MAY 2011 • VOL. 72, NO. 3

THE ALABAMA LAWYER

THE LEGACY OF ALBERT JOHN FARRAH

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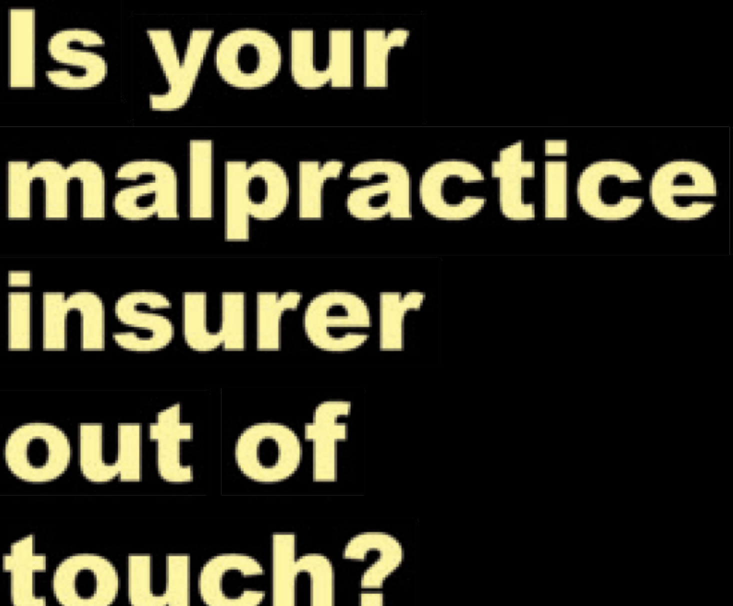

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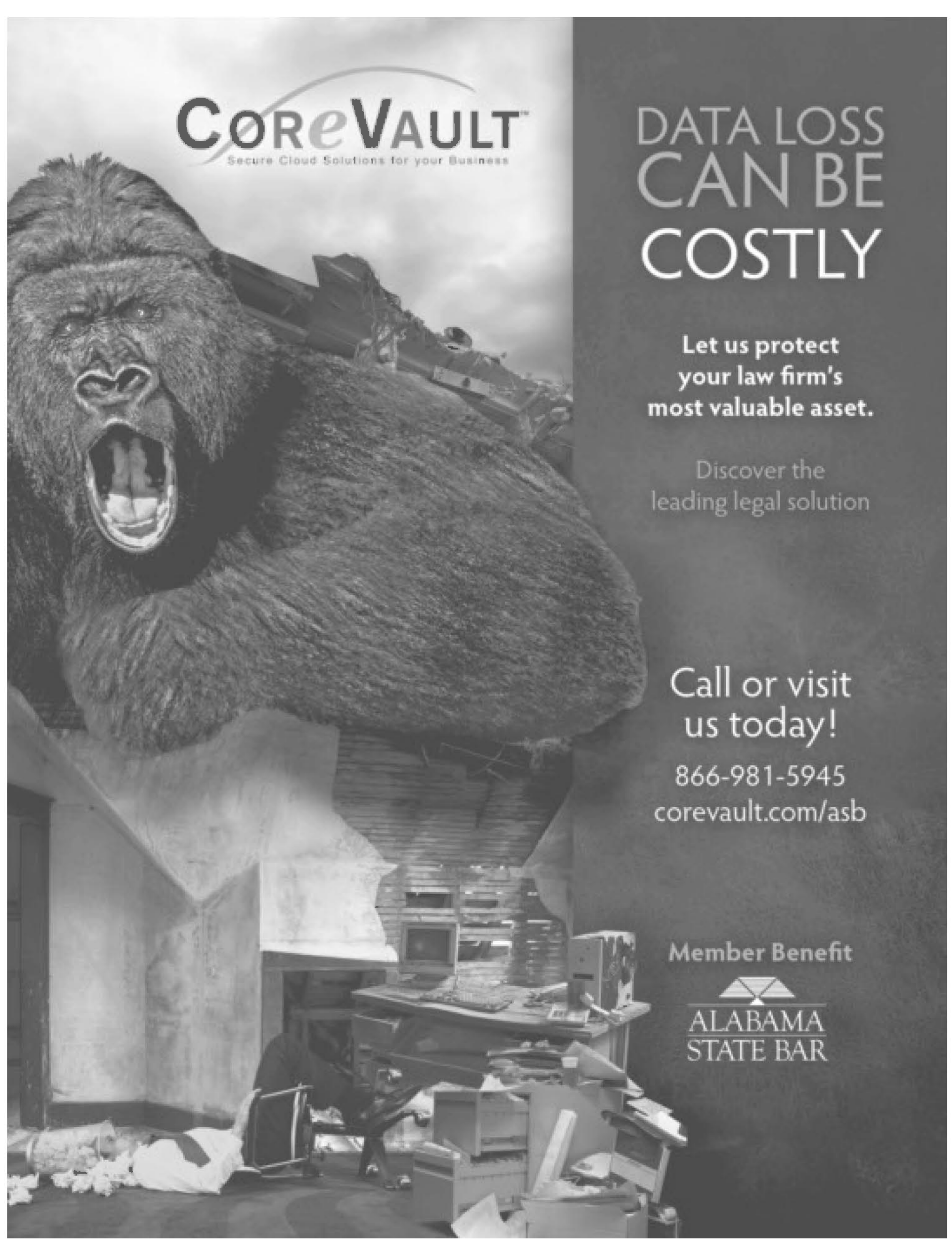
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SEPTEMBER

16 Sustainable Business and the Law *Bruno Conference Center (St. Vincent's Hospital) Birmingham*

OCTOBER

7 Personal Injury *Cahaba Grand Birmingham*
14 Real Estate *Cahaba Grand Birmingham*
14-15 Retreat to the Beach *Perdido Beach Resort Orange Beach*
21 Social Security Disability Law *Cahaba Grand Birmingham*
28 Domestic Violence/Mediation *University of Alabama School of Law Tuscaloosa*

NOVEMBER

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18 Bankruptcy *Wynfrey Hotel Birmingham*
30 Alabama Update *Renaissance Montgomery*

DECEMBER

2 Employment Law *Wynfrey Hotel Birmingham*
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9 Depositions *Cahaba Grand Birmingham*
15 Tort Law *Wynfrey Hotel Birmingham*
16 Trial Skills Law *Wynfrey Hotel Birmingham*
20 Alabama Update *Wynfrey Hotel Birmingham*

Fall 2011

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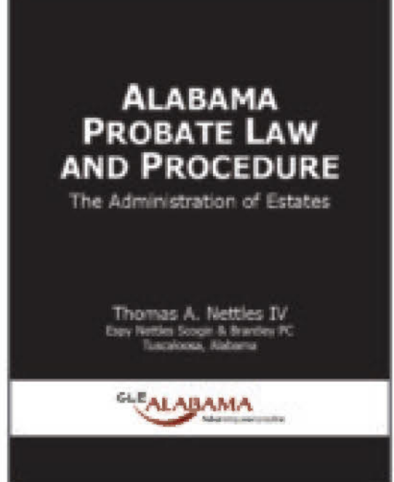

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A valuable tool for attorneys new to the area of probate, it will also serve as a quick reference aid for seasoned attorneys.

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ARTICLE SUBMISSION REQUIREMENTS

Alabama State Bar members are encouraged to submit articles to the editor for possible publication in *The Alabama Lawyer*. Views expressed in the articles chosen for publication are the authors' only and are not to be attributed to the *Lawyer*, its editorial board or the Alabama State Bar unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. The editorial board reserves the right to edit or reject any article submitted for publication.

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

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

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

ON THE COVER

Come back to the Grand! Make plans to relax and have fun at the Grand Hotel July 13–16 during the 2011 Annual Meeting. See the insert in this issue for more information or go to www.alabar.org.

–Photo by Robert Fouts, Fouts Commercial Photography, Montgomery, *www.photofouts.com*

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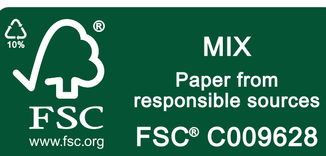

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President-elect Jim Pratt shares ideas and concerns with various bar leaders, during the leadership summit in January at the state bar.

Those Who Answered a Call to Serve

Of the questions I'm frequently asked since becoming president, most involve why I ever sought the office. They've ranged from, "Have you lost your mind?" to "How much time does it take?" The most intriguing ones always centered on how and why I got involved in bar leadership. My answers are easy: I learned it from watching my dad, a longtime member of the Board of Bar Commissioners as well as an outstanding leader in so many other ways. I also learned it from many others I've mentioned in previous articles. I was given opportunities to serve by kind leaders who saw my desire to give back to my profession, and gave me chances to learn. The "why" springs from the "how": I love being a lawyer and always want to give back to what I love.

One of the best programs of our bar is the **Leadership Forum**. Ed Patterson, our assistant executive director, plans forums with volunteer leaders. They design programs to challenge our developing leaders to think about current issues of the bar.

President-elect Jim Pratt and I had the opportunity to speak to this year's first program in January, learning much from their thoughts and ideas. Jim has met with them several times since, probing their visions, opinions and experiences. I congratulate them on their graduation this month and know this isn't the last we'll hear from them.

> If your actions inspire others to dream more, learn more, do more and become more, you are a leader.
>
> *–John Quincy Adams*

 Continued from page 183

My interaction with the Leadership Forum inspired me to interview my **Executive Committee** members who honored me by agreeing to serve this year. My goals here are two-fold: To educate members about the responsibility and work that the Executive Committee does and to inspire others to be involved in a bar leadership role.

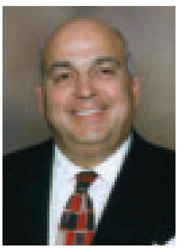
Each member was asked to serve as a liaison to various ASB entities. **Vice President Billy Bedsole**, in addition to filling in for me at various functions, has served as liaison to the Client Security Fund Task Force, the CSF Committee and the Judicial Liaison Committee. **Rich Raleigh** serves as executive liaison to the Pro Bono Celebration Task Force and attended ABA Days for me in Washington, DC in April. **Cleve Poole** is the liaison to the Civics in Education Task Force and the Pro Bono and Public Service Committee, and works closely on its test sites for the *icivics* initiative. **Joe Fawal** serves as liaison to the Judicial Resource Reallocation Task Force and the Client Security Fund Task Force, among others.

Alyce Spruell: What were your expectations about serving on the Executive Committee?

Billy Bedsole: I served on the committee once before so I knew that it is continually called upon to make recommendations and present various items to the BBC, including a quarterly report on the financial condition of the state bar and the foundation. I knew that we would always have a preliminary meeting on the day before the BBC meeting, so we could discuss the different issues, vote and make recommendations on the issues. I was reminded of how much time and attention the members of the Executive Committee give to the reports of the various sub-committees, to participating on various programs and to the actual operation and business of the Alabama State Bar.

Billy Bedsole

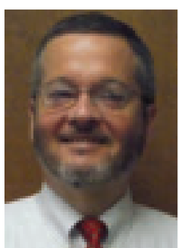
Joe Fawal: I don't know that I had any expectations about serving. I clearly understood that it would involve more time and effort and that I would be intimately involved with issues coming before the bar in helping decide what recommendations to make to the commissioners and how best to respond to issues. I have found all of that to be true and more so.


Joe Fawal

Rich Raleigh: I served on Mark White's Executive Committee, so I had a fairly good idea of what it would be like this time. My expectations before serving the first time were, I suppose, that I would get a closer look at the issues facing the bar and Alabama lawyers, and would have a greater role in devising the bar's strategy to deal with the issues facing us. Those expectations were met. I did not realize, to be honest, the extra time commitment that being on the Executive Committee entailed.

Rich Raleigh

Cleve Poole: I was curious about the inner workings of the bar and delighted to have the opportunity to have input and see, more closely, how all the parts come together to make the whole of what is the Alabama State Bar. I am amazed at the vastness of the issues addressed during the year.


Cleve Poole

AS: What have you enjoyed most about being on the Executive Committee?

BB: It's being able to discuss things and receive insight from the other members. Each has his or her own expertise, talents and interests and is truly committed to improving our profession, working constantly protecting and maintaining the integrity of our profession.

JF: I found the relationships with the other committee members to be energizing. My knowledge of the workings of the bar and our involvement in legislative and judicial matters has been an eye-opener.

RR: It's the feeling that I am assisting the rest of the Bar Commissioners and Alabama lawyers, in general, by helping analyze information and provide recommendations for dealing with issues facing the bar.

CP: The two biggest benefits are the personal satisfaction of making contributions to my profession and the

No one who achieves success does so without the help of others.

–Alfred Lloyd Whitehall

formation of new friendships and renewing old ones. One good project was working on MCLE requirements for those who have been out of practice for awhile. The committee was a great group of prepared and interested folks and it was quite worthy of the time and effort spent.

AS: What has been the biggest surprise?

BB: It was the amount of time that our president and president-elect devote to attending various functions and meetings, being so diligent in coordinating our communications with the supreme court and the legislative bodies concerning all issues important to each member of the bar. Often, they sacrifice time from their practice and their families. We should be very thankful to have these two outstanding individuals leading us this past year, toward improving our profession.

JF: I've been surprised by the variety of issues the ASB leadership has addressed, along with requests for bar involvement from different aspects of our state and profession. Doing all of that while balancing the needs of the bar has gone way beyond what I anticipated.

RR: Simply being on the Board of Bar Commissioners, I'm not sure I ever grasped how much work there was in keeping the organization running and tackling the tough issues we are asked to assist with.

CP: I continue to be quite surprised at the incredible personal commitment of time that is required of our leadership during his, or her in this case, tenure.

AS: Would you recommend others serve if given the opportunity?

BB: I highly recommend every lawyer having the opportunity to serve on the Executive Committee, learning about all the details and dedication that go into the day-to-day operation of the ASB, including the decision-making, the budget preparation, the approval and the distribution of the finances of the bar, all the responsibilities of working with the BBC, and with Keith Norman, Tony McLain and the rest of the outstanding ASB staff.

JF: It would be a great opportunity for any truly dedicated member to serve on the Executive Committee, if given the chance.

RR: Absolutely.

CP: I wholeheartedly recommend the opportunity to others, without reservation.

AS: As a member of the Board of Bar Commissioners, what have you enjoyed the most?

BB: I have served as a bar commissioner since 1993. I have enjoyed developing a personal relationship with the ASB staff and also with the outstanding lawyers who serve as commissioners for the 1st through the 41st circuits, or as members-at-large. The time and devotion expended by the bar commissioners on a voluntary basis is most impressive and should engender a deep respect by all members of our profession. Each commissioner brings his or her individual talents to our discussions, reports and decision-making and is invaluable to the bar itself. To witness their participation is truly a blessing not only to me, but to every other lawyer who practices in this state. My association with General Counsel Tony McLain, and all of his staff have helped me mature in my knowledge and enforcement of the ethical rules of our profession and made me better equipped to serve my clients in a more efficient manner. I was humbled and honored by President Spruell when she asked me to be her vice president and, subsequently, by my election from the BBC to serve in that capacity.

JF: I have most enjoyed meeting the other commissioners and sharing working times and social times with them. I've learned a lot from them and developed some great relationships. I've also really enjoyed the "process." I think it is unique to our profession that we have some of the better and most respected lawyers making decisions regarding the regulation and discipline of its members.

RR: Getting to know the other bar commissioners has been the best part.

CP: It's having an effect on my profession in a positive way and making new friends while renewing old friendships.

 Continued from page 185

AS: When did you first decide to get involved?

BB: Boyd Reeves from Mobile called me and mentioned that a position was open on the BBC. He and some others thought I should consider running. I ran against **Caine O'Rear,** who beat me by one vote. After he took office, **Broox Holmes** resigned to run for president and Caine nominated me to fill that position. I have run successfully since that time. Unless you serve on the Executive Committee or at least the BBC, it is almost impossible for the attorneys to imagine all the different forms of assistance extended by the bar to help in the practice of law, as well as the enormous business of the bar itself.

JF: Jack Neal, who was serving as a commissioner, suggested it to me and I thought it was a great idea. This was the first time I ever ran for anything relating to the practice of law. Since then, I have run again for bar commissioner and for two different posts in the **Birmingham Bar Association**.

RR: My law partner, **Dag Rowe**, suggested I become more involved in the bar and seek leadership roles.

CP: I've had an interest for some time. In our circuit, we rotate the position among the three counties, so when an opportunity to serve came open, I took it.

AS: In what other ways have you served the ASB or your local bar?

BB: For the Mobile Bar Association, I served as secretary, as chair of the Grievance Committee and as a member of the Ethics Committee, the Attendance Committee, the Nomination Committee and the Executive Committee. In addition to my current service as ASB vice president, I am also a Disciplinary Hearing Officer for Panel 1 and on the Nominating Committee for the Lawyers Hall of Fame.

JF: Before becoming a bar commissioner I volunteered on committees for the Birmingham Bar Association. I have been elected to the Birmingham Bar Executive Committee and am now president-elect of the Birmingham Bar Association.

RR: I had served on various committees, such as the ADR Committee and others.

CP: I've served on a couple of sections and a planning committee for seminars.

AS: What issues do you see facing our bar in the next three to five years and how does the BBC help address those?

BB: The Internet and e-mail have drastically affected the practice of law and how we communicate with clients and fellow attorneys, particularly in litigated cases. The regulation of advertising is a continuing issue. The cordiality between attorneys and judges, and the disciplinary process, change from year to year. One major issue facing the bar in the next five years is the funding for the state's Judicial System. And this won't be solved by increasing the filing costs. The increasing caseloads of the Alabama judges and the disparity in caseloads in different circuits also command the bar's attention.

"The true leader serves. Serves people. Serves their best interests, and in doing so will not always be popular, may not always impress. But because true leaders are motivated by loving concern than a desire for personal glory, they are willing to pay the price."

—*Eugene B. Habecker,* The Other Side of Leadership

“I don’t know what your destiny will be, but one thing I know: The ones among you who will be really happy are those who have sought and found how to serve.”

–Albert Schweitzer

The emphasis on civics education in our schools certainly enhances the educational opportunities of students and increases their skills to succeed in the 21st century work force. You, as president, have constantly endeavored to promote understanding of the judicial system, adding to the development of every young person as a better citizen of our country.

JF: I believe the economy is the biggest issue we’re facing. While you and I have discussed the difficulty with the chief’s Judicial Reallocation Bill, it is clear the judicial system is being squeezed for money. Severe economic problems have affected the judicial system’s ability to meet the needs of the public on all levels. Until the economy turns around and we can improve the funding of the judicial system, this problem will continue. Another cause for concern is the number of disciplinary matters we see involving younger attorneys. The problems seem to be economically based as well. Many young lawyers are graduating without jobs and without anyone to give them any guidance. They are doing whatever they can to make a living or taking actions not in the best interest of themselves or their clients.

RR: The shrinking state budget is possibly the most significant issue. Pro ration and other budget cuts make operating the courts in an efficient manner more challenging. The reduction in funds (including those from the federal government) will also greatly affect pro bono legal services. Alabama was the worst state in the nation in funding these services, so there is not much “fluff” in the LSA and VLP budgets. Cutting these programs when they are needed more than ever will have a long-lasting impact. We must continue to make positive progress in this area despite the lack of state and federal funds; and this will have to be as a result of private giving (both of time and money) and restructuring of the VLPs (by regionalization of certain intake processes and other activities and other measures).

ASB section, committee and local bar members shared with the president and president-elect the concerns of their various groups.

Three things are going to create a huge challenge for the bar: (1) the increasing number of law school graduates, (2) the reduction in available jobs due to contraction related to the economy and/or the failure of job creation to keep up with the additional lawyers in the marketplace, and (3) the consistent rise in debt of the law graduates. I agree with this statement from a recent survey that “those contemplating legal careers need to have the most transparent information possible concerning employment opportunities, debt and potential earnings capacity.”

CP: We need to be mindful of our limits in income and closely examine the programs and services that we offer to make sure we’re doing all we can while staying within a reasonable budget.

Jim and I hosted a leadership summit with section, committee and local bar leaders in January. We discussed issues facing our bar and the problems and concerns of their groups.

Ours is one of the few remaining professions in which we govern ourselves. With this great privilege comes a tremendous responsibility–to protect and

PRESIDENT'S PAGE Continued from page 187

Alicia Bennett, 2007-08 ASB vice president, took part in the summit as the vice chair of the CLE & Membership Criteria Task Force and as an at-large member of the board of bar commissioners.

ensure a positive future for our profession. With that in mind, I asked them ***why should our members consider getting involved?***

"It's been especially enlightening to serve on planning committees for the workers' compensation CLE seminars and see how much time and effort our section members devote to these events."

Beverly Williamson, chair, Workers' Compensation Section

"I've enjoyed traveling the state and meeting other bar members and leaders I might otherwise not have."

Clay Lanham, president, Young Lawyers' Section

"It's been a pleasure getting to know the state bar officers and staff as well as lawyers and judges around the state."

Karen Laneaux, chair, Women's Section

"Last year, part of our Military Law Symposium concentrated on the need for legal services for veterans and wounded warriors. And we have been encouraged to explore what the state bar can provide to our state's many new veterans, including court diversion programs. This topic and more will be examined at the 22nd Military Law Symposium in August."

Colonel Bryan Morgan, chair, Military Law Committee

"The Alabama Lawyer Assistance Program Committee pretty much runs itself. My job is made easier by its members who bring a willingness, commitment and desire to serve the state bar. I am grateful for the opportunity to serve but even more so to work with these committee members."

Jonathan S. Cross, chair, Alabama Lawyer Assistance Program Committee

"As immediate past president of the Magic City Bar Association and as a bar commissioner for the 10th Circuit, I have appreciated the support of other community and state bar leaders. Stepping outside of one's comfort zone to assume a leadership role can be intimidating, especially for young lawyers. Leaders welcome the participation of those willing to take on new challenges, though. This embrace by them inspires me to keep going."

Derrick Mills, 2010 ASB Leadership Class graduate

"We have been honored to work with other visionary lawyers to realize three of our greatest dreams for this profession–create a more diverse and inclusive profession that strives to serve all of those who are on our soil, address the quality of life issues which make our profession a challenging one and plan for a future that will bring about a more positive response to the profession from the general public.

"There is no greater calling than to serve. As attorneys, our service to our colleagues is desperately needed. Our profession affects every morsel of American life, and we hold the most prestigious and burdensome positions nationally. As such, service to our profession, and the enhancement of our profession, serves all of our citizenry."

Dianna Debrosse and Hope Marshall, co-chairs, Future of the Profession Committee

My final column, for the July issue, will be an interview with President-elect Pratt, along with thoughts and comments from local, circuit and county bar leaders.

PRESIDENT-ELECT PROFILE

PHILLIP W. MCCALLUM

Phillip W. McCallum

Phillip W. McCallum was born and raised in Birmingham and graduated from Vestavia Hills High School in 1979. He attended Auburn University and received his undergraduate degree from the University of Alabama in Birmingham. McCallum then earned his law degree from Cumberland School of Law and is admitted to practice in Alabama, Texas, Oklahoma and West Virginia.

McCallum is a founding shareholder and senior partner with McCallum, Methvin & Terrell PC in Birmingham, which focuses on representation of consumers and businesses in cases including business disputes, class actions, complex litigation, insurance fraud, consumer protection, and employment violations. The firm is dedicated to giving back to the community through extensive pro bono work, and civic and charitable involvement.

McCallum has been active in both the Birmingham Bar Association (BBA) and the Alabama State Bar, serving as president of the BBA's Young Lawyers' Section and as a member of the Executive Committee and the Grievance Committee. He has been an ASB Bar Commissioner for the 10th Judicial Circuit for the past nine years and on the Disciplinary Commission. Last July, Alyce Spruell chose him to be vice president when she became president of the state bar. McCallum was chair of the Judicial Liaison Committee last year and is now chair of the Celebrate the Profession Committee and a member of the Chief Justice's Commission on Professionalism.

