus, other localities could conceivably come within the provisions of the act reaching the specified population range.

On January 13, 1978, when the Alabama Supreme Court announced its *Peddycoart* decision, the legislature hurriedly proposed a constitutional amendment to validate all population-based acts prior to January 13, 1978 and established eight classes of municipalities. The categories are set forth in *Ala. Code* § 11-40-12 and based on the 1970 census. This legislation by categories has been upheld as constitutional. Now acts affecting cities in a class may be enacted as any other general law.

**Class 1:** All cities with a population of 300,000 inhabitants or more (Birmingham);

**Class 2:** All cities with a population of not less than 175,000 and not more than 299,999 inhabitants (Mobile);

**Class 3:** All cities with a population of not less than 100,000 and not more than 174,999 inhabitants (Huntsville and Montgomery);

**Class 4:** All cities with a population of not less than 50,000 and not more than 99,999 inhabitants (Gadsden and Tuscaloosa);

**Class 5:** All cities with a population of not less than 25,000 and not more than 49,999 inhabitants;

**Class 6:** All cities with a population of not less than 12,000 and not more than 24,999 inhabitants;

**Class 7:** All cities with a population of not less than 6,000 and not more than 11,999 inhabitants; and

**Class 8:** All cities and towns with a population of 5,999 inhabitants or less.

Historically, more local legislation has been enacted because consideration and passage of local legislation require comparatively less time and energy than other types of legislation. This is because members of the legislature observe the unwritten rule of legislative courtesy that implicitly binds legislators to support local legislation affecting a locality not within their own districts so long as it has the blessings and support of the member or members from the district which includes the affected locality. Prior to *Peddycoart*, legislative courtesy applied to general bills of local application as well as to specific local bills. Once a quorum of the legislative body is established the votes needed for passage is a majority of the votes cast. See

*Birmingham-Jefferson Civic Ctr. v. Birmingham*, 912 So.2d 204 (2005). (21 aye, 4 nay, 55 abstained).

Ordinarily, local legislation is passed in a perfunctory fashion without the time-consuming formalities of extended discussion or floor debate. The rules of the senate (Senate Rule 1) and the house (House Rule 6) both provide that uncontested local bills will be the first bills to be considered after introduction of bills, committee reports and resolutions. Before any legislation reaches the floor of either house, however, a legislation "bottleneck" develops as bills are reported out of committee and placed on the regular order calendar. The regular order calendar usually becomes so congested that few bills of statewide concern reach the floor until the Rules Committee of each house establishes a special order calendar as a means of enabling the more important bills to receive first consideration. Indeed, as the end of the legislative session draws to a close, the procedural device of unanimous consent allows non-controversial bills to be considered for legislative action out of the order in which they were placed on the regular order calendar. More often than not, local bills constitute the bulk of non-controversial bills which successfully work their way through this labyrinth of procedural devices to become enactments. The time-consuming part of local legislation is the advertising since bills must follow the strict requirements of the Alabama constitution.

Section 106 of the Alabama constitution requires that legislation proposed for enactment at a special session be advertised prior to that special session. The entire proposed bill may be advertised or the substance of the proposed act is published. No special, private or local bill shall be passed on any subject...unless the notice of the intention to apply shall have been published without cost to the state in a county or counties where the matter or thing to be affected

may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some paper published in the county or counties and that proof of the publication notice has been given must be certified by the clerk of the house or secretary of the senate that the notice and proof attached to the local legislation has been filed.

Historically, local laws have not been published in the *Code of Alabama*, which contained the "general and permanent laws" of the state. The *Code* commissioner, Jerry Bassett, in 2005 began systematically including local laws in Volume 45 of the *Code* beginning alphabetically with the counties. A copy of the "Local Laws" index is currently available from the Legislative Reference Service in Montgomery.

As this article went to press the legislature was one-third into the session, with 237 bills having passed the house of origin but only seven having been enacted, and none with statewide impact.

The budget shortages have predominated the session. The next *Alabama Lawyer* article will be devoted to a summary of the general bills.

## Annual Alabama Law Institute Meeting

The annual Law Institute meeting will be held Friday, July 17, 2009 in conjunction with the Alabama State Bar Annual Meeting in Point Clear.





# ALABAMA LAW INSTITUTE

## 40 Years of Service

By David R. Boyd



Bedford



Black



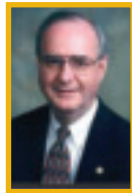
Campbell



Guin



Irons



Mitchell



Newton



Smitherman



Ward

This year marks the 40<sup>th</sup> anniversary of the commencement of operations of the Alabama Law Institute, a low-key but extraordinarily important and influential organization that has played an indispensable role in the drafting and adoption of numerous pieces of major Alabama legislation over the past four decades. Largely fueled by the pro bono efforts of thousands of Alabama lawyer-volunteers, the Law Institute has carved itself a place of distinction, earning gratitude and winning acclaim for its contributions to the legislative process.

The Alabama Law Institute was created by statute in 1967 as “an official law revision and law reform agency of the State of Alabama.” Not being funded immediately, however, the Law Institute did not actually begin operations until 1969. As the Institute’s first director, L. Vastine Stabler, Jr. wrote in July 1, 1969 letters welcoming the fledgling organization’s first members, “the Alabama Law Institute . . . was designed to engage in significant long-range improvement of the laws of our state.” Attorney-legislators Hugh Merrill of

Anniston and Howell Heflin of Tusculum were the initial executive officers of the institute, and the first annual meeting of the membership was held at the Town House Motor Hotel in Mobile on July 17, 1969, immediately before the ASB’s Annual Meeting.

Modeled generally on the Louisiana State Law Institute that had been founded in 1938, the Law Institute developed gradually in its first few years before maturing into its present form as the legislature’s permanent law improvement and law reform agency. Demopolis lawyer Rick Manley, a former and multi-term legislator elected first in 1966, recalls the institute’s creation and early contributions. “The legislature didn’t have anything like this at the time. In its early years, the Law Institute filled a great need by helping legislators in many ways. Once the Institute got on its feet, everyone wanted help with research and drafting. That’s a role filled now by the Legislative Reference Service, but the Law Institute was very well received and made a big contribution even in its first years.”

As it has evolved over the years, the Law Institute’s mission is to assist the

legislature through the clarification, simplification and modernization of existing statutory law, and by suggesting new laws, not only to fill gaps in the *Alabama Code* but also to keep Alabama generally in step with trends and developments nationally, including model acts and uniform laws. Law Institute projects may be identified or suggested by the legislature, others in state government, the state bar, judges, the general public, or by the institute itself. In addition to its important work on legislation, the Law Institute provides training workshops, handbooks and other publications for various public officials. It also supplies legislative analysts and interns to assist committees and individual legislators, and makes its resources available on an *ad hoc* basis to help with legislative projects in addition to those on the institute’s own formal agenda.

The Law Institute is housed in the Law Center Building on the University of Alabama campus, where it has access not only to state-of-the-art research facilities, but also to a faculty of legal experts in various fields of law. Although the Law

Institute's staff has a regular presence in Montgomery, particularly during sessions of the legislature, maintaining its headquarters away from the capital city provides important insulation from political influence and bolsters the institute's well-deserved reputation for non-partisanship.

Law Institute projects are often extensive revisions of the law that result from several years of study and concentrated work. Indeed, during its 40 years of assisting the legislature, the Law Institute has played a key role in the drafting and passage of approximately 100 pieces of major legislation, including everything from the *Criminal Code* in 1978, the institute's first major project to pass the legislature, to the much-needed Landlord-Tenant Act and the new *Elections Code* in recent sessions. At the beginning of the 2009 legislative session, several new proposals, including the massive *Business and Nonprofit Entities Code* and the Revised Uniform Limited Partnership Act, were introduced and enthusiastically embraced. Numerous other important law revisions are currently under study and likely destined for eventual adoption, since the legislature has never failed to enact a major Law Institute bill once presented. Not all projects are completed quickly, however. Indeed, work began in 1999 on the *Business Entities Code* that was finally introduced in the 2009 legislative session.

The Law Institute also contributes to the legislative process by providing staff support to a legislature that has little, if any, of its own. The Law Institute supplies lawyer support for many legislative committees and for the Democrat, Republican and Black caucuses. These talented lawyers, made available to the legislature at a small fraction of the cost of full-time legal staff, analyze all bills on a committee's agenda, prepare reports, attend committee meetings for discussion of the legislation and draft requested amendments. For the past 30 years, the institute has also directed the legislative intern program, through which students provide much-needed adjunct services for the legislature while enjoying the opportunity to observe and participate in the legislative process.

The Law Institute's membership is broad, consisting of lawyers, state and federal judges, law faculty from the Cumberland and University of Alabama

law schools, and lawyer members of the legislature. The institute is governed, however, by the smaller Institute Council, composed of six practicing lawyers from each congressional district as well as representatives from the appellate courts, the attorney general's office, the state bar, the law schools, the legislature, and the governor's office. Since January 1975, the Law Institute has been directed by Bob McCurley, himself an Alabama lawyer, who was joined in 1978 by Associate Director Penny Davis, likewise a member of our bar. McCurley has served as director for 33 of the Law Institute's 40 years, and is justifiably credited with having developed it into a well-oiled machine that is widely respected by legislators and other government officials.

Although a number of states have organization of similar nature and purpose, the Alabama Law Institute's model is perhaps unique. Operating with only a very small paid staff, the Law Institute is basically a volunteer-based agency. It draws its resources for drafting legislation principally from Alabama's lawyers, law professors and judges. Once a topic is identified, the institute selects a chief draftsman, or reporter, who is usually a law professor who receives a small stipend. Subject matter experts in the field under revision, mainly lawyers but on occasion legislators as well, are asked to serve on an advisory committee to prepare the proposed revision. These committee members contribute significant time, effort and expertise, pro bono, supported extensively by student law clerks supplied by the institute. Alabama legal professionals have devoted incalculable volunteer hours to researching, debating, drafting and refining dozens of important code revisions and other statutes over the past 40 years. With approximately 250 lawyers involved in various Law Institute projects in any given year, it is no exaggeration to say that several thousand Alabama lawyers have participated in Law Institute work during these four decades—all without compensation and strictly for the public good. It is estimated that on average over \$1,000,000 of donated lawyer time is contributed annually. Law Institute Director Bob McCurley proudly observes that, "Alabama lawyers volunteer more time to making the laws of their state than do lawyers in any other state."

Although the Law Institute receives a line-item appropriation from the legislature, the organization operates on a tidy budget. Four-term former legislator and former Speaker Pro Tem Jim Campbell, now a full-time Anniston lawyer, served for a number of years as president of the Law Institute. Campbell observes that, "The most remarkable thing the Law Institute has done is engage the private bar to do the bulk of the work. The legislature is getting a huge return for the small amount of money it appropriates to the Law Institute, whose budget is minuscule compared to the budgets of similar organizations in other states. And the Law Institute's product is just terrific."

The Alabama Law Institute model is not only very economical, but also widely envied—even to the point of virtual disbelief that it could possibly work at all, much less so well. Other states apparently have difficulty comprehending McCurley's explanation to them that "the smartest and brightest lawyers in Alabama are doing this stuff for nothing." House of Representatives member Cam Ward, an Alabaster lawyer, serves as one of Alabama's commissioners on the National Conference of Commissioners on Uniform State Laws. He reports frequently being asked by his other-state colleagues about the reasons for Alabama's success in passing major legislation, noting that they seem "in awe" of the institute's success. Representative Ward proudly answers by explaining that the Law Institute serves as the essential bridge between the legislature and the practicing bar, thus allowing an organized combination of efforts and talent not seen elsewhere. That collaboration, he explains, coupled with the meticulous work and the advance, pre-session planning and preparation by the Law Institute, has led to Alabama's coveted success, separating it from most other states.

The credibility earned and enjoyed by the Law Institute over its 40 years is often mentioned by legislators. House Majority Leader Ken Guin, a Carbon Hill lawyer, reports that Law Institute bills are viewed differently from most other legislation. "A lot of legislation is suspect on its face," he explains, "but Law Institute bills enjoy a high level of respect. Members know they can trust and rely on Law Institute legislation as

being thoroughly researched, well-written and fair.” Veteran Senator Roger Bedford, who practices law in Russellville, agrees that Law Institute-proposed legislation enjoys a special status. Legislators are inherently suspicious of legislation, particularly a bill of any length, and often they don’t fully understand it, Senator Bedford explains. “It’s hard to describe the validity that the Law Institute brings to a bill,” says Bedford, who has sponsored several pieces of the organization’s legislation. “Regardless of a bill’s length or complexity, if you say it’s a Law Institute bill, legislators get on board with it.”