He is a Fellow of the Alabama Law Foundation and the American Bar Foundation, and a charter member of the Atticus Finch Society.

McCallum volunteers time on the Vestavia Hills Park and Recreation Foundation Board and is past chair for the Substance and Abuse Committee for the City of Vestavia Hills. He is on the board of directors of Triumph Services, which provides community-based support to individuals with developmental disabilities who are trying to live independently and also is a wrestling coach for the Vestavia Hills Wrestling Club.

He is married to Kelley McCallum, who is also an Alabama attorney. They have three children, Caitlin (17), Savannah (14) and Murphy (12), who attend school in Vestavia Hills. The McCallums are members of St. Stephen's Episcopal Church.

PARC SOLEIL ORLANDO

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ISI ALABAMA is proud to present the
Grand Prize of this year's
Alabama State Bar Annual Meeting

6 nights and 7 days at Parc Soleil Suites
by Hilton Grand Vacations in Orlando, FL

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EXECUTIVE DIRECTOR'S REPORT

KEITH B. NORMAN
keith.norman@alabar.org

Tough Times for Law School Graduates

Times are tough for many graduates of law school. Not only are they struggling with high education debt, many are finding that employment in the field of law is very difficult to secure. The article, "Law School? Bag it, Bloggers Say" in the February 2011 *ABA Journal* details how many recent law school graduates are expressing their dismay and frustration in the blogosphere with their debt situation and lack of employment opportunities. One key problem these disappointed graduates observed is the lack of meaningful information available about education debt and employment opportunities and realistic salary information. In response to these widespread concerns, the Young Lawyers' Division (YLD) of the American Bar Association (ABA) is supporting a resolution dealing with law school costs and employment data called "Truth in Law School Education" which it hopes to bring before the ABA House of Delegates for passage in August.

 Continued from page 191

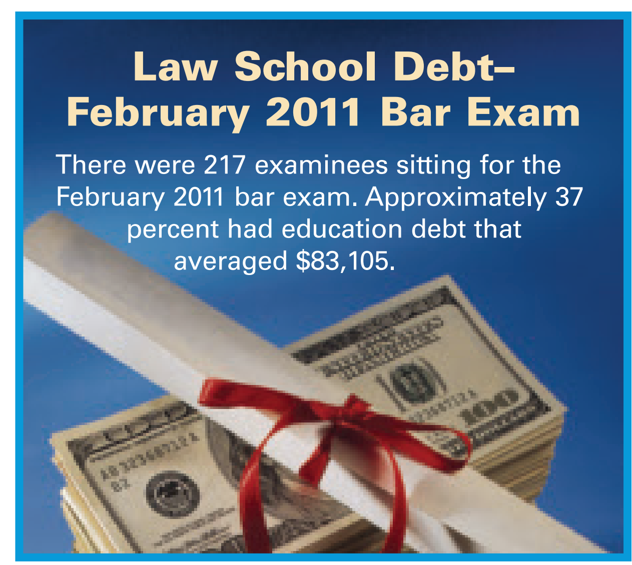
Last summer, the Alabama State Bar began considering how to get a better handle on this problem. For more than a decade, through this column, I have reported on the education debt of those sitting for the February and July bar exams. Although this information has been helpful in tracking the increasing debt load of recent law school graduates, we wanted to better understand how successful they have been in obtaining employment in the legal field. So, we decided to survey all new admittees and publish the findings. Our first survey of law school debt and post-law school employment was conducted this past winter. Laura Calloway, director of the ASB Practice Management Assistance Program (PMAP), and Brad Carr, director of communications, collaborated to analyze and publish the results. Their report follows this column and I encourage you to read it.

Almost every new admittee who completed the survey offered written suggestions, many quite extensive, to the bar about ways the ASB can assist future law students. These comments not only offered some helpful ideas, but also revealed the frustration many share because of high debt and lack of employment opportunities or low pay that they are now experiencing. This survey clearly shows the serious hurdles for many who are seeking to enter the profession.

Some new admittees blame their law schools, the bar or both for their predicament because they were not expecting these problems. I am not convinced that the bar or law schools deserve all the blame from those who chose to pursue legal careers and are now dissatisfied with their choice. Nevertheless, I do think that there are some steps which the bar can take that may mitigate some of these problems in the future.

For example, last year, the bar mailed all high school guidance counselors a new, candid pamphlet, *Law as a Career: What You Should Know Before Applying to Law School.* This year, we plan to send this same pamphlet and the survey on student debt and post-law school employment to all in-state college career advisors. Both of these pieces are also posted on the bar's website, *www.alabar.org.* We hope to add other legal career information that will be directed to high school and college students considering law school. We also plan to improve the online classified section of the bar's website to better facilitate matching those seeking employment with firms or other employers who may desire to employ a lawyer. Finally, we will do more to publicize the resources of PMAP for those who are setting up their own solo practice. The resources available through PMAP can do a great deal to ease a young or seasoned lawyer into solo practice.

Unfortunately, the ASB cannot wave a wand and lower the cost of law school or improve the economy which has been a tremendous drag on employment but this survey on student debt and post-law school employment is one way to provide more information for the benefit of prospective law students.



SUMMARY REPORT:

Survey of New Admittees Regarding Law Student Debt and Post-Law School Employment

(Survey conducted February 24, 2011)

By Laura A. Calloway and Brad Carr

Introduction

Every year, law students embark on a three-year course of study that will prepare them for a rewarding profession. Unfortunately, this course of study will also leave many of them with a considerable amount of student loan and other indebtedness at the end of their course of study. It is increasingly common for law school graduates to owe $100,000, $150,000 or more by the time they complete their education and prepare to face the last hurdle which separates them from a legal career–the bar exam.[1]

Despite these statistics, most law school students pursue this career path to fulfill their dream to practice law, to help the public and to make a difference in their communities.

Many law students apply for and are granted loans through federal lending programs. There is a limit, though, to the amount of money a student can borrow under these programs, and some students turn to alternatives to bridge the gap, including private loans.

Some legal commentators have called law student debt "the silent killer" of dreams and aspirations. A report issued by the Association of the Bar of the City of New York's Standing Committee on Legal Education & Admission to the Bar states:[2]

"The large amount of educational debt assumed by many law students has important effects on both the provision of public interest legal services and the quality of life of debt-burdened practicing attorneys. Some evidence indicates that rising law school debt may affect the ability of public interest and government legal service providers to recruit and retain attorneys to service clients' needs. Evidence also suggests that law school debt constrains law school graduates to pursue more remunerative private practice careers and deters practicing attorneys from transferring out of jobs that are lucrative but otherwise unfulfilling. Both developments should concern individuals and groups interested in either the provision of public interest and government legal services or the quality of life of practicing attorneys.

"Although law schools, legal employers, state bar associations and state and federal legislatures have taken some action to ameliorate the effects of law school debt, those efforts have thus far been minimal, have not kept pace with the escalations of costs, and have been focused mainly on attorneys pursuing qualifying public interest careers. These programs offer differing, and sometimes competing, rationales for providing law school debt relief. Law schools boast of the financial benefits that their graduates enjoy from debt relief programs, while bar associations and other advocates extol debt relief programs as a means to encourage public service and to increase access to justice."

The consequences of high law school debt, however, are felt not just in the public interest legal sector, but in the broader legal services market. Although debt may not be a controlling factor in the initial career decisions of those motivated to enter public service, it may well divert other graduates from small-firm and solo practices.

The purpose of this survey was to attempt to determine the amount of student loan indebtedness that admittees to the Alabama State Bar carry, and how that indebtedness has affected their employment options.

Survey Methodology

This report presents the results of a survey of attorneys admitted to the Alabama State Bar in 2008, 2009 and 2010. Information was collected concerning how long it took these new admittees to obtain employment after admission, in what type of practice setting they found employment and how deeply indebted they were for student loans at the time of admission.

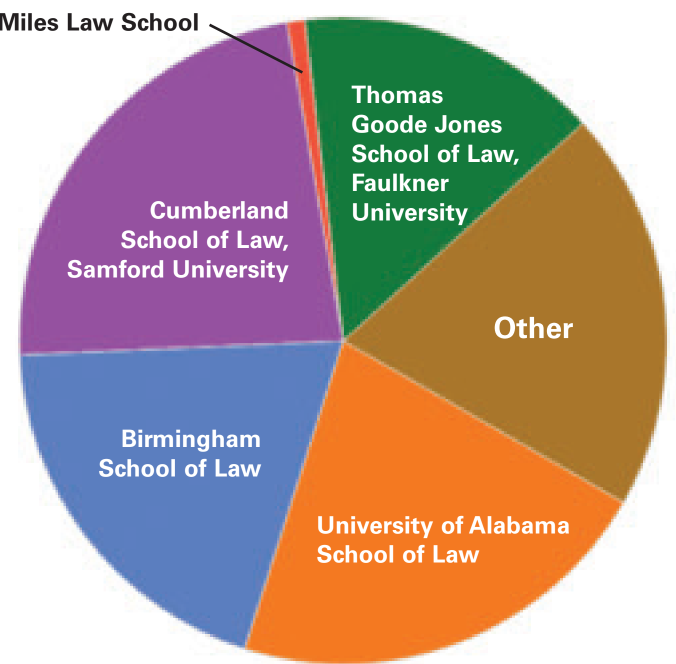
The survey was conducted by the Alabama State Bar using online survey tools. The survey consisted of four multiple-choice questions and two questions in which essay-type responses were solicited from the respondents. It was sent to 1,299 individuals in-state who were admitted to the Alabama State Bar, either through examination or by reciprocity waiver with other states, during the survey period. Four hundred fifty-four people responded, and all of them completed the survey. This represents a 35 percent response rate.

All probability samples contain some sampling error–the extent to which the views or experiences of respondents differ from the views or experiences of the entire population from which the sample was selected. For this survey, one can be 95 percent confident that the results for each part of the sample are not more than 3.71 percent different from the entire population of new admittees. Sampling error does not reflect the influence of other factors, such as question wording or question order.

Response by Law School

Respondents to the survey were fairly evenly spread over the law schools listed in the survey, with around 22 percent each coming from the University of Alabama and Cumberland schools of law, 20 percent coming from out-of-state ("Other") law schools, 19 percent coming from Birmingham School of Law and 15 percent coming from Jones School of Law. Miles Law School respondents made up less than one percent of respondents and, for that reason, cross-tabulation of that school's responses was not performed.

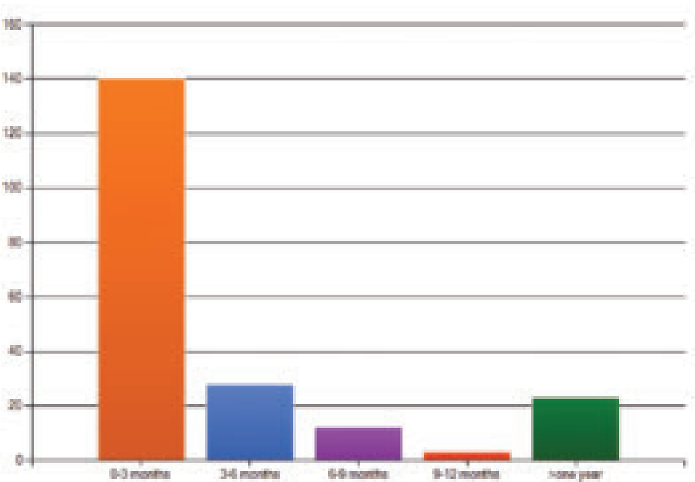
From which law school did you graduate?



Time to Legal Employment

The majority of survey respondents (71.1 percent) reported that they found legal-related employment within three months after admission. The next largest group (13.2 percent) found legal-related employment within three to six months, resulting in 84.3 percent of those surveyed having found legal-related employment within six months; however, a sizeable group (9.7 percent) reported that it took over one year after admission to find legal-related employment. Although the question was not specifically asked, a few of the respondents reported in the essay questions that they still had not found legal-related employment at the time of taking the survey.

After being admitted to the Alabama State Bar, how long did it take you to find employment in a law-related field?

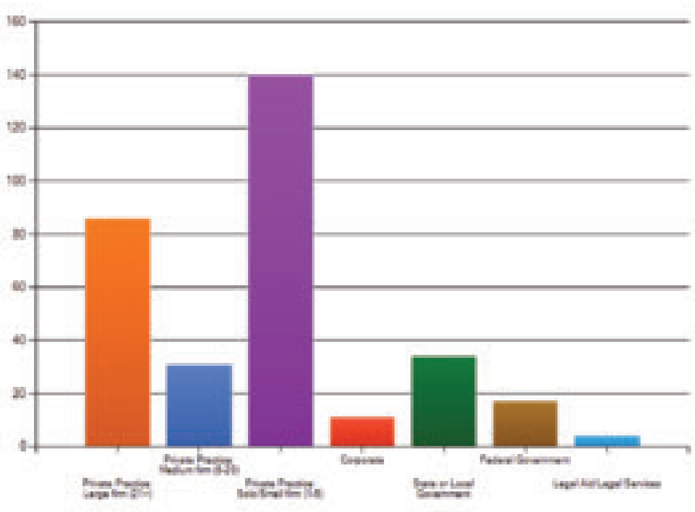


Early Hires–0 to 3 Months

For those who found employment within three months after admission, the largest group (43.3 percent) found it in the private practice setting of firms having one to five lawyers. This result is not surprising, since we know that approximately two-thirds of Alabama lawyers practice in the one-to-five lawyer setting.

The next largest group (26.6 percent) of early hires went to large firms of 21 or more lawyers, while 10.5 percent found employment in state or local government. Nine and six-tenths percent (9.6 percent) found employment in the private practice setting of firms of six to 20 lawyers. The remainder of early hires found employment with the federal government (5.3 percent), in corporations (3.4 percent) and with legal aid organizations (1.2 percent)

Please indicate your practice setting.



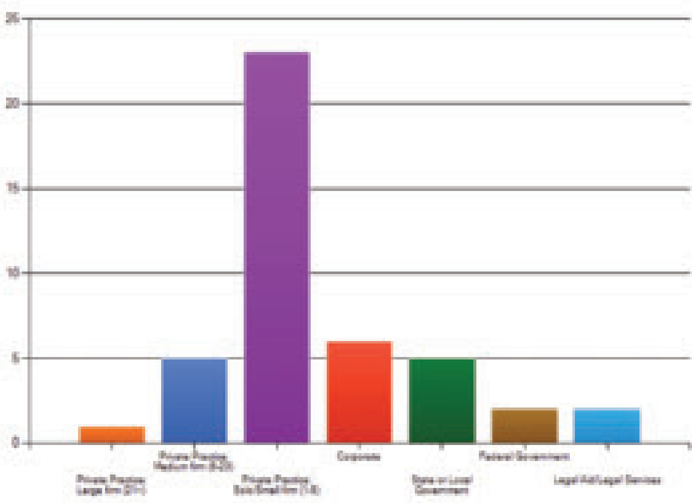
Of those who found employment within three months of admission, one-third (33.1 percent) had less than $25,000 in student debt, which may have facilitated their ability to accept the positions they took or to open their own practices. For the next largest group (17 percent), student loan indebtedness jumped into the range from $100,000 to $140,000. Fourteen and two-tenths percent (14.2 percent) had loan balances between $50,000 and $75,000, and nine percent owed balances between $140,000 and $180,000. Only a negligible percentage (3.1 percent) of those who found employment within three months owed over $180,000.

Finally, of the survey respondents who found employment within three months after admission, 23.8 percent were graduates of the University of Alabama and 22.0 percent were Cumberland School of Law graduates. Graduates of out-of-state law schools made up 20.4 percent of those obtaining legal-related employment within three months, while 18.9 percent were Birmingham School of Law graduates and 13.9 percent graduated from Jones School of Law. The fact that early hires came from all of the law schools may tend to indicate that these hires were based on personal relationships or other efforts made by the admittees to find employment prior to the end of law school.

Late Hires–Over One Year

For those survey respondents who took over one year after admission to find legal-related employment, over half (52.3 percent) also found employment in private practice with firms of one to five lawyers, giving rise to the supposition that many of them may have started their own solo practices. Several respondents so stated in the essay questions. Thirteen and six-tenths percent (13.6 percent) found corporate employment, while 11.4 percent found jobs in state and local government. Eleven and four-tenths percent (11.4 percent) went with mid-sized firms of six to 20 lawyers. Federal employment and legal aid accounted for 4.5 percent each of those survey respondents who took more than one year to find a legal-related job. Only 2.3 percent of those respondents who took more than a year to find legal-related employment were hired by large firms of more than 21 lawyers.

Please indicate your practice setting.



The amount of student loan indebtedness also may have had an effect on the jobs that the new admittees who responded to the survey accepted, with almost one-third (31 percent) of those respondents who took over one year to find a legal-related job indicating that they owed less than $25,000. Of the remainder of respondents who took over a year to find legal-related work, 56.8 percent owed between $50,000 and $180,000.

Comment Analysis
Non-legal Occupations

The survey asked respondents to indicate if they had found legal-related employment since being admitted, and, if not, then to list their current occupation.

Nationally, new bar admittees in the past three years have found a particularly bad job market, according to lawyers and industry experts. Though hiring was down last year as well, they said 2009 graduates applied for jobs before law firms had felt the full brunt of the downturn.

As the *Wall Street Journal* pointed out: "The situation is so bleak that some students and industry experts are rethinking the value of a law degree, long considered a ticket to financial security. If students performed well, particularly at top-tier law schools, they could count on jobs at corporate firms where annual pay starts as high as $160,000 and can top out well north of $1 million. While plenty of graduates are still set to embark on that career path, many others have had their dreams upended. Part of the problem is supply and demand. Law-school enrollment has held steady in recent years while law firms, the judiciary, the government and other employers have drastically cut hiring in the economic downturn.

"Large corporate law firms have been hit particularly hard. [t]he nation's 100 highest-grossing corporate firms have reported average revenue declines of 3.4 percent, the first overall drop in more than 20 years" (according to the May issue of *The American Lawyer*).[3]

With that as a backdrop for the problem of student debt, a number of respondents indicated that they had to put their law career on hold and were employed in such diverse non-legal fields and occupations as:

- Retail sales
- School counselor
- Teacher
- File clerk
- Contract administrator
- Banking
- Engineer
- Paralegal
- Probation officer
- Human resources
- Bartender
- Musician
- University professor
- Commercial real estate developer
- Software engineer
- Chemist

Suggestions for the Alabama State Bar
Six to Nine Months to Employment

These were among the verbatim comments of new admittees who took six to nine months to find employment:

1. It would be helpful if more law firms would announce that a position was available on the AlaBar website. That part of the site is a helpful resource.
2. A formal mentoring program, esp. for people who are contemplating opening a solo practice, would be useful.
3. Personally, the ASB assisted me adequately when needed, both during my school time and also throughout my bar prep time. At the present, I do not have any suggestions as to any changes that could be made to improve anything during the school time. I have heard some information about the new software that may be put in place for administering the bar exam. That may be of help to some graduates considering most everything is done now via computers. It seems it would help on the time for the exam especially for the ones who are use to working by computer instead of handwriting the exam.
4. Job search training, resume writing and/or placement service for new attorney to obtain skills.
5. Inform them on the difficulties of finding a job and how difficult it is to pay back student loans.

6. Programs explaining loan repayment options; better assistance with locating jobs at graduation/networking. Career services was only helpful to the top 10 percent of the class, which did not need help. Need better job placement assistance when career services is not helpful.
7. The amount of debt incurred to obtain a law school education is not worth it right now. I am making LESS money than I did before I went to law school. I can't afford to pay for my student loans since my salary is so low and I may have to defer them once again. All the while the interest keeps accruing. It is a vicious cycle.
8. I have no complaints. Would recommend no additions that would drive the cost of licenses up or other fees. Many hands are out to new lawyers. Not hand-shaking hands but pay me hands. The new lawyer swearing in ceremony is excellent!
9. Less bar fees for those taking the bar exam and new admittees. Publish realistic statistics about law school employment rates.
10. They teach you a lot about the law in law school but very little about how to practice law. I don't know how you would do it but any information on the nuts and bolts of practice would be very helpful.
11. Some sort of loan forgiveness program or have a detailed article in *The Alabama Lawyer* on federal loan forgiveness programs. A detailed article on how to best pay back student loans.
12. Make the fees less for newly-admitted lawyers–we are not making the money to pay them. It would be so much better after five years or more to initiate the four years of the $25 dollars here and there. Newly-admitted attorneys are shelling out money everywhere just to get the business started. Some of those costs could wait till later and I would have no problem paying them.
13. Potential law students need to know that most private law firms do not contribute to student loan debt, as I was told before starting law school. However, the federal government has a lot of programs now to assist those working in the public sector. Taking on student debt is intimidating for those who desire to work in the public sector, but they should know there are repayment plans and debt-forgiveness plans available.
14. Place a greater emphasis on becoming involved with the Alabama State Bar. Host additional CLE's (in addition to "Professionalism") that are targeted for younger practitioners.
15. Assist individuals working for organizations like Legal Services (or public service attorneys making under the median income) through loan assistance.
16. There should be a centralized job posting website for all new members of the Alabama bar–information regarding job openings is sporadic and through grapevines. Also, a form bank for various motions and free examples of other various litigation or transactional documents would be an incredible help to new attorneys.

Nine Months to One Year to Employment

These were among the verbatim comments of new admittees who took nine months to one year to find employment:

1. Lower your fees for initial members. After paying for BarBri, we have to cough up another ~$1,000 just for the bar exam fee. Then a hotel room for three nights on top of that. Then membership dues. Admittance fees to courts. Etc. It costs several thousand dollars just to be able to practice once law school is finished. For the vast majority of us who graduate without jobs lined up and firms to pay those fees, that is a huge burden on an unemployed student.
2. Create a mentor program that assigns new young attorneys with experienced lawyers who already practice in the field that they are interested in entering.
3. Require all law schools in this state to be ABA-accredited.
4. Put a cap on law school class size, which would have the effect of reducing market entrants into an already saturated legal market.
5. Force law schools to be honest–the bar has no problem sending their bulldogs from the General Counsel's office to threaten students with punishment for every conceivable offense, but does not require the law schools to be transparent, honest or even ethical in the recruitment and enrollment of law students. The greatest mistake I ever made was becoming a lawyer (and this was a dream that began for me when I was 10 yrs. old), but I would not have made this mistake if had I received accurate statistics regarding legal employment prospects following graduation.
6. One final suggestion–forbid law schools from showing "To Kill A Mockingbird" to their students–if Atticus Finch were a practicing solo practicioner in Alabama today, he would have gone out of business, filed bankruptcy and probably killed himself by now. There is truly no honor or nobility left in this profession and I [am] ashamed to be a part of it.
7. Instruct new admittees that if you do not get hired by a firm, don't be afraid to hang out your own shingle. It's been a great experience.
8. I am not certain of an easy fix. Perhaps the bar could be more active or hands-on with schools in ensuring that the needs of all of the students within a particular year are met. I know that in my case, a lot of my classmates and I felt that the Career Services Office was only interested in helping a small portion of the class, leaving the rest of us to fend for ourselves. Again, I do not know how this could be achieved, but I think the end result would be helpful to future students.
9. Tell them not to attend law school until the economy gets better, which could be anywhere from three to five years, if we are lucky.

Conclusion

Since before the start of the economic downturn, the organized bar has tried to implement a number of solutions to alleviate the problem of crushing law student debt. The most-often cited action has been to create Student Loan Repayment Assistance Plans (SLRAP), but these efforts may be cosmetic, at best.

Perhaps the most effective role for the bar lies in the form of education that is directed to high school students, guidance counselors and college undergraduates to explain and emphasize the new realities of becoming a lawyer.