Tusculumbia attorney Marcel Black has served in the house of representatives for some 18 years, many of those as chairman of the important Judiciary Committee. A frequent sponsor of institute-developed legislation, Representative Black has no reluctance to extol the organization’s worth and contributions. “When you can say it’s a Law Institute bill, all the members see it as having a stamp of approval unlike any other bill we see,” Black explains. “That credibility carries from start to finish without question.” Seven-term Senator Wendell Mitchell of Luverne, where he has practiced law for many years, offers an equally strong testimonial. “The Law Institute takes on issues that are of great importance to the public, to the legal profession and to business and presents answers in a way that legislators can appreciate and understand,” Mitchell explains. He describes the institute as being “indispensable to the process of reform and updating of Alabama’s laws, especially with much-needed uniform laws such as the *Probate Code* where there are real, practical problems to be addressed.” In contrast to his experiences with some other proponents of legislation, Mitchell says, there is never a concern about the institute “skirting issues, hiding the ball or telling half-truths.”

Equally important to the Law Institute’s sterling reputation, Democrat Ken Guin reports, is the universal perception that institute legislation is written from a non-partisan viewpoint. In illustration, he recalls the massive and comprehensive 2006 *Election Code* revision bill, the subject matter of which might inherently raise political eyebrows. It would have

been perfectly natural, Representative Guin recalls, for his Republican house colleagues to have been suspect of a new *Elections Code* sponsored by a leader of the opposition party. To his relief, however, both sides found that they could support the bill as drafted by the Law Institute, and it passed unanimously. Democrat Senator Bedford, who currently serves as vice president of the Law Institute, expresses this same sentiment, recalling instances where Republican senate colleagues dropped initial opposition to Bedford-sponsored legislation upon realizing that it had the imprimatur of the Law Institute. Senator Wendell Mitchell agrees with fellow lawyers Guin and Bedford, noting that the Law Institute’s non-partisan nature makes it particularly valuable to and credible in the legislative process. “If both the trial lawyers and the Business Council are promoting changes, for example, it’s great to have a neutral entity like the Law Institute on which to rely.”

Senator Rodger Smitherman, a Birmingham lawyer currently serving as senate president pro tem, describes the Law Institute as “non-partisan and highly competent.” Relating an experience that demonstrates the institute’s contribution to the legislative process beyond its traditional role of developing major code revisions, Smitherman points to the Homeland Security bill passed by the legislature in 2003. Many legislators had invasion-of-privacy concerns about the original legislation, Smitherman explains, and thus asked the Law Institute to review the bill, believing that legislators would receive a thorough and unbiased evaluation. The resulting Law Institute report recommended certain amendments to address legislators’ misgivings, and the revised bill passed shortly thereafter, making Alabama the first state to pass a Homeland Security law.

Representative Marcel Black echoes Senator Smitherman’s statements. “The Law Institute does a lot of work unrelated to its own bills that is very important and goes largely unnoticed,” Black says, giving as an example research to identify provisions of the *Code of Alabama* that need to be amended to include an index for cost-of-living adjustments. “They do lots of stuff that’s not in the spotlight,” explains Black.

Current Law Institute President and Speaker Pro Tem Demetrius Newton of Birmingham, where he has practiced law for some 57 years, describes the institute as “indispensable” to the legislature, remarking proudly on the “thousands of hours devoted pro bono by outstanding Alabama lawyers.” “But there is one thing that really sticks out to me,” Representative Newton relates. “But for the Law Institute, our legislative committees would be without any qualified staff assistance, which is where we were until the Law Institute began providing attorney-analysts some years ago.” Newton’s predecessor as institute president, former legislator Jim Campbell, believes that the Law Institute’s program for providing lawyer-analysts to assist legislative committees has done much to “solidify the reputation of the Law Institute among legislators.”

Senator Rodger Smitherman also praises the work of these Law Institute-provided analysts and interns who support the work of the legislature and its committees. The analysts, all of whom are lawyers, come to their work as knowledgeable non-partisans, Smitherman explains, and consequently legislators have come to have great confidence in their analysis and interpretation of proposed legislation. The legislative intern program has been under the Law Institute’s direction for the last 30 years, with approximately 13 interns—some assigned to the house generally and some to offices of individual house and senate leaders—participating in each session. Legislative interns, who assist with constituent services and provide various other needed services not involving legal research or analysis of bills, express excitement at the opportunity to be a part of the lawmaking process. “This is a tremendous opportunity to see the legislative process up close,” says Larry McCree, a Miles College student whose observations are typical of his intern colleagues, “especially the committee process, because the real decisions are often made in committee.” Other interns speak of the value of organized sessions with the state’s constitutional officers, another aspect of the program, and of watching the dynamics of legislators from opposite parties trying to enlist the support of one another for their favored legislation.

New legislators are quickly exposed to the work and reputation of the Law Institute. Florence lawyer Tammy Irons, now serving her first full term in the house, recognized almost immediately that Law Institute bills have “instant credibility and respect.” In the early days not every legislator had such immediate and unbridled appreciation for the work of the Law Institute, although most were strong supporters. The story is told of a veteran Jefferson County legislator, long-since departed from that position, who simply could not see the value in the major code revisions and other legislation advocated by the Law Institute. The grizzled lawmaker was not just dismissive of the institute’s efforts, but apparently determined to cause as much grief as possible for the organization. A tactful and well-received inquiry was made to the speaker—an institute supporter—about whether something might be done to change the adversarial legislator’s mind. No details are available, but the adversary quickly became one of the Law Institute’s most ardent legislator supporters and remained so until his retirement.