Those contemplating legal careers need to have the most transparent information possible concerning employment opportunities, debt and potential earnings capacity. The Alabama State Bar believes that the information gleaned from this survey and those we plan to conduct in the future will provide greater transparency.

Questionnaire

1. After being admitted to the Alabama State Bar, how long did it take you to find employment in a law-related field?
   - ☐ 0-3 months
   - ☐ 3-6 months
   - ☐ 6-9 months
   - ☐ 9-12 months
   - ☐ >one year

2. If you did not find employment in a law-related field, please describe the type of employment obtained.

3. Please indicate your practice setting.
   - ☐ Private Practice: Large firm (21+)
   - ☐ Private Practice: Medium firm (6-20)
   - ☐ Private Practice: Solo/Small firm (1-5)
   - ☐ Corporate
   - ☐ State or Local Government
   - ☐ Federal Government
   - ☐ Legal Aid/Legal Services

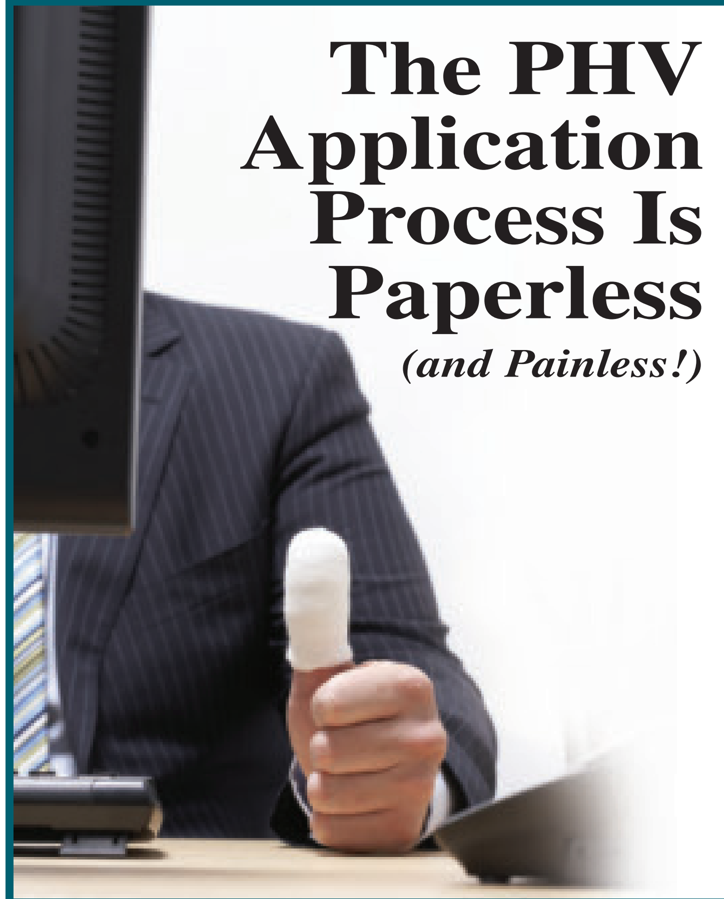
4. How much student debt did you have at the time of law school graduation?
   - ☐ <$25,000
   - ☐ $25,000–$50,000
   - ☐ $50,000–$75,000
   - ☐ $75,000–$100,000
   - ☐ $100,000–$140,000
   - ☐ $140,000–$180,000
   - ☐ $180,000–$220,000
   - ☐ >$220,000

5. From which law school did you graduate?
   - ☐ University of Alabama School of Law
   - ☐ Birmingham School of Law
   - ☐ Cumberland School of Law, Samford University
   - ☐ Miles Law School
   - ☐ Thomas Goode Jones School of Law, Faulkner University
   - ☐ Other

6. Please take a moment to suggest how the Alabama State Bar could be of assistance to future law school graduates. ▲▼▲

Endnotes

1. "Law School Debt Has a Manageable Solution," former American Bar Association President Carolyn B. Lamm, November 24, 2009
2. "Law School Debt and the Practice of Law," report issued by the Committee on Legal Education and Admission to the Bar, Association of the Bar of the City of New York, December 28, 2010
3. "Law Graduates Face a Tough Job Market," *The Wall Street Journal*, May 5, 2010



The PHV Application Process Is Paperless

(and Painless!)

The Alabama State Bar's Pro Hac Vice (PHV) filing process has gone from paper to online. Instead of sending a check and hard copy of the Verified Application for Admission to Practice Pro Hac Vice to the ASB, an out-of-state attorney can now request that his or her local counsel file their PHV application through AlaFile, including electronic payment of the $300 application fee.

Once local counsel has filed this motion, it will go electronically to the PHV clerk's office at the Alabama State Bar for review.

- If all of the information on the application is correct, the motion will be docketed and sent electronically to the judge assigned to the case for ruling.
- If the information in the application is incorrect or incomplete, a deficiency notice will be e-mailed to the filer (local counsel).

A corrected application may be resubmitted by local counsel via AlaFile.

The PHV clerk will then review the corrected application and, once accepted, the motion will be docketed and sent electronically to the judge assigned to the case for ruling.

Please refer to the "Step-by-Step Process" to file the PHV application in the correct location in the Alafile system. (It should no longer be filed under "Motions Not Requiring Fee").

Contact IT Support at 1-866-954-9411, option 1 and then option 4, or *applicationsupport@alacourt.gov* with questions or comments.

Burns, Claude Mitchell, Jr.
Northport
Admitted: 1968
Died: February 7, 2011

Howard, Alex T., Jr.
Mobile
Admitted: 1950
Died: February 10, 2011

Lair, John Henry, Jr.
Birmingham
Admitted: 1952
Died: February 20, 2011

McLaughlin, Roy Lee, III
Selma
Admitted: 1975
Died: February 5, 2011

Spears Turk, Janice Delores
Montgomery
Admitted: 1982
Died: February 21, 2011

Webb, Roy, Jr.
Tuscaloosa
Admitted: 1965
Died: January 27, 2011

THE APPELLATE CORNER

WILSON F. GREEN

wgreen@fleenorgreen.com

The Big Story: The U.S. Supremes Dance the Preemption Paso Doble

In late February 2011, the United States Supreme Court premiered a preemption two-stepper of opinions which provide civil tort and product liability lawyers, as well as constitutional scholars, with much to study. The two decisions, issued consecutively on February 22nd and 23rd, turn on different modes of preemption (express preemption vs. conflict preemption), but both concern state tort law claims in product liability contexts.

Construing an Express Preemption Statute

Bruesewitz v. Wyeth LLC, 131 S.Ct. 1068 (U.S. Feb. 22, 2011)

This was a vaccine-injury case involving a child who had suffered developmental injuries after being administered the DTP vaccine. At issue was whether the National Childhood Vaccine Injury Act of 1986 ("NCVIA"), 42 U.S.C. § 300aa, preempted all state-law claims alleging that a vaccine was defectively designed. The case turned on the statutory construction of the preemption/immunity provision in the NCVIA, found at 42 U.S.C. § 300aa-22(b)(1):

> No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.

The plaintiff contended that this statute did not bar all design defect claims, specifically those premised upon allegations that an alternative design had adequate efficacy without the injurious side effects suffered by the plaintiff. The defendant countered that the statute barred all design defect claims, so long as the vaccine was "properly prepared" (i.e., there were no manufacturing defects) and was "accompanied by proper directions and warnings" (i.e., there were no failures to warn).

 Continued from page 199

In a 7-2 decision, the Court adopted the defendant's view, concluding that all design defect claims were barred by the statute, assuming no manufacturing or warning issues. Justice Scalia's majority opinion reasoned that the language following the word "unavoidable" in the statute ("even though the vaccine was properly prepared" *et seq.*) describes what is meant by being "unavoidable"–in other words, a side effect is "unavoidable" when it is present even after proper manufacturing has occurred and proper warnings provided.

Justice Scalia criticized the dissenting view of Justice Sotomayor (joined by Justice Ginsburg), who interpreted the word "unavoidable" according to its (argued) plain meaning–that is, "unavoidable" means incapable of being avoided, a standard which would allow for an action based on a safer alternative design. The dissent also interpreted "unavoidable" as being consistent with the "unavoidably unsafe product" standard in Restatement of Torts (Second) § 402A, comment k, which contemplated the unavailability of an alternative design with similar efficacy without the harmful side effect.

Perhaps most notably, the Scalia-led majority found no apparent textual ambiguity in the statute which might lead to an examination of legislative history. For the majority, the text and structure of the NCVIA settled the question.

Seat Belts and Conflict Preemption

Williamson v. Mazda Motor of America, Inc., S.Ct. 1131 (U.S. 2011)

This case involved allegations that the rear-aisle seat in a minivan was defectively designed because it contained a lap belt, rather than a lap-and-shoulder belt. The California state trial court dismissed the complaint on the pleadings, reasoning that the claims were preempted under Federal Motor Vehicle Safety Standard 208. The decision was based on *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), in which the Court held that a 1984 version of the same federal standard preempted state-law tort claims for a failure to install airbags. The California appellate court affirmed.

The Supreme Court reversed, holding that despite *Geier's* holding and rationale, Standard 208 did not preempt the claim in issue. The Court began by noting that Standard 208 gives the manufacturer a choice of installing lap or lap-and-shoulder belts for interior rear seats. *Geier* involved the same federal standard, and also involved a similar "choice" provided to the manufacturer as to what type of "passive restraint" to use in a vehicle (airbags or other devices). Under those circumstances, the Court held that state law claims were preempted because the federal standard gave the manufacturer a choice, and, thus, the purpose and objective of the federal choice would be frustrated by imposing state-law liability.

The Court then distinguished *Geier*, however, by examining the purposes and objectives of the standard in issue, and, in particular, the background on the Department of Transportation's development of the lap belt standard. The Court concluded that the purpose and objective of the choice given in the belt standard for rear aisle seating would not be frustrated by imposing state-law liability for the manufacturer's choice to use a lap-only belt.

Justice Thomas's special concurrence provided [at least from this perch] the most persuasive ground for affirmance. He reasoned that the National Traffic and Motor Vehicle Safety Act of 1966, pursuant to which Standard 208 is promulgated, contains an express anti-preemption provision, under which "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." (citing 49 U.S.C. § 30103(e)). Justice Thomas noted that the *Geier* decision (which found preemption by the regulators) had effectively read that provision out of the statute, but that the statute's plain language was an obvious expression of Congressional intent not to preempt state-law standards.

Justice Thomas then thoughtfully critiqued the entirety of "purposes-and-objectives preemption, which by design roams beyond statutory or regulatory text . . . [and] is thus wholly illegitimate." *Williamson*, 131 S.Ct. at 1142 (Thomas, J., concurring). He concluded that the "dispositive difference between this case and *Geier*–indeed, the only difference–is the majority's 'psychoanalysis' of the regulators." *Id.* at 1143.

Other Recent Decisions of Significance

Mental Health Records; Discovery

Ex parte Northwest Ala. Mental Health Center, No. 1090629, 2011 WL 751168 (Ala. Feb. 25, 2011)

Broadhead (a now-comatose MH patient at Northwest) sued Northwest for injuries sustained in a beating which Broadhead suffered while an MH patient at the hands of fellow MH patient Johnson. In discovery, Broadhead sought MH records of Johnson from

Northwest, to establish Johnson's MH condition and to establish the extent to which Northwest owed Broadhead a duty of protection from fellow patients. Northwest objected to the request, asserting that the requested materials were subject to the psychotherapist-patient privilege. After in-camera inspection, the trial court compelled production of the records, and defendant Northwest petitioned for mandamus. The supreme court granted the writ, reasoning that under *Ex parte Pepper*, 794 So. 2d 340, 343 (Ala. 2001), the court had declined an invitation to create "an exception to the privilege applicable when a party seeks information relevant to the issue of the proximate cause of another party's injuries." *Ex parte Northwest Ala. Mental Health Center*, 2011 WL 751168, at *5 (quoting *Pepper* at 343). The court concluded that *Alabama Rules of Evidence* state five exceptions to the psychotherapist-patient privilege, see Rule 503(d), and that the situation presented here falls into none of those five exceptions. In the face of those five exceptions, the court declined to use its adjudicatory authority over an individual case such as this to create an additional exception in the interest of "public policy."

Outbound Forum Selection Clauses

Ex parte Nawas Int'l. Travel Service, Inc., No. 1091720, 2011 WL 755516 (Ala. Mar. 4, 2011)

The plaintiff, as part of a group traveling from First Baptist Church Montgomery, contracted with a New York/Connecticut travel agency for a Holy Land tour. The contract contained a forum selection clause for the Connecticut state court as exclusive venue. While traversing the Sea of Galilee, the boating contractor of the travel agent struck a rock, causing personal injury to the plaintiff for which he received medical attention in Israel. The plaintiff sued the travel agent in Montgomery County for the injuries; the agent moved to dismiss based on the forum selection clause. The trial court denied enforcement, and the defendant petitioned for mandamus. The supreme court granted the writ, holding that the clause was enforceable. The plaintiff claimed that the selected forum was "seriously inconvenient." "In order to demonstrate that the chosen forum is seriously inconvenient, the party challenging the clause must show that a trial in that forum would be so gravely difficult and inconvenient that the challenging party would effectively be deprived of his day in court." *Ex parte Northern Capital Res. Corp.,* 751 So. 2d [12] at 15 [(Ala. 1999)]. *Id.* at *3. The court noted that since the Kelleys decided to travel to Israel, they took the risk that one of them might be injured in an unexpected, tortious incident and the concomitant risk that, to the extent this might occur at the hands of an Israel-based tortfeasor, they would have to seek relief from that tortfeasor in Israel. As to the need for multiple lawsuits, due to the fact that another tortfeasor would have to be sued somewhere other than Connecticut (i.e., the courts of Israel), the court noted that multiple lawsuits would be required regardless of whether one action were in Alabama or Connecticut, and therefore it did not seriously impact inconvenience. The court also rejected the argument that the defendant was not qualified to do business in Alabama; the defendant's business was interstate in nature, therefore the door-closing statute had no field of operation.

Contributory Negligence

Thomas v. Earnest, No. 1091428, 2011 WL 755518 (Ala. Mar. 4, 2011)

The supreme court reversed the trial court's grant of summary judgment based on contributory negligence in a passenger action against a landowner for negligence in the maintenance of the real property (failing to cut vegetation, which impeded the driver's vision in an intersection). The court held that even though contributory negligence was not pleaded in the answer, it was revived when raised as a ground for summary judgment without objection. However, the court held that contributory negligence presented fact questions as to whether the passenger in the rear seat (the plaintiff) had an appreciation for the danger of entering the intersection and therefore should have warned the driver. "The duty of the passenger is not original with respect to the operation of the automobile, but is resultant and is brought into effect by known and appreciated circumstances." *Id.* at *4 (citation omitted). "The duty arises when the passenger 'should [anticipate that] the driver of the vehicle will enter the sphere of danger, or omit to exercise due care, not when he has the opportunity to anticipate the danger without anything to direct his attention to a condition requiring him to anticipate the vehicle is about to enter the sphere of danger or requiring him, in the exercise of ordinary care, to keep a lookout.'" *Id.* at *5 (citation omitted).

LLCs Ultra Vires Actions

Simmons v. Ball, No. 1090066, 2011 WL 755520 (Ala. Mar. 4, 2011)

The issue in this case (concerning a foreclosure) turns on whether a non-manager member of an LLC has authority to perform actions on behalf of the LLC and, if not, whether unauthorized actions are voidable as to third parties or void. The court held that such actions are void. The language of *Ala. Code* §§ 10-12-21(b) and 10-12-23(d), (1975), is unambiguous: if a manager has been appointed, the members of the limited-liability company no longer have the authority to act on the company's behalf. Those *Code* sections indicate an intent not simply to protect the

 Continued from page 201

limited-liability company, but also to protect third parties with whom it deals. If the deeds executed by the non-managing members are voidable rather than void, however, only the limited-liability company would be protected; third parties would be bound by such transactions, even though the limited-liability company is not. Without clear indication that the legislature intended that result, this court declines to interpret *Ala. Code* §§ 10-12-21(b) and 10-12-23(d), in such a way. The court held that a transaction, such as the one at issue here, by a member of a limited-liability company in contravention of the authority vested by the company's articles of organization in a manager of the limited-liability company is void.

Jury Selection

Ford Motor Co. v. Duckett, No. 1090833, 2011 WL 480046, (Ala. Feb. 11, 2011)

In a wrongful death action raising design defect claims, the trial court informed counsel at jury selection that because the trial was anticipated to take several weeks, he was going to talk to the jury pool and gather a subset of jurors from the pool who could possibly sit as jurors for that long of a trial. Counsel for the defendant objected, contending that the trial judge's proposed procedure violated the requirement of random selection of jurors and amounted to asking the jurors to volunteer for service. The objection was overruled and the trial court followed the proposed procedure, creating a subvenire of persons who volunteered to serve for the long trial. The trial court eventually entered a judgment on jury verdict for $8.5 million. The supreme court reversed. The court noted that there were no Alabama cases on point with regard to the concept of volunteering for jury service in this fashion, but instead relied on two federal cases that have addressed the precise issue: *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977), overruled on other grounds by *United States v. Singleterry*, 683 F.2d 122 (5th Cir. 1982), and *United States v. Branscome*, 682 F.2d 484 (4th Cir. 1982). In *Kennedy*, the Fifth Circuit concluded that "providing prospective jurors with complete discretion whether or not to serve negates the statutory mandate of random selection." *Kennedy*, 548 F.2d at 612. As the Fifth Circuit noted, in *Kennedy*, "allowing people to decide whether they wish to perform a particular task is quite the opposite of randomly selecting those who, unless within narrow and objectively determined categories of exemptions and excuses, must perform the task. A volunteer is not a random selectee." *Kennedy*, 548 F.2d at 611. Thus, the court held that the procedure employed by the trial court violated the random selection requirement of *Ala. Code* 12-16-55 (1975).

Forum Selection Clauses; Unreasonableness

Rucker v. Oasis Legal Finance LLC, 632 F.3d 1231 (11th Cir. Feb. 11, 2011)

The plaintiffs obtained non-recourse funding for litigation from the defendant, which was embodied in a contract containing a mandatory forum selection clause specifying Cook County, Illinois as the exclusive forum for disputes. The plaintiffs later sued, claiming that the contracts were unenforceable gambling contracts under Alabama law. The defendants moved to dismiss based on the clause. The district court denied the motion, reasoning that enforcement of the clause would be unreasonable because the substantive claim involved purely a question of Alabama law. The Eleventh Circuit reversed, reasoning: (1) *de novo* was the proper standard of review applicable to enforcement of a forum selection clause; (2) under *Erie*, there was no conflict between federal and Alabama law concerning enforcement of outbound forum selection clauses, the enforcement of which is governed by a reasonableness standard; and (3) the *Bremen* and *Southerland* factors did not support a finding that would satisfy the requirement that the opponent make a "strong showing" of unreasonableness in enforcement of the selected forum. ▲▼▲

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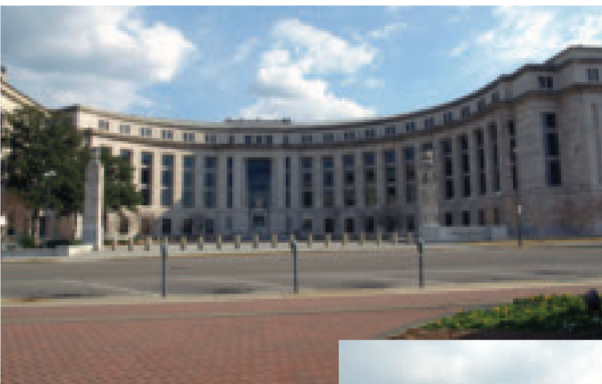

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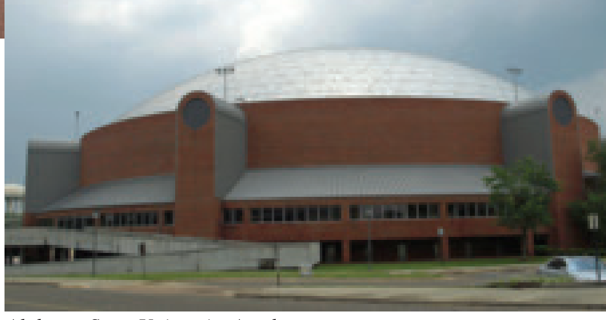

Alabama State University Acadome

CLAY A. LANHAM
clanham@vickersriis.com

From Spring to Summer

This past spring, the Alabama State Bar Young Lawyers' Section (YLS) conducted successful Minority Pre-Law conferences (MPLC) at the Frank M. Johnson, Jr. Federal Building and the Alabama State University Acadome in Montgomery and also at Birmingham Southern College. High school students from those two areas attended the conferences and were introduced to the practice of law and given advice on how to achieve their educational and professional goals. These seminars would not have been possible without generous sponsorships from:

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YOUNG LAWYERS' SECTION

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Additional supporters include the **Alabama Lawyers Association** and the **Capital City Bar Association.** Thanks also go to the lawyers and judges who volunteered their time to speak at these conferences. And, last, but certainly not least, thanks to YLS Executive Committee members **Sancha Howard, J. R. Gaines, Elizabeth Kanter** and **Mitesh Shah** for their hard work in organizing these events. The YLS hopes to expand the MPLC to other cities in the near future. If you or your firm are interested in sponsoring and/or assisting with starting a Minority Pre-Law Conference, call Sancha Howard at (334) 215-3803 and/or J. R. Gaines at (334) 244-6630.

As spring concludes and summer approaches, many of you begin planning trips to the beach. I hope you're going to attend the YLS's largest event of the year, **May 12–15, 2011,** at the Sandestin resort in Destin. The Sandestin CLE is a great place to relax and enjoy the beach with your family and gain required CLE hours at the same time. Speakers for this year's Sandestin CLE include:

Honorable Terry A. Moore (Alabama Court of Civil Appeals)

Honorable Sarah H. Stewart (Mobile County Circuit Court)

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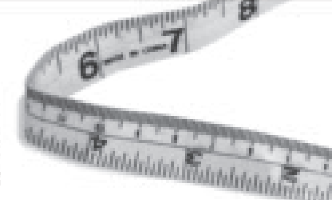

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There will also be many other enjoyable events, such as a cocktail reception Friday evening, beach parties on both Friday and Saturday afternoons and a golf tournament. At $300 (with a reduced fee of $250 for first-year lawyers), the Sandestin CLE is a very economical way to obtain CLE hours along with a trip to one of the most beautiful beach resorts in the southeast so register now! For a brochure and/or registration information, visit *www.alabamayls.org.*

And, it's not too late to be a sponsor of this year's Sandestin CLE. As of press time, firms and companies who have committed to sponsoring this year's Sandestin CLE include:

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Like many other YLS events, this seminar would not be possible without the generous sponsorships of the above-referenced firms. To sponsor or participate in this year's Sandestin CLE, contact Brandon Hughey at (251) 405-1300. A complete list of the sponsors will be provided in my next article. I know committee members **Brandon Hughey (chair), Katie Hammett (co-chair)**, and members **Larkin Peters, Brad Hicks, Chip Tait, Brian Murphy, Bill Robertson, Harold Mooty,** and **Andrew Nix** will do a great job handling this year's event.

Your YLS will sponsor the spring Admission Ceremony May 31st at the Renaissance Montgomery Hotel & Spa in its Performing Arts Theatre. The event is always appreciated by the new admittees and their families. Admission Ceremony Committee members **Nathan Dickson, Louis Calligas, Walt Hickman** and **Bill Robertson** are working hard to ensure that this latest ceremony is another successful one. To participate in or sponsor the spring ceremony, contact Nathan Dickson at (334) 738-4225.