Many knowledgeable observers believe that the Law Institute fills a void resulting from the significant decrease in recent decades of the number of lawyer-legislators. In the not-too-distant past, lawyers populated—some would say dominated—both legislative houses in large numbers, but currently there are only 11 lawyers in the 35-member senate, and only the same number in the 105-person house of representatives. In earlier years, with many more lawyers serving, the legislative process enjoyed the input of trained and experienced lawyers as a matter of course, but that is now a thing of the past. The Law Institute helps fill this void by enlisting the volunteer input and services of lawyers across the state in researching and drafting legislative initiatives. As veteran lawyer-legislator Roger Bedford says, “With so few lawyers serving in the legislature, the work of the Alabama Law Institute is absolutely invaluable.”

Perhaps the biggest challenge ever for the Law Institute—although arguably one of the most important and ultimately most satisfying projects—was the Landlord-Tenant Act. Alabama was one

of only two states not to have adopted some version of this uniform law, with opponents having kept it sidelined for years. The breakthrough came in 2006 when the legislature requested the institute to become involved. Working in the midst of a fierce legislative battle waged by tenants’ rights groups on one side and landlords on the other, McCurley and attorney Greg Masood of Montgomery managed intense negotiations that resulted in passage of the bill. A model of compromise, this legislation established a much-needed balance of power, protecting for the first time the rights of the often-poor and largely unrepresented tenants, while fairly acknowledging the legitimate business interests of the property owners. That same 2006 legislative session demonstrated the even-handed nature of the institute’s work, moreover, with passage of a *Trust Code* favored by the more affluent and a complete reorganization of the *Alabama Elections Code*, which benefited everyone.

Representative Marcel Black speaks for many in praising the work of Law Institute Director McCurley and his associate director of many years, Penny Davis. “Bob is just amazing,” Black relates. “I don’t see how he and Penny do it, running from place to place, negotiating very antagonistic situations, and staying on top of everything.” Describing McCurley as a very able negotiator and master of the art of compromise, Black also compliments Davis’s ability to “pick out important little things in proposed legislation that most others would miss.”

Representative Black relates with a grin that McCurley prides himself on being able to reduce even the most complex and voluminous piece of legislation to a very brief summary for purposes of legislative presentation. “A one-pager is the norm even for a 400-page bill,” Black says, “but we agreed that, for the 815-page *Business and Nonprofit Entities Code* that we have in this session, he could use front and back.”

By the early 1990s, at about the time of the institute’s 25<sup>th</sup> anniversary, much had been accomplished by the Law Institute. The organization was stable and mature. The legislature had passed the *Criminal Code*, *Probate Code*, *Banking Code*, *Rules of the Road*, *Administrative Procedures Act*, and some 40 other major

revisions—all Law Institute projects. Director Bob McCurley and Associate Director Penny Davis recall commenting to each other at the time that the institute might have become a victim of its own success and that they might have worked themselves out of a job. Little reason was there for concern, however, for 50 additional revisions later the 2009 legislative session is chock-full of Law Institute legislation (seven bills), with 10 additional revisions under study by various advisory committees and waiting their turn in the legislature, where they will surely be well-received and promptly enacted.

\* \* \*

A more detailed history of the Alabama Law Institute can be found in the September 1992 edition of *The Alabama Lawyer*, an article written on the occasion of the Institute’s 25<sup>th</sup> anniversary, pages 304-05. Each edition of the *Alabama Lawyer* includes an article entitled “Legislative Update.” The Institute’s Web site, [www.ali.state.al.us](http://www.ali.state.al.us), contains extensive additional information, including the annual *Report to the Alabama Legislature and Institute Membership*. The report includes a comprehensive list of enacted legislation and completed projects as well as a description of projects to be presented in the current legislative session and those under study and planned for future presentation. The institute’s procedure for considering and proposing new projects is also set out in detail. Also listed are Law Institute publications and conferences offered to assist various public officials in the performance of their duties. ▲▼▲



*David R. Boyd is a partner in the firm of Balch & Bingham LLP. A 1976 graduate of the University of Alabama School of Law, he has practiced in Alabama for his entire career, during*

*which he has participated in a number of legal matters involving the Alabama legislature. He is currently a member of the Council of the Alabama Law Institute and serves on its Executive Committee.*



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## Notices

- **Coker Bart Cleveland**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2009, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 07-196(A) by the Disciplinary Board of the Alabama State Bar.
- **Pamela Whitworth Davis**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2009, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 08-09(A) and 08-117(A) by the Disciplinary Board of the Alabama State Bar.
- **Stephen Duane Fowler**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 15, 2009, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 04-04(A), 05-11(A), 05-173(A), 05-269(A), and 06-17(A) by the Disciplinary Board of the Alabama State Bar.
- **Stephen Willis Guthrie**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2009, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 03-235(A), 07-195(A), 08-10(A) and 08-76(A) by the Disciplinary Board of the Alabama State Bar.

NOTICES

REINSTATEMENT

TRANSFER TO DISABILITY  
INACTIVE STATUS

SURRENDER OF LICENSE

DISBARMENTS

SUSPENSIONS

PUBLIC REPRIMANDS

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# DISCIPLINARY NOTICES

Continued from page 229

## Reinstatement

- The Supreme Court of Alabama entered an order reinstating **James Stephen Oster** to the practice of law in Alabama, effective December 2, 2008. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. Oster had been on suspended status since December 1, 1991. [Pet. No. 07-06]

## Transfer to Disability Inactive Status

- The Supreme Court of Alabama entered an order adopting the order by the Disciplinary Board, Panel I, of the Alabama State Bar transferring Adamsville attorney **Angela Clay Weir** to disability inactive status effective November 20, 2008, pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*. [Rule 27(c), Pet. No. 08-43]

## Surrender of License

- On January 13, 2009, the Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Commission, accepting Hoover attorney **Brett Scott Sheedy's** surrender of his license to practice law in Alabama, effective December 5, 2008. Sheedy agreed to surrender his license due to his conviction in the Circuit Court of Shelby County, Alabama for possession of a controlled substance. [Rule 22(a), Pet. No. 08-32; ASB No. 07-188(A)]

## Disbarments

- Grove Hill attorney **Stuart Craig DuBose** was disbarred from the practice of law in Alabama, effective September 12, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting DuBose's consent to disbarment. In or around May 2008, DuBose was convicted in the United States District Court for the Southern District of Alabama for falsifying a government form and for possessing firearms while under a restraining order. DuBose was also removed from the bench by the Court of Judiciary after it was determined

that he had violated several canons of judicial ethics. At the time of his consent to disbarment DuBose also had four pending investigations with the Alabama State Bar. [Rule 23(a), Pet. No. 09-05; Rule 20(a), Pet. No. 08-59; ASB nos. 5-137(A), 08-150(A), 08-197(A) and 08-198(A)]