The Blindfold for Lady Justice Does Not Go on until after Jury Selection

By Stephen D. Heninger

The courtroom is the chamber where our society determines the truth in disputes among our citizens. Truth is not "discovered" in a metaphysical or absolute sense, but the chamber is designed to be used by humans to expose errors or abuses of power that masquerade as truth in the particular dispute at issue. The relative and opposing positions of the particular truths being pursued are framed by the pleadings of the actual parties to the dispute. Pictures and stories are placed in those frames with the desire that the most reasonably satisfying depictions will be accepted as the closest resemblance of the truth. Jurors are selected or seated by the actual parties using their divergent and opposing determinations that these 12 are the most likely candidates for the mythological jurors who will apply the rules of law to make an important decision on a matter that does not concern them directly, but will have a societal impact that is not confined to this chamber and this dispute. These jurors are not like art critics or consumers who view the opposing frames and their pictures/stories with a detached objectivity to award a prize to the winner. They are not simply dispassionate judges of the presentation. Instead, they are inserted into the frames, pictures and stories, and become a part of its dynamic life. They are not sterilized (like surgeons) before entering the frames. Indeed, the law expects them to bring in their own views, experiences and values–components of what is termed "common sense." This injection causes the prepared and strategically designed frames, pictures/stories of the actual parties to move beyond three-dimensional media, videogames or simple audience participation. Twelve strangers have been placed inside the story and it will morph according to their expansions, exaggerations or filtering of the prepared strategic components. Unfortunately, we are not able to watch this morphing as it is occurring. Even though the jury is inside the frames in a dynamic way, they are physically separated in the chamber while sitting in a box and appearing to passively observe the story being acted out by the parties. No applause signals their acceptance of significant points or messages. No "boos" attend their response to perceived falsehoods or foul play.

The truth doesn't always walk in–sometimes it has to be dragged in

The truth does not always voluntarily walk in through the doors of the courtroom. Sometimes, it has to be dragged in, kicking and screaming. Documents and people have to be subpoenaed to appear. Once inside the chamber, they are tested by fierce advocates for opposing positions under the rules of evidence and the law. The frames and pictures/stories previewed in opening statement by the parties are subjected to evaluations of the legal burden of proof and the practical burden of persuasion. Did the story live up to its preview in a *technical* manner "as the record?" Was the performance convincing in its character? Did the theme resonate with the jury and find acceptance in their individual and collective beliefs, values and life experiences? In the end, after the jury deliberates in secret and delivers its verdict, the truth is revealed and walks out of the courtroom doors and into public society. One side's version of the truth has lost. One has prevailed. The system has worked by providing an orderly resolution that has been declared the most reasonably satisfying and factual truth in this dispute.

The courtroom reveals the best and worst of us

The courtroom has been my workplace for over 30 years. I have found it both inspiring and depressing. It is a chamber that provides a view of the best and the worst in all of us. The human tension between the powerful and the weak, the fair and the biased and the honest and the dishonest is always in attendance. This tension will always be with us in a system of justice that is administered by a democratic society that relies upon its diverse members to fairly and impartially resolve disputes under the facts and the law. Neither the facts nor the law have life until it is breathed into them by the

jury. They are not self-sustaining or even real until they acquire the breath and voice of the jury. This tension is what makes the system work if it is attended by advocates who strive to expose the tension and offer a resolution that fits within the law and "feels right." This tension system works if the jurors selected by the parties are the most likely candidates to openly face the facts and make difficult but necessary decisions that preserve the spirit and intent of the law.

Our system of justice is the only real insurance we have in our individual and collective lives, safety and well-being. Obedience and respect for the rules of law (and its orderly process) are the premiums we pay for this insurance. If that premium is not paid by everyone (parties, counsel, the court and the jury), the insurance disappears and there is no protection. The necessary tension of the adversary system is snapped so that brute strength, power, prejudice and political agendas infect the process. Our laws become nothing more than literature that can be re-written as "faction" (a combination of fact and fiction) on the whim of the jury that chooses not to pay the insurance premium of obedience and respect for the law.

Obedience and respect are the insurance premiums

There is reason and hope for our continued dedication to this system. As advocates for our client's cases, we have an obligation to pay our premiums as well. Part of that premium is the opportunity to have a voice in the selection process of potential jurors. We are expected (if not required) to examine potential jurors on the practical respect for the tension of the opposing positions that make up this dispute. If both sides do their work, the jury that is seated will be composed of people who will respect that tension and approach it with an open mind while giving us some insight into their individual/collective backgrounds that likely play a role in their tour of duty. If properly and completely undertaken, this opportunity enables the trial attorneys to assure a jury box that is as balanced and uncommitted to a pre-determined outcome as is reasonably possible in our democratic society, a jury that is not expected to deliver a verdict that is "faction" or simply a statement of sympathy or bias that is not based upon a fair and impartial finding of the facts presented while guided by obedience and respect for the law. How do we find such jurors who will stand on the watch tower of this specific case and perform these lofty duties? Where do we go to examine whether these potential jurors will fall asleep at their posts, be distracted from their mission or be sentinels for the opposition rather than the process? These are not easy questions to answer, but one thing is clear–the obligation starts with us as trial counsel for our respective clients in pursuing and maintaining the tension of the dispute at hand.

Blindfolds don't go on until the jury is selected

We do not wear blindfolds while we examine the jury to determine what they are going to inject into the frames of our cases. They do not wear blindfolds while they respond unless they reveal that they are likely to be voluntarily blinded by beliefs or preconceived notions. The blindfolds (my Lady Justice metaphor) don't go on until the jury is selected. These are just a symbol that *this* jury will attempt to be unaffected by improper influences while they confront the tensions presented by this dispute. These blindfolds are not expected or intended to choke off the internal beliefs, values and life experiences of the jurors.

The law on *voir dire*

In Alabama, the trial court is vested with great discretion in determining how *voir dire* will be conducted. *Ex parte Land*, 678 So. 2d 224 (Ala. 1996). The scope of questions is left largely to the trial court's discretion. *McClain v. Routzong*, 608 So. 2d 722 (Ala. 1992). The trial court may refuse to allow juror questionnaires since there is no requirement that counsel be allowed to question each prospective juror individually. *Miller v. State*, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug.27, 2010). The scope and purpose of the examination of potential jurors was extensively reviewed in the case of *Alabama Power Co. v. Bonner*, 459 So. 2d 827 (Ala. 1984) (reversed on other grounds). The court stated that the statutory rule confers two rights of examination: "1) as to qualifications, interest or bias affecting the trial; and 2) under the court's discretion, as to any matter which might affect the verdict." *Id.* at 831 (citation omitted). The court went on to state:

> This statute has consistently been given a liberal interpretation, allowing a trial lawyer a broad right to question prospective jurors as to any matter which might aid him in the intelligent exercise of his right to peremptory challenges. *Dyer v. State*, 241 Ala. 679, 4 So. 2d 311 (1941). The examination is not confined to matters which disqualify a juror, but extends to *any matter* which might tend to affect the verdict. *Avery Freight Lines v. Stewart*, 258 Ala. 524, 63 So. 2d 895 (1953). The scope of the examination is left largely to the discretion of the trial judge.

459 So. 2d at 831-32 (emphasis added).

The Alabama Supreme Court has also stated:

> To effectuate the fundamental right to an impartial jury, courts must permit a meaningful and effective *voir dire* examination; therefore, a very wide latitude is allowed in conducting the examination, *extending to any matter that might aid the parties in exercising their peremptory challenges and to any matter that might tend to affect the verdict.*
>
> The purpose of a probing, wide-ranging *voir dire* examination, besides acquainting the jury with the type of case before it, is to enable a party to select a jury of men and women qualified to competently judge and determine the facts in issue without bias, prejudice, or partiality. It is an abuse of discretion for a trial court to so limit the *voir dire* examination as to infringe upon a litigant's ability to determine whether a prospective juror is free from bias or prejudice and thereby to effectively exercise his strikes.

McClain v. Routzong, 608 So. 2d 722, 724 (Ala. 1992) (internal citations omitted) (emphasis added and original emphasis removed).

The statutory provision for challenges for cause is found at *Ala. Code* § 12-16-150 (1975). Employment by one of the parties is a proper challenge for cause. *Welch v. City of Birmingham*, 389 So. 2d 521 (Ala. Crim. App. 1980). Ownership of stock in one of the parties' parent corporation is proper challenge for cause even if the juror says he can be fair. *Wallace v. Alabama Power Co.*, 497 So. 2d 450 (Ala. 1986). Prospective jurors who indicate a problem with being fair, but then respond to the judge in a way that rehabilitates this disclosure present a significant problem. *See*, *Knop v.*

McCain, 561 So. 2d 229 (Ala. 1989); *Wood v. Woodham*, 561 So. 2d 224 (Ala. 1989). The bottom line appears to be whether the trial court is satisfied that the juror's opinion is so fixed that he/she cannot ignore it and follow the court's instructions by trying the case fairly and impartially. *Ex parte Rutledge*, 523 So. 2d 1118 (Ala. 1988). The strength of the opinion and the context of replies to questions *as a whole* must govern the issue of granting a challenge for cause. *Ex parte Beam*, 512 So. 2d 723 (Ala. 1987).

The challenge is to avoid possible prejudice

Personal acquaintance with a party is not an absolute challenge for cause. *Grandquest v. Williams*, 273 Ala. 140, 135 So. 2d 391 (1962). Nor is acquaintance with counsel. *Roberson v. U.S.*, 249 F.2d 737 (5th Cir. 1958). The question is probable prejudice. The United States Supreme Court has stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Murphy v. Florida, 421 U.S. 794, 799-800 (1975) (citation omitted).

A juror's firm statement that "I'm against punitive damages" has been held sufficient to support a challenge for cause. *Sealing Equipment Prod. Co., Inc. v. Velarde,* 644 So. 2d 904 (Ala. 1994). The mere fact that a juror's employer is a client of trial counsel is not sufficient. *Albright & Wood, Inc. v. Wallace*, 274 Ala. 317, 148 So. 2d 240 (1962). A challenge for cause has been upheld where the juror had done business with the defendant and that relationship would influence his decision. *Sewell v. Webb*, 702 So. 2d 1222 (Ala. Civ. App. 1995). Venire members in a medical malpractice action who are current patients of the defendant have a presumption of probable prejudice. *Boykin v. Keebler*, 648 So. 2d 550 (Ala. 1994).

The Alabama Supreme Court has stated:

> Parties have the right to have questions answered truthfully so that they may exercise their discretion wisely in the use of their peremptory strikes and that right is denied when a juror fails to answer correctly.
>
> *Alabama Gas Corp. v. American Furniture Galleries*, 439 So. 2d 33, 36 (Ala. 1983). Not every failure to respond correctly will entitle a party to a new trial. The test is whether the failure to respond resulted in "probable prejudice." *Freeman v. Hall*, 286 Ala. 161, 238 So. 2d 330 (1970); *Curry v. Lee*, 460 So. 2d 1280 (Ala. 1984). The test is different when considering whether the challenge would have been one for cause versus a peremptory strike. *Chrysler Credit Corp. v. McKinney*, 456 So. 2d 1069 (Ala. 1984). Questions regarding experience in adjusting claims for an insurance company or any entity that reviews claims are not improper. *Burlington Northern Ry. Co. v. Whitt*, 575 So. 2d 1011 (Ala. 1990); *Shelby Co. Commission v. Bailey*, 545 So. 2d 743 (Ala. 1989). Counsel can invite error by questions. Consider this response by a juror, who was struck for cause, but a mistrial denied on the argument that the juror had contaminated the panel:
>
> Prospective Juror: Yes. It's kind of a question but it's more of a statement. When this gentleman [defense counsel] began to speak and he was repeating what the gentleman [the prosecutor] said about circumstantial evidence as opposed to civil and criminal cases, it is my opinion that he intentionally tricked us to raise our hands to make us believe something. Now I'm prejudiced toward you and I won't ever believe anything you say.
>
> Defense counsel: You don't have to worry about it. I'm going to strike you.

Vann v. State, 880 So. 2d 495, 497 (Ala. Crim. App. 2003.)

Practical considerations

There is no prejudice detector at the doorway of the courtroom. Airports and courthouses have metal detectors that are sensitive to materials that could create a security risk. The only detection device available to identify the existence and depths of firmly held beliefs that could taint a fair and impartial jury is *voir dire*. We cannot reasonably expect a jury that does not come to its tour of duty with preconceived learnings and attitudes. We cannot erase the beliefs, life experiences and values held by this group of potential jurors who are part of this democratic soup we have been cooking in our American melting pot for two centuries. Indeed, it is the strength rather than an infirmity in our system. It is the trial lawyer's responsibility to use effective *voir dire* as a means to identify those potential jurors who appear to be so rigid in their beliefs that nothing in the evidence or the law would cause them to pause and approach the burden of proof with an open mind. That "open mind" does not involve an abandonment of their beliefs, life experiences and values. That "open mind" does not expect a mechanistic or deductive approach to linear proof that simply measures the weight and volume of the evidence. That "open mind" means that they will listen, think and consider the tension of persuasion that is being attempted by the opposing sides. It is the same "open mind" to which we resort in determining which jurors are our best prospects for being open to our adversarial persuasion. The other side is doing the same analysis (from a diametrical perspective) for their persuasive strategy. Of course, the methods used will be executed by trial lawyers with different attitudes, styles and judgments on how to seek and ultimately use the information acquired. The beliefs, life experiences and values of the trial lawyer are just as present and vital in this phase of the trial as those of the jurors. Common sense, gut reactions and instincts attend the decision making process just like they do the jurors' deliberations. We all have to *feel* that we are making the right decision based upon the information available.

Right decisions require relevance and insight

The best assurance for making the right decision is to expand the amount of relevant and insightful information. Don't waste valuable time. It's not about us as trial lawyers–it's about them as the jury. Who are they? What life experiences have they gone through that would attach to this case? What are their core values? How do those values align with the real issues in this case? Where do they go when they face a tough question that tests their beliefs and values? Do they believe that rules play a vital role in assuring our safety and well-being? How do they express their answers for these questions?

In emergency rooms, doctors ask questions to determine what drugs are already "on board" because this can alter their approach to the condition at hand. Voir dire does the same thing from a beliefs and values standpoint. What is already "on board" and how high is the dosage? The ultimate interest of the legal system is arguably not blank impartiality but "impartial decision-making."

Trials are about stories

Imagine that our cases are like an aquarium that is a new and intimidating environment to the jurors. We have stocked the aquarium with the fish, plants, oxygen pump and decorations that will make up our story. The jury enters the water with their own life support system–oxygen tanks that are filled with the past experiences, beliefs, values and instincts that have served them well (in their opinions) to get them this far in life. They are not going to abandon this life support system and simply jump into your aquarium in blind trust. It doesn't make sense to expect them to confront a new and intimidating environment by abandoning their own tested and approved life support system. You are not going to convince them to do it. However, you need to know what is in that system that is going to be sustaining them while they swim in your case. In short, you need to watch them swim with it during *voir dire* to see how it works and why they find it so reliable.

Trials are about stories. The story of our struggle for independence and preserving the right to trial by jury. The story of our legal system and its rules/purpose. The story of these two parties and what has brought them here. The stories that brought these jurors here to this involuntary endeavor and what they brought with them for the job. Story-telling requires three basic elements: a story-teller, a story and an audience. In *voir dire*, the roles of the trial lawyers and the jurors are reversed. They are the story-tellers and we are the audience. We pick the topics, but they tell the stories. We act only as facilitators to give birth to information. That labor requires attention and patience. We should ask "value neutral" questions that are open ended and allow the jurors to speak. For example:

"Q. Mrs. Johnson, how do you feel about insurance?

A. Well, I think it's important to have it.

Q. Why do you say that?

A. Because you need to be protected in case you have an unexpected problem that could be very expensive unless you have taken out insurance to take care of that possibility.

Q. Have you had any experiences with insurance that were good or bad?

A. Yes. I have had both. One time . . . ."

Look who's talking

Look at who is doing the talking. The lawyer is *listening* and following up to facilitate the release of more discussion and information. The lawyer should also be observing how the rest of the panel is reacting to her story. He follows up with another juror who was nodding. "Mr. Smith, tell us how you feel about insurance and your experience." Then to the whole panel: "Could I see a show of hands of those of you who share Mrs. Johnson and Mr. Smith's experiences? Those who have a different view?" Why are there differences?

Don't be afraid of negative answers that are the opposite of what you hoped for in this case. Answers don't poison the panel. You need to know this negative information and rather than being disappointed, you should be glad you uncovered it. You won't convince this juror he is wrong and don't try. He won't convince the panel he is right either. Stay value neutral when you suggest topics or expand the discussion by follow-up questions. Let the jurors talk. This is not the time to try your case or persuade the jury. Your goal is not to win an argument, but to win an audience. Winning the audience means making them feel comfortable and trusting they can share information with you.

1. Ask *value neutral* questions, but about *value pregnant* topics.
2. Select topics that are relevant to your case without tipping your hand on what responses you would like. Avoid "buzz words" or "hot buttons" except where you say "*Some people* feel that _______________; how do you feel about that?" This keeps you neutral, but opens the door for discussing how "some people feel." Where do these jurors fall on the spectrum?
3. *Listen* to the responses. Follow up to let the juror talk more freely. Listening earns trust. Jurors don't trust us until we earn that trust.
4. Evaluate these responses *outside* the boundaries of *voir dire* when you are considering your strikes. This is where your own beliefs and values enter the picture–not before. Premature advocacy is to be avoided so you keep the channels of open communication alive and build your own credibility with the audience. Taking positions will attract some and repel others. Don't take those chances–let them talk and *then* you judge.

Using *voir dire* as a tactical exercise

If the primary purpose of *voir dire* is to attempt to identify the worst potential jurors for our particular case, a corollary is to avoid identifying our best jurors and doing the work for the opposing counsel. When we ask questions that are not "value neutral" or attempt to try our cases in *voir dire* we solicit individual jurors to give speeches that are supportive of our announced position. This may make us feel good temporarily by getting such vocal support but, at the end of the day, we have simply made the striking decisions of our opponent easier. Of course, we all know that some venire members will expose themselves in strong positions regardless of our efforts. However, we should not facilitate or magnify the problem. If a juror does give a response that is strongly in support of our position it may be wise to get the spotlight off the individual and put him in a group by consensus. Turn to the venire and ask for a show of hands of the jurors who share that juror's feelings. This keeps the decision-making process on the other side of the room more difficult. You don't need to get other individuals to respond. Go to the whole panel to build a consensus that puts less of a "bull's eye" on this juror and puts him in a herd of others who will have to be addressed by the opposition or ignored at their peril. What if no other jurors share this juror's feelings? Go to individuals who will explain why they disagree, but will likely give good support for some of the initial juror's comments. Then, reverse the process again by going to the group.

Identifying the "dangerous" juror

Recent jury studies have confirmed that the objective of identifying dangerous jurors is a more viable approach than attempting to establish commitments from the jury or persuading them on the theme of the case. *See Voir Dire: What is the Effect?* By Angela Abel of Decision Quest (2009.) Voir dire itself does not appear to have any long-term effect on influencing the jury during the remainder of the trial other than contributing to the trust and credibility accorded attorneys. While its effect on the jury is negligible, it is very effective, if done properly, in identifying jurors who will be a problem in this case.

There are several quotes from disparate non-lawyer sources that have influenced my thinking on trial work:

> "Would you persuade, speak of interest, not reason." (Benjamin Franklin)
>
> "The way to persuade someone is not to beckon him to come and look at things from where you stand, but to move over to where he stands and then try to walk, hand in hand, to where you would like both of you to stand." (Sydney J. Harris, essayist)
>
> "The most important single factor influencing learning is what the learner already knows. Meaningful learning involves the assimilation of new concepts and propositions into existing cognitive structures." (David Ausubel, professor/author)
>
> "There are two levers to set a man in motion, fear and self-interest." (Napoleon)
>
> "I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel." (Maya Angelou, poet)

You can't hunt three rabbits with one dog

Jurors are not going to come to important decisions that do not make them feel right. If there is a clash between the requested result and their basic beliefs, life experiences and values, it is not rocket science to determine the likely winner of that clash. Our task is to learn this backdrop and link into it–find an aspect of our case that attaches to such values. It is unlikely this can be done on a wholesale basis, but it can be done on important, salient and well-selected issues. (Don't try to hunt three rabbits with one dog.) What will get through the filters our selected jurors will bring to this case? They are just like us, they view stories through their own filters and tend to listen to and believe information/themes that are consistent with their own life experiences, beliefs and values. They will discount or discard information/themes that are inconsistent with that filtering system. Therefore, effective trial lawyers must do more than marshal the evidence and know the law. We have to understand and embrace what makes us all different and what makes us all the same. Don't be afraid of this tension. Swim in it–or sink from the weight of our egos and myopic views that our view is the only view.

Conclusion

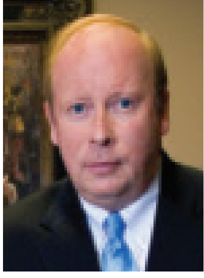
We all go to seminars and read materials like this article on how to improve our skills in advocacy. We should strive to remember that it makes a great deal of difference whether we set out to learn the tricks of the trade or the trade itself. Tricks of the trade are just that–tricks! They have no place in the courtroom. Some of our brethren never really drink from the fountain of advocacy. They merely gargle. There are no shortcuts. We need to recognize the elements and foundations of effective advocacy and persuasion. We need to take into account the psychological, emotional and rational aspects of our audience in the courtroom. We need to care about our jurors. Care about what they think and believe. Care about what we can give them to make their job easier. Care about giving them all the facts and values that will make them feel good about their verdict. I didn't say to act like we care–we actually should care.

One final observation: How many times have you heard someone say, "We need to think outside the box?" When you think about the process of communication, that is dangerous. Communication is getting through to your audience. It is not simply "giving out" to your audience. Information without any reference points has no value. The jurors' values are crucial to our endeavor. Those values are *inside* the box. Creative thinking "outside that jury box" is just academic or for show. The last time I checked, the verdict form doesn't have any question about who was the most entertaining, creative lawyer. There is no award for "Miss Congeniality." One party wins and the other loses. We all need to be creative, but with an eye toward the effect on the people in the box.

I recently read this quote that says it much better than I can:

> "Artists don't think outside the box because outside the box there is a vacuum. Outside the box there are no rules and no reality. You have nothing to interact with, nothing to work against. *Artists think along the edges of the box. That's where the audience is.* We need the reference points of the box to communicate with the audience. That is why maintaining a touch with the edge is imperative. Nothing exists in itself without a contrast." (Unknown artist)

I need to be reminded of this and that trials are not about me, but about the jury. I don't make them see what I believe. I know that there is more truth in "believing is seeing" than "seeing is believing." I need to know what the jurors' believe and value so I can touch the edges of that box and communicate with them. They will see what they *believe* and it is my job to show them what fits with their beliefs. My client's case is what is at stake, not my reputation as someone who thinks outside the box or makes pretty speeches. ▲▼▲



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The Legacy of Albert John Farrah

By Judge William H. Pryor, Jr.

***Editor's Comment**: Judge Pryor recently researched and wrote an interesting speech, which he presented to the Farrah Law Alumni Society Banquet February 18, 2011. He kindly agreed to allow* The Alabama Lawyer *to publish it for the benefit of the entire state bar.*

Tonight this organization of alumni of the University of Alabama School of Law gathers to celebrate and advance the continued vitality of a top-tier institution of legal education. The current reputation of the law school, built over the last few decades, is due, in no small part, to your generous support and the tireless and able leadership of Dean Ken Randall. I am an admirer, but, alas, not an alumnus, of the law school. When I was admitted to the law school in 1984, I opted instead to attend Tulane, a venerable school near my hometown of Mobile, and Dean Randall, 27 years later, still gives me a hard time about it. In many ways, the University of Alabama School of Law is still a young institution, but it has enjoyed a meteoric rise in its reputation. There is not today another law school, public or private, in the Deep South with a better reputation than the University of Alabama. In fact, we should all be thankful that we do not have to apply for admission today, as the standards are higher than ever.

I deeply appreciate the opportunity that I have enjoyed teaching for the last several years as a visiting professor of federal jurisdiction at the law school. It is a delight to teach the current students, and four graduates, in recent years, have served in my chambers as able law clerks for our Court. In the past few years, my Alabama clerks have worked alongside clerks who graduated from Harvard, Yale, Stanford, Duke, Michigan, and Virginia, and the Alabama clerks have been every bit as good as or better than their fellow clerks.

Tonight, I speak about the dean of the law school, who laid the foundation for success at the University of Alabama, the

Dean Farrah c. 1890

first dean, in the words of Professor Wythe Holt, "to leave a permanent mark upon the Law School,"[1] and the dean in whose honor this Society is named: Albert John Farrah. As one historian has written, "As the first dean of the Law School to possess extensive training and considerable experience in the field of legal education as well as in law practice, Farrah was exceptionally qualified to guide the Law School in a period of increasing national pressure for improvement in legal training."[2] I will speak about Dean Farrah's background and his tenure as dean. I especially will give tribute to the mark that Dean Farrah left on the four essential ingredients of a law school: its facilities, faculty, curriculum and students. Dean Farrah's tenure enables us to appreciate how far the law school has progressed in the last century.

Dean Farrah was a remarkable teacher and administrator who took a circuitous route to the University of Alabama where he served for more than 30 years. Before he studied law, Albert Farrah was a high school teacher and, for several years, a superintendent of public education.[3] Farrah graduated from the University of Michigan Law School in 1898 and, after practicing law briefly, became a professor at Michigan.[4] In 1900, only two years after his graduation from Michigan, Farrah became the first dean of the Stetson University College of Law.[5] (Perhaps Farrah should be credited with leading the migration of snow birds from the Rust Belt to the Sunshine State of Florida.) Farrah served as the founding dean at Stetson for nine years and then became the first dean of the University of Florida College of Law where he served for three years.[6] Few good stories about the foundation for success at the University of Alabama, whether in football or law, are complete without a reference to the late president of the university, George Denny, who, in 1912, persuaded Albert Farrah to become a professor and assistant dean at the law school.[7] Professor Holt rightly explained, "Denny knew a good man when he saw one, as he had somehow . . . hired away the man who had been the first dean at both Stetson University and the University of Florida Law Schools to come to Alabama merely as a professor and assistant dean."[8] Keep in mind that Farrah was almost 50 years old when he came to Alabama in 1912, and he would remain at Alabama for 32 years.[9] In the spring of 1913, William Bacon Oliver resigned as dean of the law school, and Albert Farrah succeeded him.[10]

Farrah "faced numerous challenges as he assumed leadership of the School."[11] Former Dean Charles Gamble described "[t]he law school that Dean Farrah inherited [as] in disarray. It had been founded in 1845 and promptly closed for lack of students. At the law school's reopening in 1872, legend has it that the trustees made it a condition that the law faculty not be permitted to vote with general faculty at the University."[12] Robert McKenzie wrote, "The faculty required strengthening, the course of study and admission requirements needed constant upgrading in order to meet national standards, and a crying need for improved facilities existed."[13] Dean Gamble explained, "The law library had only a few hundred books and, upon Farrah's arrival, classes were held in Morgan Hall which had been described as 'where it waxed somewhat hot during the summer and cold in the winter.'"[14] Dean Farrah described the situation more candidly as follows: "We froze in the winter and roasted in the summer."[15] One professor, William Brockelbank, in his first term of 1922-23, "was forced to wear an overcoat to class during the winter and . . . on one cold morning 'about one square yard of plaster in the ceiling above [his] desk gave way, due to a leak in the roof, and simply blotted out all on [his] desk.'"[16] "Moreover, all these problems had to be surmounted in the face of a constant shortage of funds; Alabama was a predominantly agrarian state and these were years for the most part lacking in prosperity for farmers."[17]

Farrah started his deanship with two full-time professors, including himself, and two part-time lecturers.[18] Farrah added to the full-time faculty a former colleague from the University of Florida, Edmund Dickinson, who, like Farrah, had graduated from Michigan. "Initially, Farrah filled gaps in the teaching ranks with recent graduates of the Law School."[19] Eventually, Farrah hired graduates of Harvard, Chicago, George Washington, and Indiana.[20] By 1929, the faculty had six full-time professors.[21] Farrah could spot talent: one of the part-time instructors that year was Robert Harwood who had graduated from Alabama and later obtained an advanced degree from Harvard and became a professor at the

law school, before becoming a United States Attorney, Attorney General of Alabama and Associate Justice of the Supreme Court of Alabama.[22]

Dean Farrah's main priority in the 1920s was the construction of a new building for the law school. President Denny had listed a law building as among those needed at the university in the 1920s,[23] and he pledged at least $75,000 for the project "if Farrah could raise $40,000."[24] Farrah succeeded and added a personal and generous contribution to the total.[25] "[A] committee of lawyers appeared before the Board of Trustees and urg[ed] that the new building be named for Dean Farrah."[26] The three classes of the law school made the same petition to the board.[27] And, in 1927, the new facility, a "three-story, red-brick building (designed to house 200 students) was dedicated, and it bore the name Farrah Hall."[28] The new building allowed the law library to grow and hold 9,500 volumes by 1928.[29] When Farrah's tenure as dean ended, in 1944, the library held 17,000 volumes.[30]

Another of Dean Farrah's priorities in the 1920s was the raising of standards for legal education. In 1920, "the number of years' study in Law School was raised from two to three; it had been merely a year and 6 weeks when [Farrah] first came in 1912."[31] Farrah had already introduced a "curriculum in letters and law" in 1919, which enabled a student to obtain both a bachelor's degree and a law degree.[32] In 1923, the legislature allowed graduates of the law school to be admitted to the state bar without first sitting for a bar examination.[33] In 1924, the prerequisite education for admission to the law school was raised from 14 high school units to one year of college, and in 1926, the requirement was raised to two years of college.[34] Dean Farrah's raising of standards enabled the law school to receive the approval of the American Bar Association and, after the customary period of two years' probation, membership in the prestigious American Association of Law Schools in 1928.[35] Farrah also replaced the lecture system of classroom instruction with the predominant case method.[36]

Farrah's tenure led to the promotion of extra-curricular activities and scholarship. Before the publication of *The Alabama Lawyer* and the *Alabama Law Review*, from 1925 to 1930, the faculty edited the *Alabama Law Journal*, with the assistance of students as associate editors.[37] Chapters of Phi Delta Phi, Phi Alpha Delta and Sigma Delta Kappa were formed, and a debating society known as the Law Forum flourished.[38]

Farrah also succeeded in increasing student enrollment. Enrollment was 117 in 1928-29, and it steadily increased and peaked at 277 in 1934-35.[39] This increase in enrollment is nothing short of astonishing when you consider that it occurred during the Great Depression.[40] The faculty apparently weeded out the students who did not belong in law school because the first-year class during the 1930s always exceeded 100 students, but "[t]he second- and third-year classes varied in size from 50 to 75."[41]

Dean Farrah should also be credited with two other important developments. In 1936, the law school established an endowment after Miss Unity Dancy of Decatur and Judge Robert C. Brickell of Huntsville donated $45,000.[42] In 1937, the law school established the Farrah Order of Jurisprudence, an honor society that worked toward the establishment of a chapter of the Order of the Coif, which already existed at elite law schools (like Tulane), and a chapter was formed at Alabama in 1969.[43] That year, this Law School Alumni Association was renamed the Farrah Law Society.[44]

By all accounts, Albert Farrah was a great dean and teacher and a good man. He knew all the law students by name,[45] referred to them affectionately as "his boys"[46] and kept up with their careers in law, the military and politics.[47] Over 1,200 students graduated during his tenure, including two United States senators, six members of Congress, four justices of the Supreme Court of Alabama, four members of the state senate, and 20 members of the state house of representatives.[48] He frequently addressed the Alabama State Bar to apprise the profession of the progress of the law school.[49] He made the case for state support of the law school commensurate with state support of the medical school.[50] He drafted numerous bills for the legislature.[51] He also regularly spoke in defense of the role of the Supreme Court in constitutional interpretation at a time when New Deal Democrats often were skeptical about that role.[52] Farrah frequently condemned, for example, President Franklin Roosevelt's court-packing plan.[53] Above

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all, Farrah was a man of the law and especially the law school. One other important thing: Farrah's favorite sport was football, and even though he was a Michigan wolverine, one clipping in his papers attests that, when he was unable to attend a game, "his ears [were] glued to a radio" to hear about the play of the Crimson Tide.[54] Fittingly, the Alabama State Bar inducted Farrah into the Alabama Lawyers' Hall of Fame in 2004 along with Frank M. Johnson Jr., Arthur Davis Shores and Annie Lola Price.

I end my remarks by raising a glass and proposing a toast to the first great dean of the law school in whose honor we gather tonight: Albert John Farrah. Thank you for allowing me to be a part of this annual event.

Endnotes

1. Wythe W. Holt Jr., *A Short History of Our Deanship*, 25 ALA. L. REV. 165, 166 (1972).
2. Robert H. McKenzie, *Farrah's Future: The First One Hundred Years of the University of Alabama Law School, 1872-1972*, 25 ALA. L. REV. 121, 135 (1972).
3. ALBERT JOHN FARRAH, 1863–1944, ADDRESSES, PAPERS, AND LETTERS 92 (1985)(undated article from the *Tuscaloosa News*)[hereinafter FARRAH PAPERS].
4. Charles W. Gamble, *Foreword*, FARRAH PAPERS, at vii (1985).
5. *Id.*
6. *Id.*
7. Holt, *supra* note 1, at 166.
8. *Id.*
9. McKenzie, *supra* note 2, at 135.
10. *Id.* at 134-35.
11. *Id.* at 135.
12. Gamble, *Foreword*, FARRAH PAPERS at vii.
13. McKenzie, *supra* note 2, at 135.
14. Gamble, *Foreword*, FARRAH PAPERS at vii.
15. An Address to the Alabama Bar 1937, FARRAH PAPERS, at 53.
16. Holt., *supra* note 1, at 166.
17. McKenzie, *supra* note 2, at 135.
18. *Id.*
19. *Id.* at 136.
20. *Id.*
21. *Id.*
22. *Id.* at 141.
23. *Id.* at 139.
24. Holt, *supra* note 1, at 168; Robert McKenzie reported that the university made $105,000 available and the dean raised $35,000. McKenzie, *supra* note 2, at 140.
25. FARRAH PAPERS, at 73.
26. McKenzie, *supra* note 2, at 140.
27. Holt, *supra* note 1, at 168; FARRAH PAPERS, at 80.
28. McKenzie, *supra* note 2, at 140.
29. *Id.*
30. *Id.* at 143.
31. Holt, *supra* note 1, at 168; McKenzie, *supra* note 2, at 137.
32. McKenzie, *supra* note 2, at 139.
33. *Id.* at 139.
34. *Id.*; Holt, *supra* note 1, at 168.
35. *Id.*
36. *Id.* at 137, Holt, *supra* note 1, at 168.
37. McKenzie, *supra* note 2, at 137.
38. *Id.* at 138.
39. *Id.* at 131.
40. *Id.* at 140.
41. *Id.* at 141.
42. *Id.* at 142.
43. *Id.* at 142, 156.
44. *Id.* at 160.
45. Holt, *supra* note 1, at 169.
46. FARRAH PAPERS, at 73, 80.
47. *Id.* at 63, 77.
48. McKenzie, *supra* note 2, at 143.
49. FARRAH PAPERS, at 29-33, 43-47 and 52-54.
50. *Id.* at 51–52.
51. *Id.* at 80, 84.
52. *Id.* at 24-29, 33-39 and 56-59.
53. *Id.* at 88, 89 and 93.
54. *Id.* at 84.

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William H. Pryor, Jr. is a judge of the U.S. Court of Appeals for the Eleventh Circuit. Judge Pryor was first appointed by President George W. Bush February 20, 2004 during a recess of the U.S. Senate. On June 9, 2005, the U.S. Senate confirmed Judge Pryor's appointment to a life term.

Pryor served as Attorney General of Alabama from 1997 to 2004. He was appointed to complete the unexpired term of Jeff Sessions, who was elected to the U.S. Senate. Pryor was then the youngest Attorney General in the United States. He was elected to a four-year term in 1998, and was reelected in 2002 with 59 percent of the votes, the highest percentage of any statewide candidate.

Judge Pryor is a graduate, *magna cum laude*, of the Tulane University School of Law where he was editor-in-chief of the *Tulane Law Review*, a member of Order of the Coif and the recipient of the George Dewey Nelson Memorial Award.

From 1987 to 1988, Pryor served as a law clerk for Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit.

From 1988 to 1995, Pryor engaged in a private litigation practice in Birmingham. From 1989 to 1995, Pryor also served as an adjunct professor of admiralty at the Cumberland School of Law of Samford University. Judge Pryor currently teaches federal jurisdiction at the University of Alabama School of Law.

Pryor is a member of the American Law Institute and the Board of Advisory Editors of the *Tulane Law Review*. He is a Fellow of the Alabama Law Foundation and has served as chair of the Federalism and Separation of Powers Practice Group of the Federalist Society. In 2002 and 2003, Pryor served as a member of the State and Local Senior Advisory Committee of the White House Office on Homeland Security.

Judge Pryor has lectured widely, including at the Ronald Reagan Presidential Library and the law schools of Harvard, Yale, Columbia, Tulane, and Notre Dame. He has published in several law reviews, including *Columbia Law Review*, *Yale Law & Policy Review*, *Notre Dame Journal of Law, Ethics & Public Policy*, *Tulane Law Review*, *Alabama Law Review*, and *Cumberland Law Review*. He has published op-ed articles in *The New York Times*, *The Washington Times*, *The Wall Street Journal*, and *USA Today*.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented Saturday, July 16, during the Alabama State Bar's 2011 Annual Meeting at the Grand Hotel in Point Clear.

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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 bars must complete and submit an award application by June 1, 2011. Applications may be downloaded from *www.alabar.org*. For more information, contact Rita Gray at (334) 517-2162 or *rita.gray@alabar.org*.

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As a member of the Alabama State Bar, you are required to keep the Membership Department informed of your current address, telephone number, fax number, e-mail address, etc. All requests for address changes and other information *must be made in writing and will be accepted by mail, fax or e-mail (P.O. Box 671, Montgomery, AL 36101; 334-261-6310; ms@alabar.org).* There is also a form available on the bar's website (*www.alabar.org*) for your use when notifying our office of any address information change. Our policy does not permit us to make changes via phone. **The Administrative Office of Courts is not authorized to make changes to your contact information.**

In *Humphries v. Rice*, 600 So. 2d 975 (Ala. 1992), the Alabama Supreme Court radically expanded the means of proving *scienter* by allowing for a finding based on actual or constructive knowledge of the "breed propensity" of the dog in question.

The Current State of Alabama Dog-Bite Law:

Breeding Confusion in the Law

By Clay T. Rossi

Over a decade and a half ago, the Alabama Supreme Court departed from the traditional common law rule concerning a dog owner's liability for dog-bite. The common law rule, more often than not mischaracterized as the "one bite" or "free bite" rule, focused on an owner's actual or constructive knowledge of the vicious propensities of the particular animal in question. The rule came to be called the "*scienter* rule" and the action, distinct from negligence and sounding *in case*, likewise bears the name *scienter* (coming from the words *scienter retinuit* in the old form of the writ).[1] In *Humphries v. Rice*, 600 So. 2d 975 (Ala. 1992), the Alabama Supreme Court radically expanded the means of proving *scienter* by allowing for a finding based on actual or constructive knowledge of the "breed propensity" of the dog in question. The supreme court's innovation was ostensibly a social policy measure fueled by well-publicized attacks by certain "dangerous breeds," i.e., Rottweilers, Doberman Pinschers and Pit Bull Terriers. Unfortunately for the attorney involved in a dog-bite case, the question of how one goes about proving (or disproving) the breed propensity under the *Humphries* standard is not quite clear. The traditional common law rules for proving *scienter* would seem to apply but, even if they do, contending with the *Humphries* standard still presents various practical issues for the litigator.

The Common Law Action for *Scienter*

Theoretically, the common law of England applies the rule of *scienter* to all animals regardless of species or breed. As a practical matter, over the course of time the imputation of *scienter* as a matter of law was established for owners and keepers of wild or dangerous animals, i.e., *ferae naturae*. Conversely, in the case of "harmless animals," *scienter* had to be proven. A harmless animal (*ferae mansuetae*) was defined as either an animal which by its very nature poses no danger to humans or one which, though it has the potential to be dangerous, by virtue of longstanding domestication is shown to be harmless.[2] A dog arguably falls under the second prong of the test for a "harmless animal" as it does possess a potential danger by reason of its physical capabilities and predatory skills. From these categories it is plain to see that the traditional tests for animal dangerousness were anthropocentric and that an animal's dangerous propensity toward other animals was not relevant to proving *scienter*.[3]

Intertwined with the requirement of human-directed aggression is the law's traditional understanding that "in the case of harmless animals, it is not sufficient to prove that the wrong was a direct one, for something also turns upon the *mens rea* of the animal . . . the rule is that the injury must be the result of a vicious propensity."[4] Requiring that the animal be possessed of something akin to *mens rea* brings into focus why the common law explicitly rejected any notion that a dog could be judged dangerous on the sole basis of its breed.[5]

The common law did provide certain affirmative defenses to the *scienter* action. Aside from the standard affirmative defenses of consent, contributory negligence and self-defense on the part of the dog, the common law also provided a defense if a lost animal had reverted to a wild state.[6]

There also existed at common law certain wrongs committed by dogs which would not fall under the *scienter* action, the most obvious being when a dog was purposefully sicced upon another person.[7] Also recognized were actions in negligence where an animal caused harm by reason of being brought to an inappropriate public place.[8] At least one more recent English case can be found where the owner of a loose dog who innocently caused injury by tripping a pedestrian was liable for both nuisance and negligence.[9]

Finally, in what would otherwise be a historical footnote if not for a quirk in Alabama law, the *scienter* action is one which sounded in trespass on the case.[10]

The Alabama Law of *Scienter*

One of the oldest recorded dog-bite cases in Alabama, *Durden v. Barnett & Harris,* 7 Ala. 169 (Ala. 1844), conforms very neatly to the traditional common law. The opinion of Justice Goldthwaite begins by acknowledging that "an action on the case is the proper remedy when an injury has been sustained from the act of any mischievous animal."[11] This raises the important issue as to the proper statute of limitations on a *scienter* claim. As noted in *McKenzie v. Killian*, 887 So. 2d 861 (Ala. 2004), actions *in case* are subject to a six-year statute of limitations rather than a two-year period for standard negligence claims. Given that this specific issue has not yet been addressed, this allows for the argument to be made that the statute of limitations for an action for dog-bite injuries in Alabama is six years.

Continuing in the *Durden* opinion, the court affirms the traditional common law position regarding the requirements of a *scienter* claim, as Justice Goldthwaite writes:

> It is said the owner of domestic animals, not necessarily inclined to commit mischief, such as dogs, horses, &c., is not liable for an injury committed by them, unless it can be

shown that he previously had notice of the animals [sic] mischievous propensity; or, that the injury was attributable to some neglect on his part.[12]

Using the term "mischief" as synonymous with what we today would call "vicious propensity," Justice Goldthwaite briefly outlines the *scienter* action. He also seems not to rule out the possibility of a negligence action stemming from "neglect." Stating that under the facts of the case it "was necessary to allege and prove a scienter," the court made clear that to do so it was necessary to show the dog was "accustomed to bite mankind."[13]

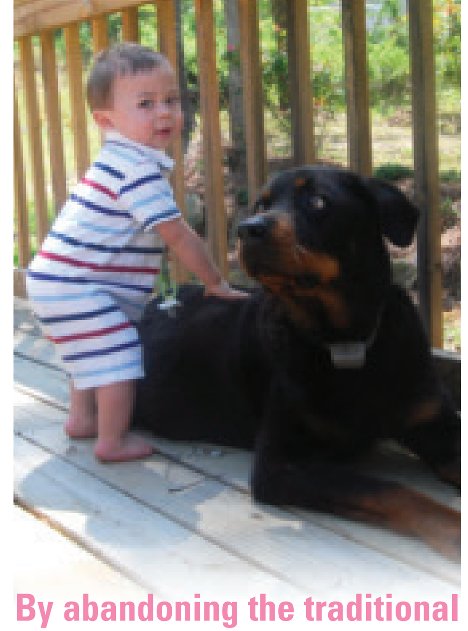
However, a scant nine years later, the Alabama Supreme Court in *Smith v. Causey*, 22 Ala. 568 (Ala. 1853) began to retreat from the idea that a negligence action existed for the careless keeping of a dog as it stated:

> At common law, where an injury to another *arises from carelessness in keeping domestic animals*, which are not necessarily inclined to do mischief, such as dogs, horses, &c., no recovery can be had against the owner, for an injury done by them, unless it is averred and proved that he knew their vicious propensities, and so carelessly and negligently kept them, that injury resulted to the plaintiff therefrom. (emphasis added)[14]

The explicit subsuming of all dog-related negligence claims under the *scienter* rule came in *Owen v. Hampson*, 258 Ala. 228 (Ala. 1952). The *Owen* court extended the scope of the *scienter* requirement beyond canine acts of viciousness to include those of mere "playfulness," stating:

> Based on a review of our cases, as well as those from other jurisdictions, it is our opinion that the law makes no distinction between an animal dangerous from viciousness and one merely mischievous or dangerous from playfulness, but puts on the owner of both the duty of restraint when he knows of the animal's propensities.[15] *Crowley v. Groonell,* 73 Vt. 45, 50 A. 546, 55 L.R.A. 876; *State v. McDermott*, 49 N.J.L. 163, 6 A. 653; *Knowles v. Mulder*, 74 Mich. 202, 41 N.W. 896; *Hicks v. Sullivan*, 122 Cal. App. 635, 10 P.2d 516; *Mercer v. Marston*, 3 La. App. 97; *Hartman v. Aschaffenburg*, La. App., 12 So. 2d 282.

Interestingly, the *Owen* court denies that this departure from the common law is an innovation in Alabama law, though they fail to cite any Alabama case law, and more curiously the court cites as part of its authority two Louisiana cases–a jurisdiction which has never adopted the Common Law of England in which the concept of *scienter* is rooted. The court's decision represents a failure to appreciate the etymological development of the word "mischief." Review of the earliest English dog-bite cases through early 20th-century Alabama cases shows that "mischief" was employed as a term of art synonymous with viciousness, not the more modern sense of playfully annoying. The court's reading of "mischief" essentially ignored the traditional *mens rea* element of the *scienter* rule which, as late as *Alabama Great Southern R.Co. v. Sheffield*, 213 Ala. 15 (Ala. 1925), had the court likening the act of keeping a known vicious dog as the equivalent of harboring an outlaw. The *Owen* court likewise denied that liability could be found for negligently allowing a dog to escape (though quizzically in the quote, *supra*, they speak of "the duty of restraint"), thus implicitly closing the door to the negligence cause of action seemingly provided by *Durden.*



By abandoning the traditional *scienter* rule, creating a breed inquiry and making breed propensity an issue of fact for the jury, *Humphries* has left many issues yet to be resolved.