- Andalusia attorney **Sherrie Narelle Reid Phillips** was disbarred from the practice of law in Alabama, effective October 27, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Phillips's consent to disbarment. Phillips was convicted October 29, 2008 in the Circuit Court of Covington County of theft by deception and using her office for personal gain while a probate court judge. [Rule 23(a), Pet. No. 08-68]
- Birmingham attorney **Pamela Vera Senft** was disbarred from the practice of law in Alabama, effective December 31, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Senft's consent to disbarment. Senft admitted to mishandling real estate loan-closing and lender funds held in her trust account. [Rule 23(a), Pet. No. 09-04; ASB nos. 09-03(A) and 09-04(A)]
- Jasper attorney **Gary Thomas Ward, Jr.** was disbarred from the practice of law in Alabama, effective January 16, 2009, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Ward's surrender of his license and consent to disbarment. [Rule 23, Pet. No. 09-02 *et al*]

## Suspensions

- Saraland attorney **George Wayne Arnold** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective February 2, 2009. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Arnold's conditional guilty plea and consent to revocation of probation wherein Arnold admitted that he was in violation of the terms of his probation. In November and December 2008, two separate grievances were filed against Arnold. In ASB

No. 08-218(A), Arnold failed to appear in court on behalf of a client on at least four occasions and failed to make contact with the court regarding a reason for his non-appearance. In ASB No. 08-248(A), Arnold failed to perform any work and failed to keep in communication with his client after receiving payment from the client. Arnold admitted that he violated rules 1.3, 1.4(a), 1.4(b) and 8.4(a), *Ala. R. Prof. C.*, thereby violating the terms of his probation imposed in ASB nos. 08-15(A) and 08-35(A). [ASB nos. 08-15(A), 08-35(A), 08-218(A) and 08-248(A)]

- Dothan attorney **Randy Carroll Brackin** was interimly suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 10, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Brackin had been arrested February 5, 2009 and held without bond on 11 felony counts. [Rule 20(a), Pet. No. 09-1114]
- Effective December 10, 2008, attorney **Pamela Whitworth Davis** of Athens, Alabama has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-01]
- Alabama attorney **Kevin Lee Featherston**, who is also licensed in Tennessee, was suspended from the practice of law in Alabama for 90 days, effective October 30, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order, as reciprocal discipline, pursuant to Rule 25, *Alabama Rules of Disciplinary Procedure*. The supreme court's order was based upon the October 21, 2008 order of the Supreme Court of Tennessee, suspending Featherston for 90 days for violations of rules 1.15, 8.4(b) and 8.4(c), *Tennessee Rules of Professional Conduct*. Featherston breached his fiduciary duty to his law firm by failing to report to his fellow law firm shareholders income and expenditures he received through a jointly owned title company. Featherston also made a number of unauthorized withdrawals from the title company for personal expenses and purchases. [Rule 25, Pet. No. 08-66]
- Birmingham attorney **Richard Leslie Jones** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of

the Alabama State Bar dated October 31, 2008. The Disciplinary Commission found that Jones's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 07-61]

- Enterprise attorney **John Lacey McClung** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 16, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that McClung had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 09-01]
- Effective December 10, 2008, attorney **Valerie Rana Meredith** of Brentwood, Tennessee has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-04]
- Birmingham attorney **Christopher Patrick Moseley** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 17, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Moseley's conduct is causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(a), Pet. No. 09-1152]
- Decatur attorney **Joseph Benjamin Powell** was interimly suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 30, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Powell was neglecting his clients and their files and, further, that Powell was mismanaging trust funds. [Rule 20(a), Pet. No. 09-1056]
- Effective December 10, 2008, attorney **Brett Scott Sheedy** of Hoover has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-05]

# DISCIPLINARY NOTICES

Continued from page 231

- Effective December 10, 2008, attorney **Amy Leigh Thompson Thomas** of Pelham has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-09]
- Effective December 10, 2008, attorney **Angela Clay Weir** of Adamsville, Alabama has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-10]
- Effective December 10, 2008, attorney **Linda Sue Wellman** of Montgomery has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-11]
- Effective December 10, 2008, attorney **Tillery Delquon Wilhite** of Toney, Alabama has been suspended from the practice of law in Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-12]
- Birmingham attorney **Leotis Williams** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 45 days, effective February 24, 2009. Williams was also placed on two years' probation. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Williams's conditional guilty plea wherein Williams pled guilty to violating rules 1.15(a) and 8.4(a), *Alabama Rules of Professional Conduct*. Williams admitted that he improperly used a debit card linked to his IOLTA trust account to make several personal purchases. [ASB No. 08-212(A)]

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## Public Reprimands

- On December 5, 2008, Gadsden attorney **John Edward Cunningham** received a public reprimand with general publication for violations of rules 1.3, 1.4(a) and 8.1(b), *Alabama Rules of Professional Conduct*. In or about December 2005, the complainant and her father retained Cunningham to file a lawsuit against a municipality, and paid him a \$1,000 attorney's fee. Although Cunningham informed the complainant that the lawsuit was being prepared and would be filed soon, it was not filed by the time the complainant terminated Cunningham's services in February 2006. Cunningham responded to the Office of General Counsel's request for information regarding the complaint only after he received a certified letter from the Office of General Counsel informing him that his failure to respond would subject him to a summary suspension of his law license. In this matter, Cunningham failed to diligently pursue the lawsuit, failed to keep his clients informed of the status of the matter and failed or refused to respond to the bar's request for information regarding a disciplinary matter. Cunningham's prior disciplinary history was also considered in this determination. [ASB No. 06-68(A)]
- Enterprise attorney **John Richard Hollingsworth** received a public reprimand with general publication on

February 6, 2009 for violating Rule 8.4(g), *Alabama Rules of Professional Conduct*. Hollingsworth's sister owned property deeded to her by their late father. Twenty acres of the property were leased to an individual for farming purposes. Without Hollingsworth's sister's knowledge or authorization, Hollingsworth accepted the lease payment on behalf of his sister and did not promptly remit the money to her or deposit it into the estate account. [ASB No. 06-101(A)]