In 1969, the court of appeals in *Reddett v. Mosley*, 222 So. 2d 369 (Ala. App. 1969), reaffirmed the traditional position that proof of *scienter* can only be had "in the defendant's knowing of the dog manifesting a tendency to bite mankind," i.e., the mischief displayed must be anthropocentric.[16] To hold otherwise is to place a dog owner "under absolute liability as might be the keeper of a tiger or a cobra."[17] The need for clear anthropocentric aggression was likewise affirmed 13 years later in *Allen v. Whitehead,* 423 So. 2d 835 (Ala. 1982), where the court held "as a matter of law that evidence that a dog was large and mean looking, chased and barked at cars, and frequently barked at neighbors is not sufficient to present an issue of fact as to the dangerous propensities of such an animal."[18]

A needed clarification of *Owen* came in *Rucker v. Goldstein*, 497 So. 2d 491 (Ala. 1986). The seminal aspect of *Rucker* is that the court did not allow the plaintiff to conflate *Owen*'s mischief categories of the "playfully dangerous dog" and the "viciously dangerous dog" as is held that evidence that a dog was "rambunctious" was not sufficient to prove *scienter* in a vicious dog attack.[19] Importantly, *Rucker* also addressed Alabama's dog-bite statutes, Ala. Code §§ 3-6-1 to 3-6-4 (1975), for the first time. The court found that the statutes in question, which established liability for bites occurring to those persons lawfully on the dog owner's property, shifted the burden of proof as to *scienter*, essentially making the lack of *scienter* an affirmative defense.[20] For those bites occurring by a dangerous dog "at liberty" from its owner's property, Ala. Code § 3-1-3 (1975) still maintains the common law's strict liability through the application of the rule of *scienter*.

The hegemony of the rule of *scienter* in dog-bite liability took a blow in *King v. Breen*, 560 So. 2d 186 (Ala. 1990). The Alabama Supreme Court reversed and remanded the summary judgment on a claim of attractive nuisance arising out of a child being bitten by a dog chained on the owner's property. The plaintiff had also attempted to assert that the oft-quoted passage from *Durden* provided both a *scienter* and a negligence action. For the first time the court explicitly stated that *Durden* allowed for only the *scienter* action as "the English cases referred to in *Durden* provide that the owner must have knowledge that the dog was accustomed to bite."[21] However, immediately after foreclosing the language in *Durden*, the court stated that the

claim for attractive nuisance was viable because "a jury question is presented as to whether a reasonable person in the exercise of ordinary care would have realized the condition of the dog and kept it from coming into contact with children."[22]

The case of *King v. Breen*, despite its acknowledgment that a chained vicious dog may be a dangerous condition sufficient to support a claim of attractive nuisance, essentially reinforced the idea that an owner was responsible to know his or her dog, and bear responsibility if the dog manifested some type of behavior that was likely to hurt a human. Any apparent erosion in *King* to the preeminence of the *scienter* action by allowing an attractive nuisance claim was nothing when compared to the tectonic shift in dog-bite liability that was to come two years later.

Humphries v. Rice and "Breed Scienter"

It cannot be denied that the restructuring of Alabama's liability regime for dog bites under the case of *Humphries v. Rice,* 600 So. 2d 975 (Ala. 1992) came at a time that some social scientists have characterized as the height of the "Pit Bull Panic."[23] Therefore, *Humphries* was less a "dog-bite" case and more a "Pit Bull" case.

Humphries involved the attack of a gas deliveryman, Clarence Rice, who, attempting to leave a bill at the front door of a mobile home owned by Herbert and Louise Humphries, was knocked off the porch by a Pit Bull Terrier owned by the Humphries's son, Carl. Rice suffered a fractured leg and wrist, as well as bite wounds. Rice sued under Ala. Code § 3-6-1 (1975), which provides, in part, that "the owner of such dog shall be liable in damages to the person so bitten or injured . . . when the person so bitten or injured is upon property owned or controlled by the owner . . . ". As the dog belonged not to the property owner, but his son, Rice sought to have the court extend the scope of the statute under the theory that Ala. Code § 3-1-3 (1975) (a codification of common law strict liability for dangerous animals) expressly establishes liability for "any person [who] owns or keeps a vicious or dangerous animal . . . ".

While the court refused to extend the scope of §3-6-1 beyond its express language of dog "owners" to also include "keepers," *Humphries* did articulate the new prospective rule that "an owner or keeper of an animal will be charged with knowledge of the propensities of the breed of animal he or she owns," thereby creating what may be called "breed *scienter*."[24] In crafting this new standard the court relied on the language of Justice Jones's dissent in *Coley v. Hendrix*, 508 So. 2d 216 (Ala. 1987), another Pit Bull case.

What had prompted the court to make such a radical departure from traditional dog-bite liability? In its citation of his dissent, the *Humphries* court made no mention of precisely what the alleged "breed propensities" were which had alarmed Justice Jones, but they are informative:

> The trial court had before it documents which describe the history and nature of pit bulldogs–animals bred as tenacious attackers with a high tolerance for pain and with jaws capable of exerting 2,000 pounds of pressure per square inch.[25] Reviewing this record, I cannot but find that the mere ownership of a pit bulldog may impute to the owner knowledge of the natural tendencies of that class of animal–including an extreme aggressiveness toward other animals, a lack of external signs to warn of an impending attack, a refusal to cease an attack once it has begun, and a ratio of attack ten times greater than its proportionate representation in the canine population.[26]

The court's new rule of dog-bite liability was an innovation, although it refrained from the bolder step of declaring specific breeds (like the Pit Bull) dangerous as a matter of law, but rather left breed propensity as an issue of fact for the jury.[27] However, *Humphries* failed to provide a new framework for proving "breed *scienter*" or, conversely, to affirm that the traditional evidentiary proofs of *scienter* were still in place. Additionally, as the character of an animal in question is putatively governed, as it is for humans, by *Ala.R.Evid.* 405[28], *Humphries* presents a number of challenging questions which could ultimately spell problems for the practicability of the standard.

Practical Problems with the *Humphries* Standard

By abandoning the traditional *scienter* rule, creating a breed inquiry and making breed propensity an issue of fact for the jury, *Humphries* has left many issues yet to be resolved. Though not an exhaustive list, the following issues will foreseeably arise in dog-bite litigation.

Do the Common Law Rules of Proof Still Apply?

As noted above, the common law accepted as proof of *scienter* only evidence of dog aggression toward humans. Is anthropocentric aggression the rule in proving "breed *scienter*"? No matter how that court answers that question, problems of apparent under-inclusion and over-inclusion of dogs which could be held to be "dangerous breeds" are likely to occur.

As the *Humphries* standard was ostensibly created to hold "dangerous breed" owners in general, and Pit Bull owners specifically, liable and to forestall their ability to argue that their individual dog showed no problem behaviors, the common law rules of proof present a special problem. Justice Jones remarked that Pit Bulls are markedly known for aggression toward other animals. The latest scientific inquiry into breed-specific behavior confirms this, but also shows that Pit Bull Terriers score below average in terms of aggression toward humans.[29] Ironically, the *Humphries* standard may be incapable of addressing the alleged dangerousness of the very breed that spawned the rule. Utilizing the same study, the *Humphries* standard could allow for Dachshunds, Chihuahuas, Jack Russell Terriers, Australian Cattle Dogs, American Cocker Spaniels, and Beagles to be categorized as dangerous based on their propensity for aggression toward humans.

Conversely, if the court seeks to close the "Pit Bull loophole" by abandoning the common law rule of proof that aggression must be anthropocentric, and determines that aggression toward any creature is competent evidence, a dragnet will be created that for practical purposes will encompass the vast majority of dog breeds, even those not commonly thought to be dangerous, i.e., Yorkshire Terriers and Basset Hounds.

Who Is an Expert for the Purposes of Determining Breed Propensity?

Though the court, on occasion, has accepted the testimony of veterinarians as to the propensities of a breed of dog[30], it is not a given that ALA. RULE EVID. 703 automatically qualifies a veterinarian as a breed behavior expert. It could be argued that a veterinarian would not only need to show some type of training in the study of dog behavior but, if rendering a personal opinion as to a breed, to have encountered a representative sample of the breed in order to achieve the rule's requirement of "specialized knowledge." This might pose a problem when dealing with some rare breeds, such as the Presa Canario which has been the subject of notoriously vicious attacks.

Certainly those with specific degrees in animal behavior science could be qualified as experts, as well as those lay people who have experience specifically with dog temperament testing.[31] However, counsel should realize that the more specialized experts can be expensive to retain and may not be cost effective in a case with less than severe injuries to the plaintiff.

The "breed propensity" test creates numerous practical and theoretical problems by opening the door to strict liability against owners whose individual dogs engage not only in unforeseen acts of aggression but in unforeseen acts of playfulness by virtue of their breed alone.

The Problem of "Breed" and the Mutt

The introduction of documentation of a pedigree can establish the breed of the purebred dog. In the absence of pedigree paper, it is also foreseeable that DNA testing to establish a dog's breed will be a future accepted method as biotech firms begin to provide more accurate identification services at a reasonable price.[32] What about the mutt, though?

The *Humphries* standard specifically addresses "breed" propensity, thereby leaving the sizeable mixed-breed population seemingly only under the traditional *scienter* rule. With any random-mixed dog there is the potential problem of lack of predictability not found in purebreds.[33] This problem is only exacerbated by the growing popularity of mutts[34] and purposeful "designer mixes" such as "labradoodles."[35] *Humphries's* approach to breeds and mutts is problematic as a public policy measure in that it specifically extends liability to those who undertake the type of selective and controlled breeding through which aggressive tendencies may be isolated and minimized while limiting the liability stemming from unpredictable mixes of dogs–thereby destroying the incentive to engage in responsible breeding and also discouraging pure-bred ownership.

Humphries's breed-based liability regime, with its lack of sound guidelines, also invites the question of "what exactly is a breed?" to be raised. Once again *Humphries's* prototype of the dangerous breed, the Pit Bull, proves irksome as the term "Pit Bull" does not indicate a single breed but is a catch-all term for three closely related breeds, the American Pit Bull Terrier, the American Staffordshire Terrier and the Staffordshire Bull Terrier, with the added complication that some kennel club organizations allow for dual registration of a single dog under more than one of those breed categories.[36] Questioning whether a dog which is the offspring of an American Pit Bull Terrier and an American Staffordshire Terrier is a purebred or mixed-breed is the type of casuistry which is the natural end result of the *Humphries* breed-based inquiry.

These problems not only make the *Humphries* standard impracticable and ineffectual in terms of being a public policy measure but also raise constitutional issues of due process and equal protection. Given the current framework, a dog owner facing a possible strict liability claim has no way of knowing whether the dog he owns is a "dangerous breed" until a jury determines that matter as an issue of fact. Furthermore, under *Humphries*, the troubling scenario is foreseeable where the same breed is at issue in two different litigations: in one case a defendant is found liable, via proof of "breed *scienter*," while in the other a jury finds for the defendant solely because the same breed is found not to have dangerous propensities. Such inconsistency in the law is antithetical to our basic concepts of justice and fairness.

The Playful Mischief Problem

When the *Humphries* standard is coupled with the holding in *Owen* a curious result occurs. As *Owen* holds that a dog may be determined to be dangerous by reason of its playfulness (if that playfulness is the source of the injury) then the application of the *Humphries* standard would mean that a dog who never exhibited any signs of playful jumping, but who is of a breed with a propensity for playfulness and excitability (a Labrador Retriever for instance), could be determined to belong to a "dangerously playful breed" and its owner held strictly liable for injuries from an otherwise unforeseeable and isolated incident.

Does the Humphries *Rule Apply to an Attractive Nuisance Claim?*

In *King v. Breen*, the possibility of an attractive nuisance claim predicated on a dangerous dog is acknowledged. The court has not yet addressed whether the *Humphries* standard is applicable to determine the "dangerousness" of the canine in this kind of action. If *Humphries* does apply it brings with it the "playfully dangerous breed" dilemma. Another potential question created is that if the only evidence of the dangerousness of the instrumentality on the land, in this case the dog, is the "breed *scienter,*" then is the attractive nuisance claim unavailable because "the danger from the instrumentality which caused the injury is patent and obvious . . ."?[37] Stated another way, could the *Humphries* standard be used as a basis of an assumption of the risk defense where the breed of the dog is one commonly thought to be dangerous?

Conclusion

The standard for dog-bite liability in Alabama given in *Humphries v. Rice* was created to address what was seen as the dangerous propensities of certain breeds, chiefly the Pit Bull. Given the latest scientific research into breed propensities, it appears that *Humphries* is ineffectual in addressing concerns about the Pit Bull breed. The "breed propensity" test creates numerous practical and theoretical problems by opening the door to strict liability against owners whose individual dogs engage not only in unforeseen acts of aggression but in unforeseen acts of playfulness by virtue of their breed alone. The standard is also woefully incapable of addressing the sizeable mixed-breed dog population. Add to this the practical concern that the necessity for experts to testify as to breed propensity creates additional costs, sometimes quite large, which may cause victims with less than very severe injuries to find it difficult to retain representation as their cases will not be cost-effective.

Overall, *Humphries* does not seem to offer a long-term solution as a dog-owner liability regime. Suggestions for correcting the problems include abandoning "breed *scienter*" and returning to the traditional view that *scienter* is applicable only to vicious acts, thereby freeing injuries arising out of playfulness to sound under a traditional negligence standard; abandoning the second prong of the traditional common law test for a harmless animal, thereby creating a standard where the physical potentialities, rather than the breed, of the individual dog would determine whether it is likely dangerous to humans; and also admitting evidence of dog abuse by owners (starving, chaining and beating) as competent *scienter* evidence for proving the likelihood that their dogs will attack humans. Finally, the concept of "breed *scienter*" invites improper speculation by jurors as to the public and media perception of certain breeds, because, as one commentator has keenly noted, "once the case goes to the jury scant attention is apt to be paid to the *scienter* principle."[38] ▲▼▲

Endnotes

1. Glanville L. Williams, *Liability for Animals*, p. 273 (1939).
2. *See Filburn v. People's Place Co.,* 25 Q.B.D. 258 (1890).
3. *See* William L. Prosser, *Handbook on Torts* § 57 (1st ed. 1941) ("Notice that a dog or horse will attack other animals is not notice it will attack human beings."); *see also Osborne v. Chocqueel,* 2 Q. B. 109 (1896) (Addresses the longstanding rule at common law that "the scienter which must be shown is that the dog had a ferocious disposition toward mankind.").
4. Williams, *supra* at 314.
5. *See Mason v. Keeling* 1 Ld. Raym. 606, 91 E.R. 1305, 12 Mod. 32, 88 E.R. 1359 (1700).
6. Williams, *supra* at p. 326.
7. *See Walter v. Jones*, 2 Ro. Ab. 526 (1643).
8. *Mitchil v. Alestree*, 2 Lev. 172 (1676). *See also Kelly v. Wade* (1848) 12 I.L. R. 424 (Suggests that a negligence action is available: "a man brought a dog to a very improper place; as for instance if a man brought a bull-dog to a theatre or a levee.").
9. *Pitcher v. Martin* 2 All E.R. 918, 53 T.L.R. 903 (1937).
10. Williams, *supra* at p. 280.
11. *Durden v. Barnett & Harris*, 7 Ala. 169, 169-170 (Ala. 1844).
12. *Id.*
13. *Id.*
14. *Smith v. Causey*, 22 Ala. 568, 571 (Ala. 1853).
15. *Owen v. Hampson*, 258 Ala. 228, 232 (Ala. 1952).
16. *Reddett v. Mosley*, 222 So. 2d 369, 370 (Ala. App. 1969).
17. *Id.*
18. *Allen v. Whitehead*, 423 So. 2d 835, 837 (Ala. 1982).
19. *Id.*
20. *Rucker v. Goldstein*, 497 So. 2d 491, 493 (Ala. 1986).
21. *King v. Breen*, 560 So. 2d 186, 189 (Ala. 1990).
22. *Id.*
23. *See* Judy Cohen & John Richardson, *Journal of Popular Culture*, Volume 36, Number 2, October 2002, pp. 285-317(33).
24. *Humphries v. Rice*, 600 So. 2d 975, 978 (Ala. 1992).
25. At least one researcher, Dr. Lehr Brisbin, has stated that the assertions that a Pit Bull can bite with a force of 2,000 pounds per square inch "have absolutely no basis in fact or scientific proof. The testing of dog-bite strength has never been done and would be difficult, if not impossible, to perform." *See Toledo v. Tellings* 871 N.E.2d 1152 (Ohio 2007).
26. *Coley v. Hendrix*, 508 So. 2d 216, 217 (Ala. 1987).
27. *Wright by & through Wright v. Calvin Reid Constr. Co.*, 723 So. 2d 55, 58 (Ala. Civ. App. 1997) (The "propensities of the breed of a dog in a dogbite case is an issue of material fact.").
28. *See* Charles W. Gamble, *McElroy's Alabama Evidence* §40.01, footnote 3, (5th ed., 1996).
29. Deborah L. Duffy, Yuying Hsu & James A. Serpell, "Breed Differences in Canine Aggression," *Applied Animal Behaviour Science* 114 (2008) 441–460.
30. *See Edgar v. Riley*, 725 So. 2d 982, 985 (Ala. Civ. App. 1998).
31. One such lay testing organization whose research has been accepted by Alabama courts is the American Temperament Testing Society, Inc. (ATTS). The research of ATTS was presented in the *amicus* brief the Washington Animal Foundation, Inc. in the case of *City of Huntsville v. Tack*, 843 So. 2d 168 (Ala. 2002). That *amicus* brief may be found at *http://www.understand-a-bull.com/BSL/Research/HuntsvilleAmecus.pdf.*
32. *See* Jennifer VanderSmith, *Pet Tales: Pet DNA Testing Kits Available To Buy*, San Luis Obispo Tribune Mar. 15, 2009 *at* http://www.sanluisobispo.com/news/local/story/652501.html.
33. Linda P. Case, *The Dog: Its Behavior, Nutrition & Health* 132, (2nd ed. 2005).
34. *See* Sharon L. Peters, *Mutts Are the New Top Dogs*, USA Today, February 6, 2007 *at* http://www.usatoday.com/life/lifestyle/2007-02-05-mutts-main_x.htm.
35. *See* Patt Diroll, *Upwardly Mobile Mutts*, Pasadena Star News, March 16, 2009 *at* http://www.pasadenastarnews.com/letters/ci_11927999.
36. Pit Bull Rescue Central, *Common Questions and Answers*, *at* http://www.pbrc.net/mediacenter/mediaqa.html.
37. *Herbert v. Regency Apartments, Inc.*, 295 So. 2d 404, 407 (Ala. 1974).
38. Williams, *supra* at p. 299.

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In Re Delco Oil, Inc.– A Cautionary Tale for Vendors Doing Business with Chapter 11 Debtors

By Rashad L. Blossom and Jennifer H. Henderson

Sellers of goods and services to companies in bankruptcy have to manage credit and other risks. A recent decision of the Eleventh Circuit has created a hidden risk that vendors may not be able to control. In *In re Delco Oil*, *Inc.*,[1] the Eleventh Circuit required an innocent vendor to return almost $2.0 million in payments for goods delivered to the bankruptcy estate. Although the payments were in the ordinary course of business and for value, the Eleventh Circuit avoided the payments because the chapter 11 debtor did not have authority to use cash collateral.

Preliminary Considerations

The Chapter 11 Debtor in Possession

In most cases, a debtor in chapter 11 remains in possession and control of the bankruptcy estate and exercises the powers and duties of a trustee under title 11 of the United States Code (the "Bankruptcy Code").[2] Moreover, under Section 1108 of the Bankruptcy Code, a debtor-in-possession (the "DIP") automatically is authorized to operate its business.[3]

To minimize disruption of normal operations, Section 363(c)(1) of the Bankruptcy Code authorizes the DIP to enter into transactions in the ordinary course of business without notice and a hearing.[4] However, Section 363(c)(2) of the Bankruptcy Code provides that the DIP may not use, sell or lease "cash collateral" without either (i) the consent of each creditor that has an interest in the cash or (ii) court authorization, granted after notice and a hearing.[5] Most commonly, cash collateral consists of cash, deposit accounts and other cash equivalents, such as proceeds of accounts receivable and inventory, that are subject to a lender's security interest.[6] A creditor's interest in cash collateral is protected further by Section 363(e), which provides that, upon request of the creditor, the bankruptcy court must prohibit or condition the DIP's use, sale or lease of property "as is necessary to provide adequate protection of such interest."[7]

These restrictions on using cash collateral are designed to strike a balance between the competing interests in the collateral. On one hand, the DIP has a compelling need to use cash to rehabilitate its business and meet daily operating expenses such as rent, payroll and utilities.[8] On the other hand, the DIP's unrestricted use of cash collateral jeopardizes the creditor's interest in the collateral,[9] as cash is dissipated by use.[10]

Avoidance Powers under the Bankruptcy Code

To maximize the value of the bankruptcy estate and ensure common treatment of similarly situated creditors, the Bankruptcy Code provides a trustee (and by extension, a DIP) with the power to avoid and recover certain transfers of the debtor's property. Common examples of the trustee's "avoidance powers" include preferences under Section 547 of the Bankruptcy Code and fraudulent transfers under Section 548 of the Bankruptcy Code. Sections 547 and 548, by definition, apply to pre-bankruptcy transfers. Section 549 of the Bankruptcy Code allows the trustee to set aside unauthorized transfers made by a debtor after filing bankruptcy. Section 549 most often applies when debtors, without court approval, pay claims that arose prior to the bankruptcy case. With the *Delco Oil* decision, the Eleventh Circuit has expanded the scope of Section 549 to include payments to post-petition vendors in the ordinary course of business.

The Delco Oil *Decision*

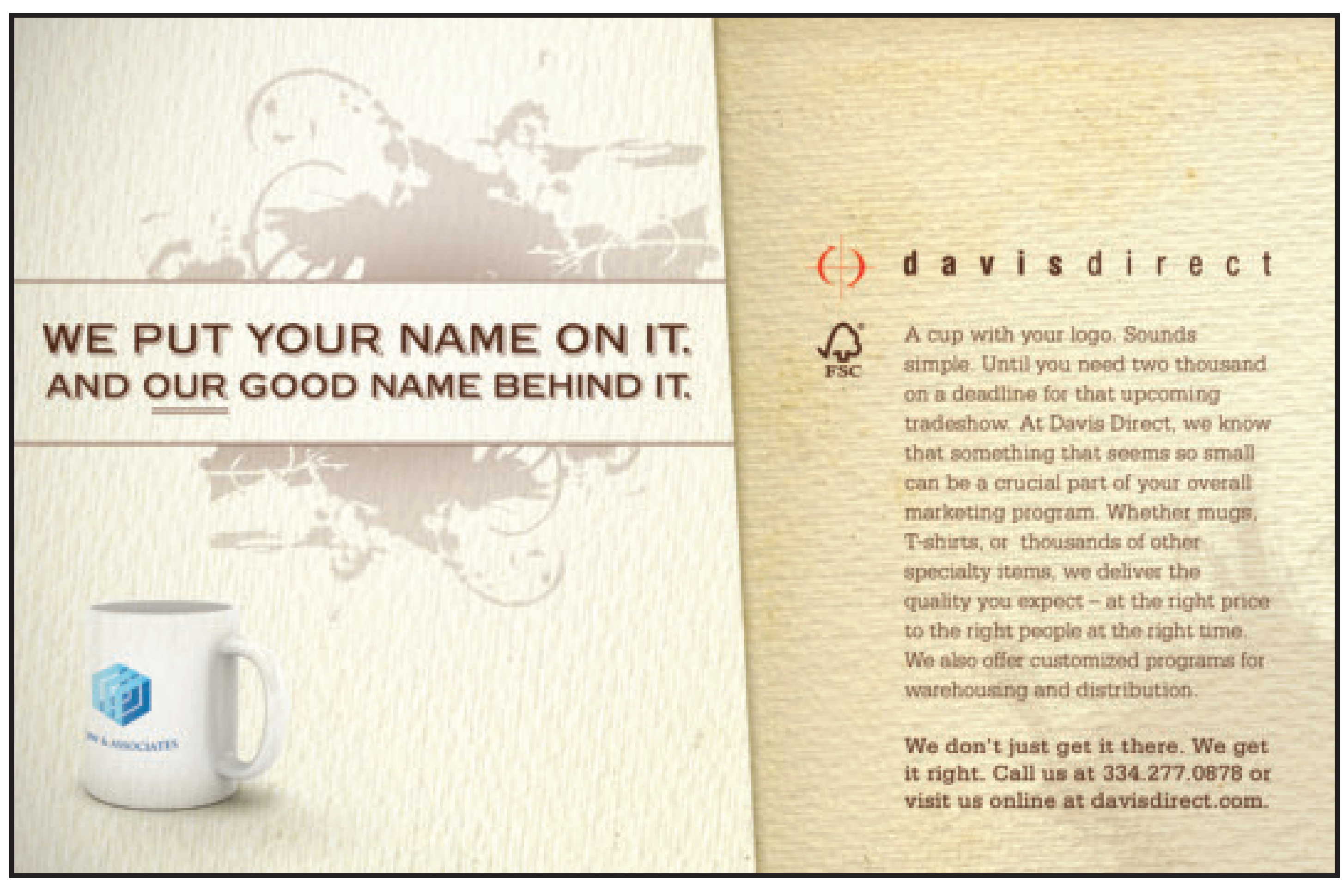
Prior to filing for bankruptcy protection under chapter 11 of the Bankruptcy Code, Delco Oil, Inc. ("Delco") operated as a distributor of motor fuel and associated products. CapitalSource Finance, LLC ("CapitalSource") provided financing to Delco pre-bankruptcy and obtained a pledge of essentially all of Delco's personal property, including accounts receivable and inventory and the proceeds thereof. Marathon Petroleum Company, LLC ("Marathon") sold petroleum products to Delco pre-bankruptcy pursuant to a sale agreement and continued to sell to Delco after the bankruptcy filing.