- Birmingham attorney **Marilyn Hollis Maddox** received a public reprimand without general publication on February 6, 2009 for violations of rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct*. Maddox was retained to represent a client in an action to collect child support. She failed to file a proposed final order as directed by the court, failed to respond to an order dismissing the case and failed to notify the client about the dismissal. [ASB No. 07-240(A)]
- Mobile attorney **Vader Al Pennington** received a public reprimand without general publication on December 5, 2008 for violations of rules 1.4, 1.5 and 8.1, *Alabama Rules of Professional Conduct*. Pennington was retained by an individual to represent his mother in a bond-reduction proceeding. The client's son initially paid Pennington \$1,000 plus \$300 for representation in district court. Although Pennington filed a motion to reduce the bond in district court, it was not ruled on before the case was waived to

the grand jury. When the client was indicted, Pennington was paid an additional \$10,000. Thereafter, the client's son filed a grievance alleging that Pennington misrepresented facts to them, failed to reasonably communicate with his mother and charged a clearly excessive fee. During the investigation, Pennington told the investigator with the Mobile Bar Association that he was going to meet with the client and refund the unearned portion of the retainer, but did not do so. [ASB No. 08-64(A)]

- Jasper attorney **Mark Bishop Turner** received a public reprimand without general publication on February 6, 2009 for violations of rules 1.4(a), 1.15(a), 1.15(b) and 1.16(d), *Alabama Rules of Professional Conduct*. This discipline was the result of a negotiated plea agreement, which initially imposed a 91-day suspension that was deferred pending a two-year period of probation. Turner successfully complied with the terms of his probation, which resulted in an abatement of the suspension and imposition of this reprimand.

In ASB No. 05-125(A), Turner was paid a \$2,500 retainer to obtain a deed to his clients' house. Turner failed to respond to his clients' reasonable requests for information and was terminated. Turner failed to promptly return their file and, although he eventually refunded the unearned portion of the fee, Turner admitted that he did not do so promptly, violations of rules 1.4(a) and 1.16(d), *Ala. R. Prof. C.*

In ASB No. 05-302(A), Turner was retained to represent a client in a divorce case. The client's ex-husband was



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# DISCIPLINARY NOTICES

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ordered to reimburse Turner's client for attorney's fees. Although the ex-husband paid the fees, Turner did not promptly remit them to his client. Further, Turner admitted that he failed to maintain a trust account, failed to promptly notify the client upon receipt of the funds and failed to promptly account to the client for those funds, violations of rules 1.15(a) and (b), *Ala. R. Prof. C.* [ASB nos. 05-125(A) and 05-302(A)]

- Mobile attorney **John Charles Wilson** received a public reprimand without general publication on December 5, 2008 for violating Rule 1.4(b), *Alabama Rules of Professional Conduct*. Wilson was retained to represent a client who had previously represented himself *pro se* in an employment related civil action. The client paid a \$5,000 retainer and agreed to pay Wilson an additional 20 percent of any recovery. Although it was a written

fee agreement, the client did not understand the hybrid nature of the hourly-fee/contingency-fee agreement.

During the course of Wilson's four-year representation of the client, the client had difficulty in communicating with Wilson concerning the status of the matter. Further, Wilson did not explain matters that would allow the client to make informed decisions regarding the representation. [ASB No. 07-94(A)]

- Phenix City attorney **Thomas Floyd Worthy** received a public reprimand without general publication on December 5, 2008 for violating Rule 1.8(c), *Alabama Rules of Professional Conduct*. In February 2006, Worthy prepared a will for his neighbor that bequeathed her home and the care of her poodle to Worthy. Worthy was not related to the testator by blood or marriage. [ASB No. 07-71(A)]



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## About Members

**James K. Brabston** announces the opening of **The Brabston Law Firm LLC** at 605 Madison St., S.E., Huntsville 35801. Phone (256) 534-3188.

**Shannon Floyd** announces the opening of **Shannon Floyd Legal PC** at 6236 Cahaba Valley Rd., Birmingham 35242. Phone (205) 948-3976.

**John P. Graves** announces the opening of **Law Offices of John P. Graves LLC** at 205 20th St., N., Ste. 210, Birmingham 35203. Phone (205) 588-0979.

**Edward McF. Johnson** announces the opening of **Edward McF. Johnson LLC** at 205 N. 20th St., Ste. 500, Birmingham 35203. Phone (205) 328-2274.

**Steven F. Long** announces the opening of **Steven F. Long PC** at the Frank Nelson Building, 205 20th St. N., Ste. 521, Birmingham 35203. Phone (205) 323-8444.

**Michael D. Mitchell** announces the opening of **The Mitchell Law Firm, LLC** at 4000 Eagle Point Corporate Dr., Birmingham 35242. Phone (205) 942-0249.

**Randy Quarles** announces the opening of **Quarles Law Firm LLC** at 313 20<sup>th</sup> St., N., Ste. 205, Birmingham 35203. Phone (205) 583-4737.

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## ABOUT MEMBERS, AMONG FIRMS Continued from page 235

### Among Firms

Governor Bob Riley appointed **Angela Dawson Terry** district judge for the **36th Judicial Circuit (Lawrence County)**, with offices in the Lawrence County Courthouse, 14330 Court St., Ste. 307, Moulton 35650.

**Bishop, Colvin, Johnson & Kent LLC** announces that **Claire Hyndman Puckett** has become a member.

**Bradley Arant Boulton Cummings LLP**, the result of a merger between Bradley Arant Rose & White LLP and Boulton, Cummings, Conners & Berry PLC, announces that **Rhonda Caviedes, Jack Robinson Dodson III, Christian W. Hancock, Jonathan Head, Daniel Kaufmann, Thomas Atkinson Roberts, Jr., Angela Raines Rogers**, and **Jason A. Walters** have been named partners.

**Cauthen & Gentry LLC** has been dissolved. Mr. Cauthen and Mr. Gentry will continue to have offices at 601 Greensboro Ave., Alston Place, Ste. 1-A, Tuscaloosa 35401. Phone (205) 349-4101 (Frank M. Cauthen, Jr.) and (205) 349-4147 (James E. Gentry).