On the first day of its chapter 11 case, Delco filed a motion for authority to use cash collateral. The bankruptcy court later denied the motion. In the interim, Delco paid Marathon over $1.9 million for petroleum products supplied to Delco after the bankruptcy petition. When the bankruptcy court denied Delco's request to use cash collateral, Delco voluntarily converted its bankruptcy case to a case under chapter 7 of the Bankruptcy Code. The chapter 7 trustee sued Marathon under sections 549 and 363 of the Bankruptcy Code to recover the payments Marathon received from Delco while the case was pending under chapter 11. The bankruptcy court entered summary judgment in favor of the trustee, and Marathon appealed.

Section 549 of the Bankruptcy Code authorizes a bankruptcy trustee to avoid a transfer of property of the bankruptcy estate that is made after the case is filed and that is not authorized by the Bankruptcy Code or the bankruptcy court.[11] In *Delco Oil* the trustee took the position that the funds paid to Marathon were cash collateral subject to CapitalSource's security interest. Because CapitalSource did not consent to the use of its cash collateral and the bankruptcy court did not authorize Delco to use cash collateral, the trustee argued the payments were unauthorized under Section 363(c)(2) of the Bankruptcy Code and, therefore, avoidable under Section 549.

Marathon asserted multiple defenses to the trustee's claims. First, Marathon argued that it took the cash from Delco free of CapitalSource's security interests under applicable state law. Second, Marathon alleged that a genuine issue of material fact existed as to whether the monies paid to Marathon constituted cash collateral, challenging the trustee's claim that all funds in Delco's deposit account were identifiable proceeds of CapitalSource's pre-bankruptcy collateral. Third, Marathon requested that the bankruptcy court find implied, equitable exceptions to Section 549. Because the bankruptcy estate received equivalent value in the form of goods delivered, neither the bankruptcy estate nor CapitalSource were harmed by the subject transfers. Moreover, the transfers were made in the ordinary course of business, and Marathon acted in good faith and without knowledge of CapitalSource's alleged security interest in the funds. Depriving Marathon of payment for goods delivered to the DIP post-petition would unduly harm Marathon and create a windfall to the estate.

As to Marathon's first defense, the Eleventh Circuit conceded that Marathon took the monies paid by Delco free of CapitalSource's security interest pursuant to Florida's version of the Uniform Commercial Code ("UCC").[12] Section 9-322(b) of the UCC provides that "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party." [13] The Eleventh Circuit nevertheless concluded that Section 9-322(b) was irrelevant for



purposes of determining whether each transfer was an unauthorized transfer of cash collateral under Section 363(c) of the Bankruptcy Code. The Court stated that the funds constituted cash collateral at the times of the transfers, and, absent lender consent or specific court approval, the transfers were not authorized by the Bankruptcy Code.[14] The Eleventh Circuit explained:

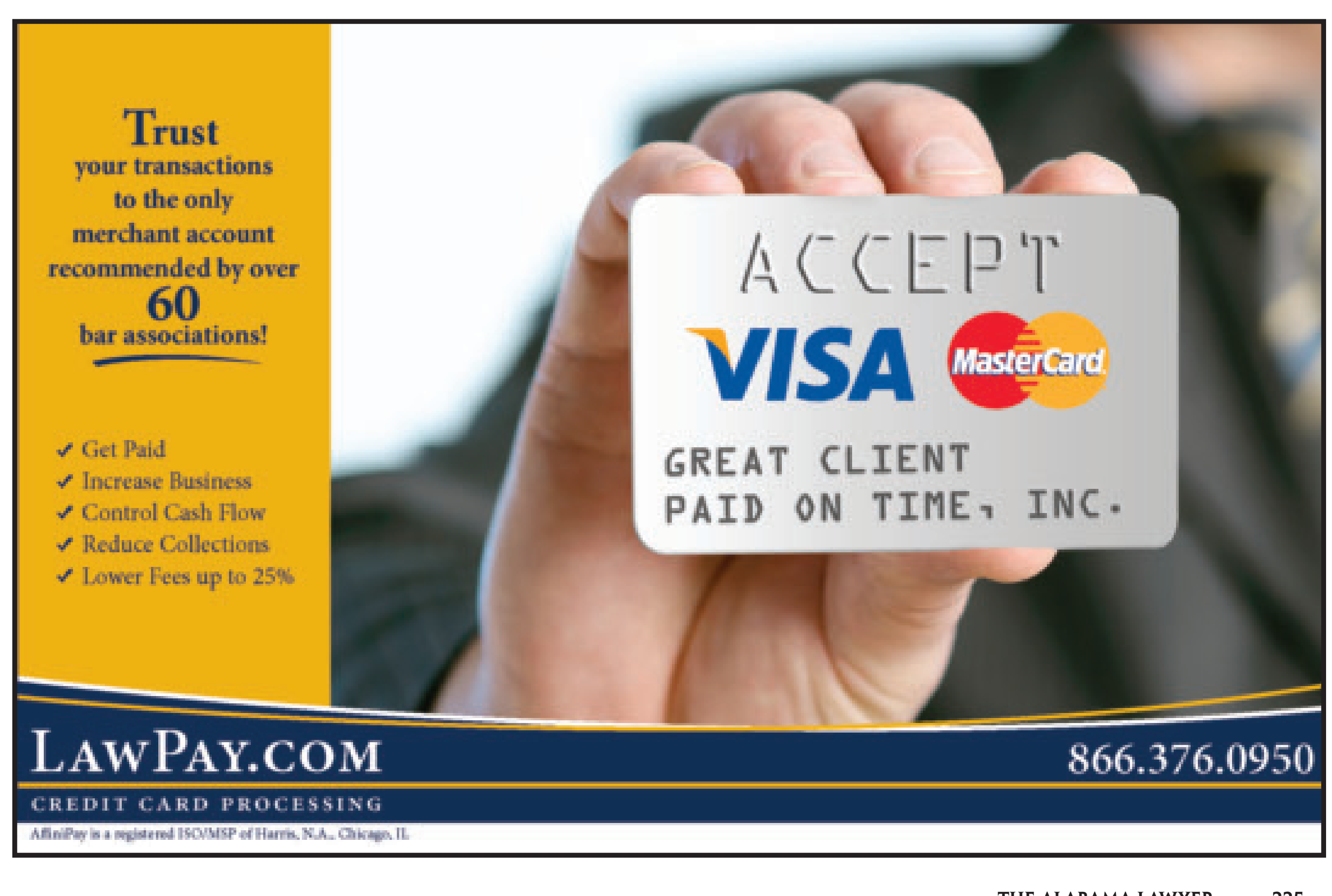
> Lest any confusion exist, [the trustee] may avoid and recover from Marathon the funds [Delco] transferred to it not because CapitalSource continued to have a security interest in the funds once they were in the hands of Marathon, but because [Delco] was not authorized to transfer the funds to anyone post-[filing] without the permission of CapitalSource or the bankruptcy court.[15]

The Eleventh Circuit also rejected Marathon's second defense, holding that no material issue of fact existed as to whether the monies transferred to Marathon were CapitalSource's cash collateral.[16] Marathon argued that the trustee had not proven Capital Source's control of Delco's deposit account or established that the monies paid to Marathon were identifiable cash proceeds of CapitalSource's collateral. While acknowledging that CapitalSource might not have a perfected security interest in Delco's *deposit account*, the Court concluded that CapitalSource held valid, perfected, security interests in all *monies in* the deposit account through "proceeds perfection."[17] In reaching this conclusion, the Court cited an affidavit of an officer of Delco, which stated that CapitalSource held a perfected security interest in all cash and all bank deposits in Delco's possession as of the date of the bankruptcy filing. The Eleventh Circuit opined that the monies transferred to Marathon after the bankruptcy filing could have come from no other source than the proceeds of CapitalSource's pre-bankruptcy collateral.[18]

Finally, rejecting Marathon's defenses as to the value given, lack of harm, ordinary course nature of the transactions and its status as an innocent purchaser, the Eleventh Circuit strictly construed Section 549, stating that no such exceptions were codified in the code section and that Congress would have included such express exceptions if it had intended to do so.[19]

Criticism of Delco Oil

Delco Oil creates terrible problems for the trial courts, lawyers and vendors who must apply the Court's ruling.[20] For instance, the Eleventh Circuit failed to consider the effect of Section 552 of the Bankruptcy Code. Section 552 provides, with limited exceptions, that after-acquired property clauses in pre-petition security agreements do not apply to assets that the debtor acquires post-petition.[21] Some of the funds transferred to Marathon could have come from revenues generated during the bankruptcy case. Pursuant to Section 552 of the Bankruptcy Code, cash



generated by Delco during the bankruptcy case might not have been subject to CapitalSource's lien. Tracing and separating pre-petition revenues from post-petition revenues is a material factual issue in many bankruptcy cases. Because the Eleventh Circuit did not discuss this issue, the trustee may not have met his burden of proving that the subject funds were cash collateral. Problems with the trustee's proof are compounded by the Court's failure to require the trustee to definitively prove that the funds transferred constituted identifiable cash proceeds under applicable state law.

While the gaps in the Delco trustee's evidence on proceeds perfection could be remedied in subsequent cases, there are broader conceptual problems with the Eleventh Circuit's analysis in *Delco Oil*. Most notably, the Court did not address whether the estate or the lender was entitled to the funds recovered by the trustee. Trustees and secured creditors often dispute who gets the benefit of transfers avoided and recovered on behalf of the estate.[22] If the transferee takes the subject property free and clear of the secured party's interest under applicable state law, as in the *Delco Oil* case,[23] the secured party may not have an effective argument that its lien should attach to the recovered funds.[24] Conversely, Delco's bankruptcy estate received value for the payments and was not harmed by the debtor's unauthorized use of CapitalSource's cash collateral. No matter how the courts subsequently decide the issue of whether the bankruptcy estate or the secured party is entitled to the recovered funds, the Eleventh Circuit did not address critical legal and equitable issues.

Courts trying to sort out the critical question the Eleventh Circuit failed to address will face problems with either answer. On one hand, if the bankruptcy estate is entitled to receive the funds recovered by a trustee upon avoidance of an unauthorized transfer of cash collateral, the estate receives a windfall. The estate receives value from the vendor's goods and is not harmed by the damage, if any, to the lender's interest in the cash. Allowing the estate to keep the goods and the recovered cash is an anomalous result, especially considering the basis for the right to recover the funds from the vendor is the debtor's unauthorized use of the secured party's collateral.

On the other hand, returning the recovered cash to the lender presents other problems. Section 550 of the Bankruptcy Code states that the trustee may recover transfers avoided under Section 549 *for the benefit of the estate*.[25] Courts have concluded that this precludes a chapter 7 trustee from pursuing an avoidance action that will not benefit the unsecured creditors of the estate.[26] Allowing the lenders to recover unauthorized transfers of cash collateral under Section 549 could violate Section 550. Moreover, if the goods received by virtue of the unauthorized transfers of cash collateral were subject to

the secured creditor's lien on inventory or proceeds, the secured party also could get a windfall if it receives the trustee's recovery. The problems with permitting a trustee to pursue avoidance actions for the benefit of a secured creditor under *Delco Oil* are compounded by the Eleventh Circuit's conclusion that the transferee took the funds free and clear of the secured party's liens under state law.[26] The trustee's recovery for the benefit of the secured party under *Delco Oil* would have the effect of trumping UCC priority rules by requiring an innocent transferee to return to the secured creditor funds that it took free and clear of the creditor's liens.

A review of the docket in the underlying bankruptcy case suggests the bankruptcy court approved a compromise between CapitalSource and the trustee prior to the commencement of the suit against Marathon, pursuant to which CapitalSource agreed to fund the litigation in exchange for 60 percent of the amounts recovered.[28] As a result, CapitalSource arguably used the trustee's powers under Section 549 to overcome the state law priority rules, and the bankruptcy estate received a windfall. Because a DIP is vested with the powers of a bankruptcy trustee, *Delco Oil* appears to allow a debtor to pursue an action to recover its own unauthorized transfers. The provisions of the Bankruptcy Code governing the use of cash collateral are intended to limit the debtor's ability to prejudice the interests of secured lenders. These provisions should not affect the debtor's relationship with vendors. The effect of *Delco Oil* may be to allow debtors to profit from their own failure to abide by the rules. The only party who got hurt in *Delco Oil* was the innocent vendor.

In addition to failing to address which party was entitled to the recovered payments, the Eleventh Circuit failed to discuss whether, upon return of the payments received, the transferee was entitled to an administrative expense claim. Section 503 of the Bankruptcy Code states that a party that confers a benefit on the bankruptcy estate, such as by providing goods or services, is entitled to an administrative expense claim for the value provided.[29] Administrative expense claims are entitled to priority of payment over pre-petition unsecured claims.[30] An unpaid vendor generally will be entitled to an administrative expense claim for the value of the goods delivered.[31] However, Section 502(h) of the Bankruptcy Code provides that claims arising from a trustee's recovery of property in accordance with the trustee's avoiding powers are to be treated as pre-petition claims.[32] Section 502(h) might have the effect of turning what would otherwise have been an administrative expense claim, had no payment been received by the transferee, into an unsecured claim. Accordingly, the *Delco Oil* decision creates an unnecessary conflict between sections 503 and 502(h) of the Bankruptcy Code.

After entry of the *Delco Oil* decision, Marathon filed a request for an administrative expense claim in the bankruptcy case for the amounts recovered by the trustee. CapitalSource objected to the claim. The parties filed a motion to approve a compromise, under which Marathon agreed to significantly reduce its administrative expense claims in the bankruptcy case.[33] At the end of the day, therefore, the vendor who delivered the goods and was paid in due course, according to its rights, ended up in a worse position than if it had never been paid at all.

The Implications of Delco Oil

The *Delco Oil* decision is contrary to the purpose of chapter 11, which is to rehabilitate debtors and maximize enterprise value. A key policy of chapter 11 is to encourage vendors to do business with the debtor. The Eleventh Circuit's ruling increases the risk to vendors of continuing to do business with companies in chapter 11 and places an untenable burden on vendors to conduct due diligence on a debtor's cash collateral authorization before shipping goods or providing services to the debtor. A likely consequence of the *Delco Oil* decision, and the litigation that will necessarily follow, is that vendors will be less likely to continue to do business with a company that files for protection under chapter 11, which could have a significant detrimental impact on companies seeking to reorganize in bankruptcy and their creditors. ▲▼▲

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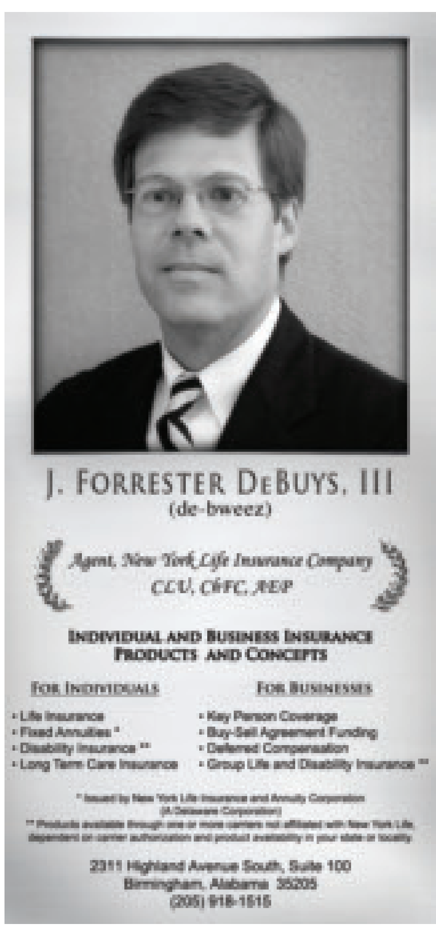

Endnotes

1. *Marathon Petroleum Co., LLC v. Cohen (In re Delco Oil, Inc.)*, 599 F.3d 1255 (11th Cir. 2010).
2. *See* 11 U.S.C. §§ 1101 and 1107. The bankruptcy court may appoint a chapter 11 trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement…" 11 U.S.C. § 1104(a)(1).
3. 11 U.S.C. § 1108; *In re WWG Industries, Inc.*, 772 F.2d 810, 811-12 (11th Cir. 1985).
4. 11 U.S.C. § 363(c)(1).
5. 11 U.S.C. § 363(c)(2).
6. Cash collateral is more broadly defined in the Bankruptcy Code as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title." 11 U.S.C. § 363(a).
7. 11 U.S.C. § 363(e). Section 363(e) applies to other types of collateral as wells as cash collateral. *See id.*
8. *Chrysler Credit Corporation v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.*), 727 F.2d 1017, 1019 (11th Cir. 1984).
9. *See id.*
10. *In re Somero*, 122 B.R. 634, 640 n. 5 (Bankr. D. Me. 1991).
11. 11 U.S.C. § 549(a). This avoiding power is subject to certain limited exceptions not applicable in the *Delco Oil* case. *See* 11 U.S.C. 549(b) (describing an exception for certain transfers made during the gap period in involuntary bankruptcy cases between the date of the bankruptcy filing and the entry of the order for relief); *see also* 11 U.S.C. § 549(c) (describing an exception for certain real property transfers to good-faith purchasers).
12. *See In re Delco Oil, Inc.*, 599 F.3d 1255, 1260 (11th Cir. 2010); *see also* Flat. Stat. § 679.332(2).
13. Flat. Stat. § 679.332(2); *see also* U.C.C. § 9-322(b).
14. *Delco Oil*, 599 F.3d at 1259-60.
15. *Id.* at 1260.
16. *Id.* at 1262.
17. *Id.* at 1261-62.
18. *Id.* at 1262.
19. *Id.* at 1262-63.
20. *See, generally*, Christopher W. Frost, *Seller Beware: The Unauthorized Use of Cash Collateral, Innocent Vendors, and Proceeds Post Bankruptcy*, 30 No. 7 Bankr. L. Letter 1 (July 2010); Jonathon Friedland and Bill Schwartz, *Punishing the Innocent: Lessons from* Delco Oil, 29 Am. Bankr. Inst. J. 1, 88 (May 2010).
21. Section 552 provides that property acquired by a debtor after filing for bankruptcy is not subject to any lien resulting from a pre-petition security agreement except in certain limited circumstances, such as proceeds of property acquired before the commencement of the case that the estate acquires after the commencement of the case. *See* 11 U.S.C. § 552(a) and (b).
22. *See, generally*, Nancy L. Sanborn, *Avoidance Recoveries in Bankruptcy: For the Benefit of the Estate or the Secured Creditor?*, 90 Colum. L. Rev. 1376 (1990).
23. *See In re* Delco Oil, Inc., 599 F.3d 1255, 1260 (11th Cir. 2010)
24. *See* Nancy L. Sanborn, *Avoidance Recoveries in Bankruptcy: For the Benefit of the Estate or the Secured Creditor?*, 90 Colum. L. Rev. 1376, 1396-98 (1990).

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25. *See* 11 U.S.C. § 550(a).

26. *See, e.g., Congress Credit Corp. v. AJC Intern.*, 186 B.R. 555, 558-59 (D. Puerto Rico 1995).

27. *See In re Delco Oil, Inc.*, 599 F.3d 1255, 1260 (11th Cir. 2010).

28. *In re* Delco Oil, Inc., No. 06-03241 (Bankr. M.D. Fla. Apr. 23, 2007) (order granting motion to approve compromise of controversy between the estate and CapitalSource Finance, LLC).

29. *See* 11 U.S.C. § 503(b)(1)(A).

30. *See* 11 U.S.C. § 507.

31. *See, generally, In re The New Power Co.*, 313 B.R. 496, 504 (Bankr. N.D. Ga. 2004) (citing a New York bankruptcy case for the proposition that "expenses will generally be entitled to priority treatment if 'the right to payment arose from a post-petition transaction with the debtor estate rather than from a prepetition transaction with the debtor, and the conduct giving rise to the payment was beneficial to the estate of the debtor'") (internal citation omitted).

32. *See* 11 U.S.C. § 502(h).

33. *In re Delco Oil, Inc.*, No. 06-03241 (Bankr. M.D. Fla. filed Oct. 17, 2006).

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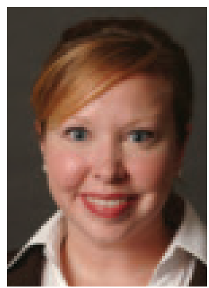

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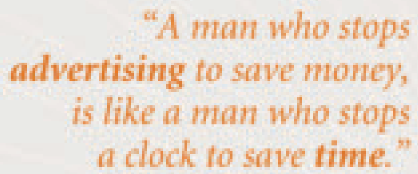

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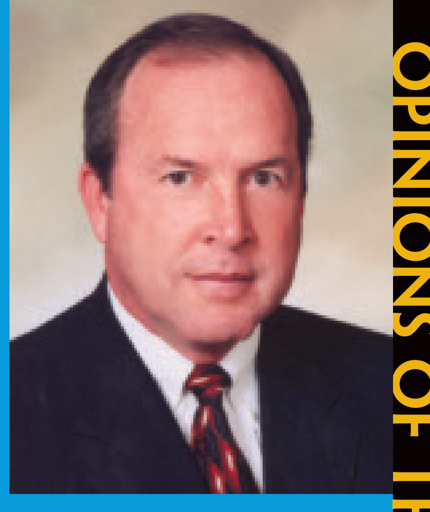


J. ANTHONY MCLAIN

Lawyer's Indemnification of Defendants for Unpaid Liens

QUESTION:

May a plaintiff's or claimant's lawyer, on behalf of his client, personally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses? May a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as a condition of settlement?

ANSWER:

Pursuant to Rule 1.7 and Rule 1.8(e), *Alabama Rules of Professional Conduct*, a plaintiff's or claimant's lawyer, on behalf of his client, may not agree to personally indemnify the opposing party for any unpaid liens or medical expenses due to be paid from the settlement proceeds or underlying cause of action unless the liens or expenses are known and certain in amount at the time of the proposed settlement. Likewise, a lawyer representing the defendant or the defendant's insurer may not request or require the opposing lawyer to personally indemnify defendant(s) for unpaid liens or medical expenses as a condition of settlement unless such liens and expenses are known and certain in amount at the time of the proposed settlement.