**Christian & Small LLP** announces that **William R. Pringle** has become a partner.

**Cockrell & Cockrell** announces that **Leigh Maples Snodsmith** has joined as an associate.

**Douglas A. Dellaccio, Jr.** has been named shareholder at **Cory Watson Crowder & DeGaris**.

**Daniell, Upton, Perry & Morris PC** announces that **William D. Anderson** has become a partner.

**Feld, Hyde, Wertheimer, Bryant & Stone PC** announces that **Josh**

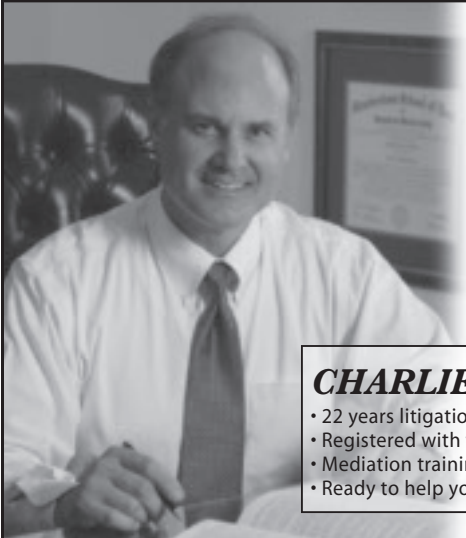
**Watkins** has joined as *of counsel* and **Ashley Neese** as an associate.

**Justin K. Forrester** and **Randall K. Forrester** have formed **Forrester Law LLC** with offices in Birmingham and Jasper. Phone (205) 521-0011 (Birmingham) and (205) 221-6606 (Jasper).

**Hand Arendall LLC** announces that **Benjamin S. Goldman, William H. Reece** and **W. Bradley Smith** have become members.

**Haskell Slaughter** announces that **G. Douglas Jones** has become a member and **Anil A. Mujumdar, Rebecca A. Beers, M. Baird Beers, Michael W. Kelley**, and **Maridi L. Thompson** have become associates.

**Samuel M. Hill** and **Brian D. Turner, Jr.** announce the formation of **Hill Turner LLC** at 2117 Magnolia Ave.,



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**Henry F. Lee III** and **Michael P. Lasseter** announce the formation of **The Law Office of Lee & Lasseter PC** at 403 S. Academy St., Geneva 36340. Phone (334) 684-6406.

**Littler Mendelson** announces that **Brad Adams** has become a shareholder.

**Lowndes, Drosdick, Doster, Kantor & Reed** announces that **Mary Rebecca Furman** has become a partner.

**Martin, Disiere, Jefferson & Wisdom LLP** announces that **Mary Ellen Wyatt** has joined as an associate.

**Maynard, Cooper & Gale PC** announces that **Scott W. Faulkner** has joined as an associate and **Robin A. Adams, John B. Holmes III, Joe F. Lassiter, James L. Mitchell, and Clayton M. Ryan** have been named shareholders.

**Moses & Moses PC** announces that **Eric L. Toxey** has joined the firm.

**Ogletree, Deakins, Nash, Smoak & Stewart PC** announces that **T. Scott Kelly** has become a shareholder.

**Rushton, Stakely, Johnston & Garrett PA** announces that **R. Mac Freeman** has become a shareholder and **J. Evans Bailey** has joined as an associate.

**Candice J. Shockley** and **Rachel A. King** announce the opening of **Shockley & King LLC** at 2491 Pelham Pky., Pelham 35124. Phone (205) 663-3363.

**Smith, Spires & Peddy PC** announces that **Jennifer W. Pickett** has become a partner.

## ABOUT MEMBERS, AMONG FIRMS Continued from page 237

**Starnes & Atchison LLP** announces that **Robin H. Jones** and **Ben D. McAninch** have become partners.

**Thompson, Garrett & Hines LLP** announces that **Amanda C. Hines** and **J. Kirkman Garrett** have become partners.

The **United States Attorney's Office** for the Northern District of Alabama announces that **Davis Barlow** has joined as a special assistant United States Attorney.

The **United States Bankruptcy Court** for the Northern District of Alabama announces the appointment of **Douglas E. Wedge** as chief deputy clerk.

**Herman Watson, Jr., Rebekah Keith McKinney** and **Eric J. Artrip** announce the formation of **Watson, McKinney & Artrip LLP** at 203 Greene St., Huntsville 35801.

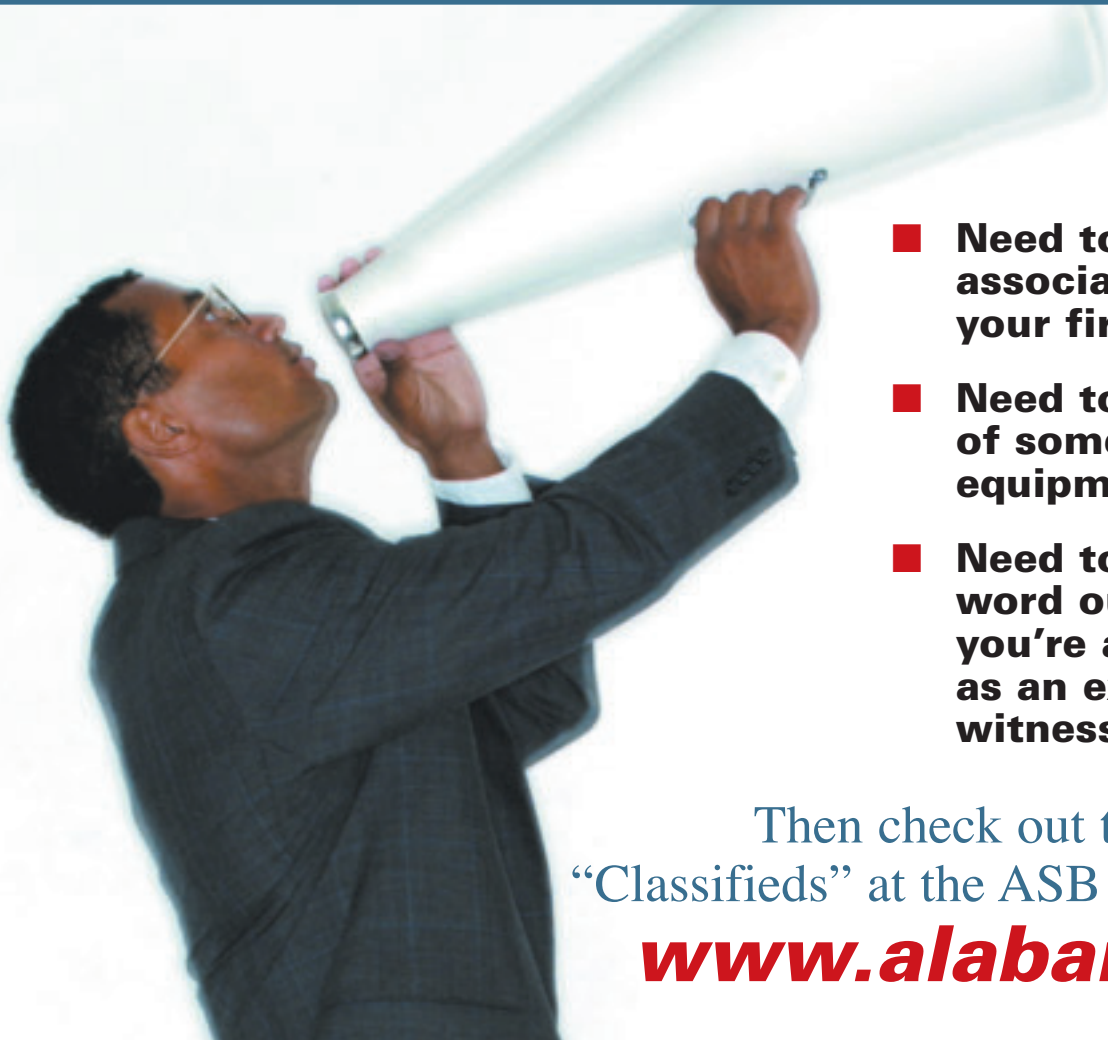
**Wilmer & Lee PA** announces that **Joseph A. Jimmerson** has joined as a partner, **Chad W. Ayres** has

become a partner and **Kimberly N. Kelley** has joined as an associate.

**Wilson & Berryhill PC** announces that **Jud C. Stanford** has become a shareholder and **Robert Andrew Feeley** has joined as an associate.

**Wright, Green PC** announces that **David G. Kennedy** has become an associate.

**Zeb Little Law Firm LLC** announces that **Anne Searcy-Vaneman** has joined as an associate. ▲▼▲



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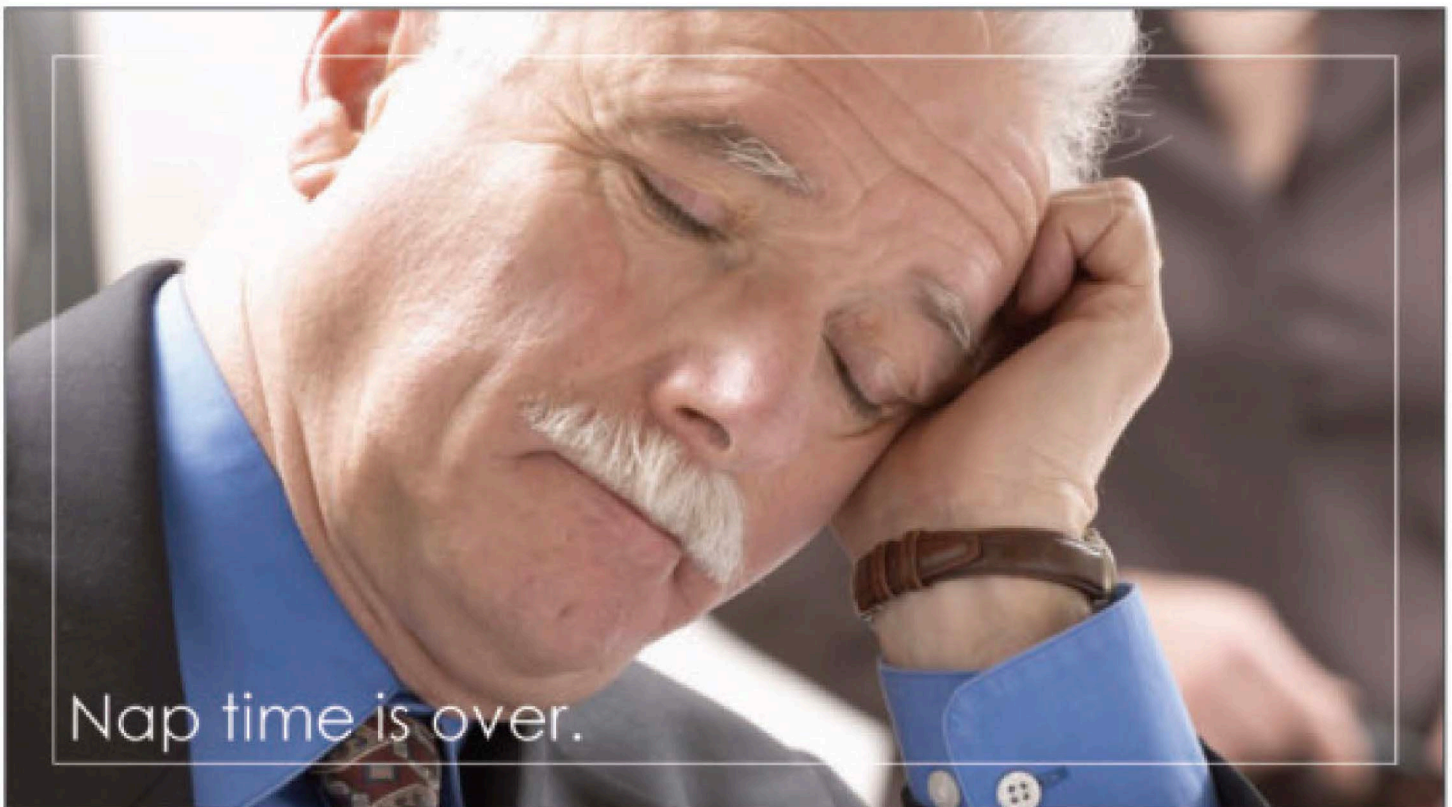
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