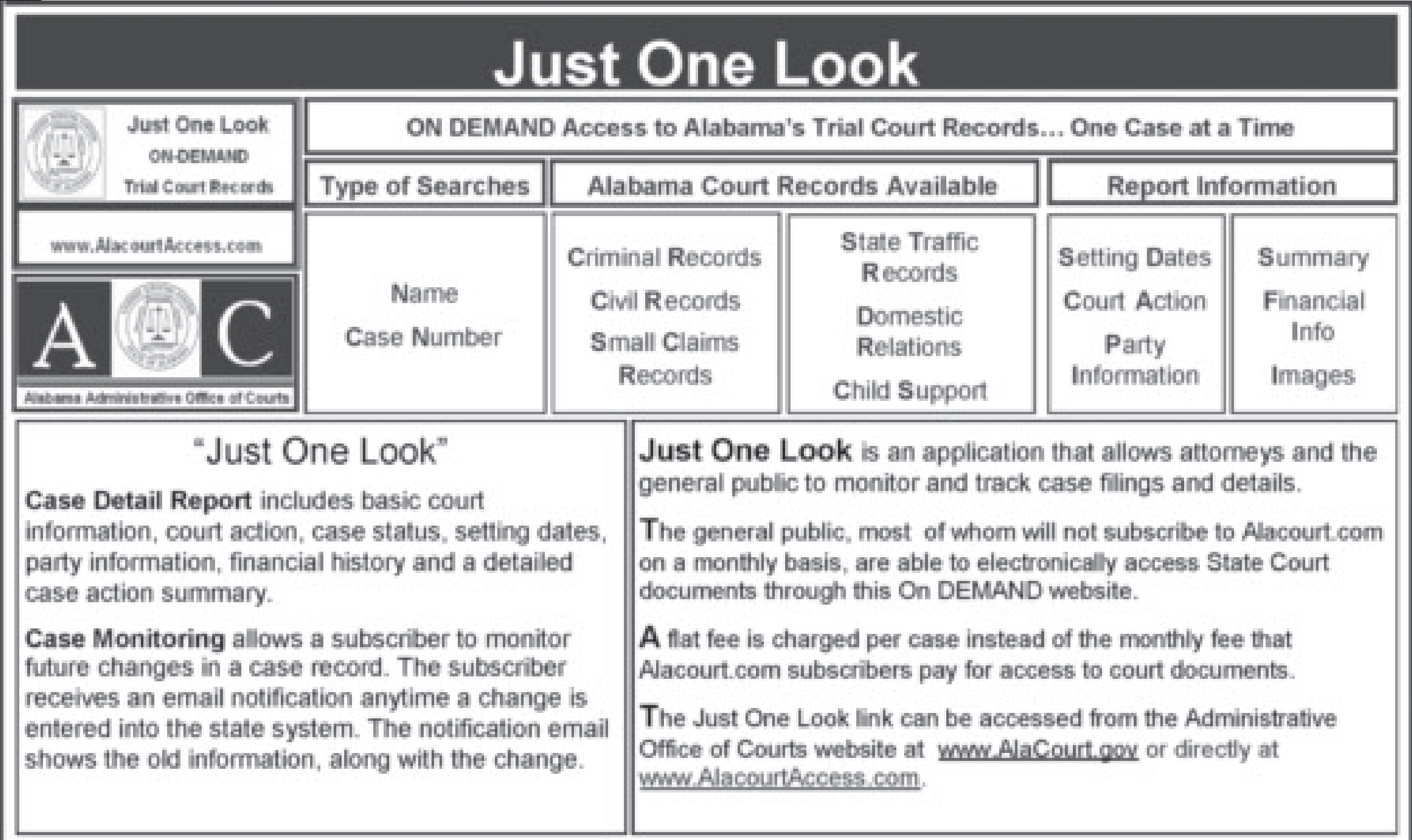
OPINIONS OF THE GENERAL COUNSEL Continued from page 231

If the amount of the lien or expense is known at the time of settlement, the plaintiff's attorney may agree on behalf of the client to use the settlement funds to satisfy such liens or expenses, and, thereby, relieve the defendant or his insurer of any further liability. However, a settlement agreement may not contain language indemnifying an opposing party, their insurer or their lawyer for unknown liens or expenses or where the amount of such liens or expenses is unknown at the time of settlement. Such a request would violate Rule 8.4(a), *Ala. R. Prof. C.,* which prohibits an attorney from "induc(ing) another" to violate the *Rules of Professional Conduct.*

DISCUSSION:

The Disciplinary Commission has been asked to issue a formal opinion regarding the growing trend of defense counsel requiring, as a condition to settlement, that plaintiff's counsel personally indemnify the defendant, his insurer and counsel against any unpaid liens, medical bills or third-party claims against the plaintiff arising from the litigation. In examining the issue, the Disciplinary Commission notes that 13 bars have issued formal opinions expressly prohibiting plaintiff's counsel from entering into such indemnification agreements.[1] In finding that such indemnification agreements are prohibited, these bars found that such agreements may create an impermissible conflict of interest and/or constitute improper financial assistance to the client.

For instance, the New York City Bar Association determined that such indemnity agreements by a client's lawyer to "guarantee a client's obligations to third party insurers . . . amounts to 'guaranteeing financial assistance



to the client'". Rule 1.8(e), *Ala. R. Prof. C.,* provides as follows:

RULE 1.8 CONFLICT OF INTEREST:
PROHIBITED TRANSACTIONS

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Under Rule 1.8(e), a lawyer may not provide any financial assistance to a client except in limited circumstances as set out in the rule. An indemnification agreement in which the lawyer agrees to be personally liable for any outstanding liens or medical expenses incurred by the client would not fall under any of the exceptions to the rule and would, therefore, constitute impermissible financial assistance to the client.

Other bars have focused on the fact that indemnification agreements create an impermissible conflict between the financial interests of the lawyer and those of the client. 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

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OPINIONS OF THE GENERAL COUNSEL Continued from page 233

(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.

As noted by the Arizona Bar in Ethics Op. 03-05 "[t]he mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney." Such a conflict involves the lawyer's own financial interests in seeking to avoid such exposure and liability for the client's debts and the client's own desire to settle the matter on favorable financial terms.

While the Disciplinary Commission agrees that a plaintiff's or claimant's lawyer may not generally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses, a lawyer may agree, on behalf of the client, to use settlement funds to satisfy liens and expenses that are known and certain at the time of settlement. In order to do so, the amount of the lien or expense must be known at the time of the settlement. The liens or expenses to be satisfied under the terms of the settlement must be included in the settlement agreement. Further, the client must agree, in writing, that the settlement funds will be used to satisfy those liens or expenses. Such would be akin to the lawyer's issuing a letter of protection to the opposing party, their insurer or their lawyer that the settlement

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funds will be used to satisfy a particular lien or expense. Once an agreement has been entered into amongst the parties, the plaintiff's or claimant's lawyer would have an ethical obligation to ensure the payments are made.

Just as a plaintiff's or claimant's lawyer may not agree to sign a general indemnification agreement on behalf of a client, a lawyer representing a defendant may not require the plaintiff's lawyer to personally and generally indemnify the defendant against any unpaid liens or medical expenses as a condition of settlement regardless of whether such liens or expenses or their amounts are known at the time of the settlement. Requiring general indemnification as a condition of settlement is analogous to when a lawyer is required to agree to refrain from representing other persons against the defendant in exchange for settling a claim on behalf of a client. Rule 5.6(b), *Ala. R. Prof. C.*, expressly prohibits any lawyer from offering or making any agreement that would place a restriction on a lawyer's right to practice as part of a settlement between private parties. Just as a lawyer cannot participate in making or requiring any agreement that would limit a lawyer's right to practice, a lawyer cannot agree to or require another lawyer to personally enter into a general indemnification agreement on behalf of a client.

Further, Rule 8.4(a), *Ala. R. Prof. C.,* provides, in part, as follows:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

OPINIONS OF THE GENERAL COUNSEL Continued from page 235

> (a) violate or attempt to violate the *Rules of Professional Conduct*, knowingly assist or induce another to do so, or do so through the acts of another . . .

As discussed previously, a plaintiff's or claimant's lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e), *Ala. R. Prof. C.* Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the *Rules of Professional Conduct*." As such, a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the *Rules of Professional Conduct*.

[RO-2011-01]

Endnote

1. See Arizona Opinion 03-05; Indiana Opinion No. 1. of 2005; Illinois Adv. Op. 06-10; Kansas Op. 01-05; Missouri Formal Op. 125; New York City Bar Op. 2010-03; North Carolina Ethics Op. RPC 228; South Carolina Ethics Adv. Op. 08-07; Tennessee Formal Op. 2010-F-154; Vermont Ethics Op. 96-05; Wisconsin Formal Op. E-87-11, and Washington State Bar Op. 1736.

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With the change in the legislature and the shifting of power to the Republican Party, the new leadership completed their **"Handshake with Alabama"** in their first 10 legislative days.

Among the goals and specific agenda included in the Republican "Handshake," which is shown in bold, the following bills have passed at least one house of the legislature:

Creating Jobs and Economic Opportunities

HB 61–Provides that qualifying employers are authorized tax deductions of 200 percent of the amount paid for employee health insurance premiums from the employer's income tax

HB 64–A constitutional amendment that would require a secret ballot for all the elections, including union representation votes

Controlling Wasteful Spending

HB 57–Created the education budget estimate, a rolling reserve that will provide a new way of determining the money available for the calculation of the education budget. The budget estimate will be based on prior 15-year revenues rather than future expected revenues.

SB 72–Repeals the Deferred Retirement Option Plan (DROP) accounts, previously allowed for state employees and teachers who have reached 55 years of age, have 25 years of state service and elect to end accumulating time for calculating their retirement years

 Continued from page 237

Ending Corruption in Montgomery

In the Special Session in December, the legislature adopted Act 2010-763, giving the state Ethics Commission subpoena power, and in the Regular Session passed HB 62, that will grant the Ethics Commission an automatic budget of one-tenth of one percent of the state's General Fund amount.

Further, by Act 2010-761, membership dues paid from payroll deductions for public employee groups were prohibited, with this directly affecting the AEA.

Act 2010-760 prohibited legislators from holding other state jobs.

Act 2010-765 prohibited the transfer of campaign money between political action committees, also known as Pac-to-Pac Transfers.

Act 2010-759 prohibited pass-through appropriations from one agency to another.

Act 2010-762 requires ethics training for elected officials and their employees in the executive and legislative judicial branches, as well as for lobbyists.

Act 2010-764 amended the ethics act to limit lobbyist gifts, meals and travel reimbursement to public officials and state employees and requiring mandatory disclosure of gifts. This act has been further tweaked by SB 222 in the Regular Session to define the gift must be "corruptly" given.

HB 19 requires a photo ID to vote and will no longer accept non-picture identification from voters. The bill further provides that the secretary of state will set up a statewide system for photographing cards to be used for voting in each county.

Combating Illegal Immigration

HB 56 concerns enforcement on the state and local levels of unauthorized illegal immigrants in Alabama. This will make illegal immigrants felons in some events.

Blocking the Washington, DC Power Grab

HB 60 will prohibit mandatory participation of Alabama citizens in any healthcare system for persons, employers or healthcare providers as may be required in the O'Bama Healthcare Plan.

HB 18 prohibits an abortion on or after 20 weeks after conception. This bill provides both civil and criminal remedies.

Other Items to Be Considered

Tort Reform

Post-Judgment Interest–SB 207, HB 236

Under current Alabama law, if a defendant loses a lawsuit and chooses to appeal, he must begin paying 12 percent post-judgment interest on the amount the court or jury awarded the plaintiff, creating a significant financial deterrent to appealing an unjust verdict. This bill reduces post-judgment interest to 7.5 percent.

Alabama Small Business Protection Act–SB 184, HB 251

In a product liability suit, Alabama retailers, wholesalers and distributors may be sued even if they did not participate in the manufacture or design of a product. This bill will prohibit suits against distributors.

Wrongful Death Venue Reform–SB 212, HB 228

This requires that a suit can be brought only in a county where the decedent could have filed suit had they lived.

Expert Witness Reform–SB 187, HB 239

This bill requires application in Alabama of the federal expert witness rule enunciated in the *Daubert* case rather than the current *Frye* standard.

The Budgets

The education budget for the current 2011 year is $5.347 billion and for 2012 is $5.587 billion, which is a

four percent increase over the current year. The 2011 General Fund budget is $1.67 billion, but has been prorated to $1.587 billion. The proposed amount appropriated for 2012 is $1.764 billion, an increase of five percent. The new budgets, however, take into account that Medicaid was budgeted $345 million in 2011 and this year budgeted $647 million, a 188 percent increase. The mental health budget goes from $99 million to $117 million. Next year, over 150 organizations that were appropriated funds in 2011 will not be in the budget. This year, the legislature considered the budgets before the session was half over, an unprecedented effort.

Redistricting

After the budgets, the legislature will look to redistricting. Prior to the Congressional Elections in 2012, each U.S. House of Representatives district must be redrawn and have an equal and exact population. Redistricting of the Alabama house and senate will not have to be completed until the 2014 elections. Once the legislature redistricts, the Justice Department then must approve.

Crime Bills

There are three packages of "crime bills" bills being proposed, one by the supreme court, another by the attorney general's office and a third by the district attorneys.

The district attorneys have revised the sexual offender laws. The chief justice has proposed a new Class D felony act that would provide a classification of crimes with punishment by imprisonment of not less than one or more than three years, and a fine of not more than $7,500. Class D felonies will be exempt from being considered under the Habitual Offender Act. In another bill, the minimum threshold amount for theft offenses has been raised.

A First-Time Felony Offender Act will allow a court to give a defendant a suspended sentence and impose a fine, commit the defendant to jail or place the defendant on probation for a period of not more than three years.

The last day that the legislature may remain in session is June 13, 2011. To stay in touch with the happenings of the legislature I recommend the Alabama Legislative Information System, *alisondb.legislature.state.al.us/acas/ACASLoginIE.asp.*

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Reinstatement

- The supreme court entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating **John Gordon Brock** to the practice of law in Alabama, effective November 4, 2010. [Rule 28, Pet. No. 10-736]

Surrender of License

- Gadsden attorney **Leon Garmon** surrendered his license to practice law in Alabama. The voluntary surrender of license was accepted by the Alabama Supreme Court and made effective December 31, 2010. [ASB nos. 05-21(A) et al]

Disbarments

- Alabama attorney **Jack Tarpley Camp,** who is also licensed in Georgia, was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective December 21, 2010. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Camp's consent to disbarment. In or around November 2010, Camp pled guilty in the U.S. District Court of Georgia to a felony charge of unlawful possession of a controlled substance and a misdemeanor charge of conversion of government property. [Rule 23(a), Pet No. 10-1904]

- Mobile attorney **Herman Young Thomas** was disbarred from the practice of law in Alabama, effective February 26, 2010, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the February 26, 2010 order of Panel I of the Disciplinary Board of the Alabama State Bar.

  In ASB No. 09-1457(A), the Office of General Counsel of the Alabama State Bar received information that Thomas had improperly reduced and/or altered sentences for a number of criminal defendants. In addition, Thomas would meet with criminal defendants who had cases pending before him without notifying defense counsel or the prosecutor. It was also reported that Thomas would paddle and/or engage in sexual conduct with some of these defendants. At a formal hearing before the Disciplinary Board of the Alabama State Bar, Thomas was found to have engaged in improper ex parte contacts with criminal defendants on his docket and, further, that he had spanked or paddled a number of these criminal defendants. As such, the Disciplinary Board of the Alabama State Bar found Thomas guilty of violating rules 8.4(a), (b), (c), (d), (e), and (g), *Alabama Rules of Professional Conduct*.

  In ASB No. 09-1975(A), Thomas was alleged to have engaged in the unauthorized practice of law and then to have given false testimony regarding the same during a deposition at the Alabama State Bar. On March 30, 2009, Thomas was interimly suspended from the practice of law in Alabama by order of the Supreme Court of Alabama and remained on a suspended status since that time. The Office of General

 Continued from page 241

Counsel of the Alabama State Bar received information that Thomas was performing legal services for clients while on a suspended status. During a deposition before the bar, Thomas falsely testified that he had not engaged in the practice of law since his interim suspension. Upon commencement of the hearing in this matter, Thomas admitted to the allegations contained in the formal and amended charges and pled guilty to violations of rules 1.16(a)(1), 3.3(a)(1), 3.4(b), 3.4(c), 5.5(A).1, 8.1(a), 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.*

Thomas was subsequently disbarred from the practice of law in Alabama in both matters. On March 12, 2010, Thomas filed a notice of appeal with the Supreme Court of Alabama. On December 7, 2010, the Supreme Court of Alabama entered a certificate of judgment affirming the disbarment orders of the Disciplinary Board in *Herman Young Thomas v. Alabama State Bar.*

Suspensions

- Mobile attorney **Randy Scott Arnold,** formerly of Troy, was suspended from the practice of law in Alabama for 91 days, effective January 18, 2011, with said suspension being deferred pending successful completion of a one-year period of probation. Arnold was found guilty of violating Rule 1.15, *Ala. R. Prof. C.* Arnold accepted a retainer fee for work that he considered to be a "flat fee" in a criminal case. However, Arnold failed to deposit the unearned portion of the flat fee into his trust account until such time as it was earned. Arnold could not complete the representation, which necessitated a refund of the unearned portion of the fee. The refund was made from Arnold's general account. [ASB No. 08-185(A)]

- Birmingham attorney **Steven Douglas Eversole** was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission ordered that the suspension be held in abeyance and Eversole be placed on probation for two years pursuant to Rule 8(h), *Ala. R. Disc. P.* In ASB No. 08-251(A), Eversole pled guilty to violating Rule 1.16(d), *Ala. R. Prof. C.* Eversole was retained to represent a client in a divorce. On or about October 10, 2008, the client terminated the representation. Thereafter, Eversole failed to promptly withdraw from representation and failed to promptly provide the client with a copy of his client file. In ASB No. 10-623, Eversole pled guilty to violations of rules 1.4(a) and 1.15(a), *Ala. R. Prof. C.* Eversole was hired by a mother to represent her son in a divorce. Thereafter, Eversole failed to adequately communicate with the client. During the course of the bar's investigation, it was also determined that Eversole commingled personal and client funds in his trust account. [ASB nos. 08-251(A) and 10-623]

- Effective January 10, 2011, attorney **Pamela Bryant Fetterolf** of Birmingham has been suspended from the practice of law in Alabama for noncompliance with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 10-689]

- Birmingham attorney **Daniel Benjamin Graves** 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 February 16, 2011. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Graves had failed to respond to requests for information from a disciplinary authority. [Rule 20(a), Pet. No. 11-387]

- Birmingham attorney **James Robert Grisham** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for 91 days. The Disciplinary Commission also ordered that said suspension be made retroactive to August 3, 2010, the date of Grisham's previously ordered interim suspension. Grisham was interimly

suspended from the practice of law in Alabama pursuant to Rule 20(a), *Ala. R. Disc. P.*, effective August 3, 2010, by order of the Disciplinary Commission of the Alabama State Bar. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Grisham's conduct was causing or likely to cause immediate and serious injury to a client or to the public.

In ASB No. 09-1889(A), the Disciplinary Commission accepted Grisham's conditional guilty plea wherein he pled guilty to a violation of Rule 8.4(g), *Ala. R. Prof. C.* In or around September 2008, Grisham was arrested for driving under the influence and for driving with a suspended license. On or about April 6, 2009, Grisham signed a contract with the Alabama Lawyer Assistance Program. Thereafter, Grisham failed to comply with the terms of the contract. [Rule 20(a), Pet. No. 10-1088; ASB No. 09-1889(A)]

- Opelika attorney **Stephanie Northcutt Johndrow** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91 days, effective December 31, 2010. The supreme court entered its order based upon the order of the Disciplinary Commission of the Alabama State Bar accepting Johndrow's conditional guilty plea wherein she pled guilty to violating rules 1.1, 1.3, 1.4(a) and 1.15(a), *Ala. R. Prof. C.* Johndrow was paid to represent a client in an uncontested divorce. Johndrow did not have proper office procedures in place for receipting fees and monitoring the status of client matters. As a result, Johndrow failed to follow up in the matter and the divorce was never filed. Several months later, the client received what purported to be a final divorce decree. Later, it was discovered that the decree had been forged. Due to Johndrow's inadequate office management procedures, it was impossible to clearly establish under what circumstances and by whom the final decree had been forged. During the course of the investigation, witnesses also gave materially conflicting accounts of receipt of the final decree from Johndrow and, therefore, it was impossible to prove with any reasonable degree of certainty who actually possessed the forged document, other than the client. [ASB No. 10-598]

- Birmingham attorney **Bradley Ryan Overton** was summarily suspended from the practice of law in Alabama pursuant to Rule 8(e) and Rule 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 13, 2011. On March 18, 2011, the Disciplinary Commission granted Overton's request that the summary suspension be dissolved and entered an order to that effect. [Rule 20(a), Pet. No. 11-169]

- Birmingham attorney **Leotis Williams** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective February 23, 2011. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Williams's conditional guilty plea in which Williams pled guilty to violations of rules 1.3, 1.4(a), 5.5(a)(1) and 8.4(g), *Alabama Rules of Professional Conduct*. Williams was retained to represent a client in a bankruptcy proceeding for a fee of $1,400. In November 2008, Williams filed the chapter 7 Bankruptcy Petition; however, during representation, Williams failed to file reaffirmations papers with Chrysler Financial and failed to adequately communicate with his client. Williams was suspended March 16, 2009 from the bar of the United States District Court for the Northern District of Alabama and, by affiliation, the U.S. Bankruptcy Court for the Northern District of Alabama. Williams filed approximately 46 petitions for bankruptcy during his period of suspension from the U.S. District Court and U.S. Bankruptcy Court. [ASB No. 09-2862(A)]

Public Reprimand

- Tuscaloosa attorney **Deena V. Tyler-Satterfield** received a public reprimand without general publication on October 29, 2010 for violations of rules 1.3, 1.4(a), 1.16(d) and 8.4(a), *Ala. R. Prof. C.* Tyler-Satterfield was appointed to represent a criminal client on a Rule 32 appeal. The Rule 32 petition was filed and the case was continued in April 2005. Tyler-Satterfield advised the client in or around May 2005 that a hearing would be set in the near future. Thereafter, she accepted other employment and withdrew representation from many of her cases. However, in this particular case, she failed to withdraw from the case and failed to timely advise the client she would no longer be able to represent him in his appeal. [ASB No. 08-246(A)]

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Adams & Reese announces that **David Bowsher** has become a partner.

Altec, Inc. has named **Aldos Vance** associate general counsel.

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15	$195	$200	$255	$485	$725	$1,150	$1,830
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ABOUT MEMBERS, AMONG FIRMS

Continued from page 245

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **C. Meade Hartfield** has joined as an associate.

Balch & Bingham LLP announces that **Emily Branum, David Burkholder, Joel Gilbert, Judd Harwood, Chris Heinss,** and **Angela Luckett** have become partners.

Burr & Forman LLP announces that **Michael Ray** has joined *of counsel* and **Kathryn Y. Bouchillon, Edward D. Cotter, Matthew T. Mitchell, Kip A. Nesmith,** and **David G. Wanhatalo** have become partners.

C. J. Robinson has been promoted to Deputy District Attorney for the **19th Judicial Circuit**.

Christian & Small LLP announces that **Richard M. Thayer** has joined as a partner.

Constangy, Brooks & Smith announces that **Carla J. Gunnin** and **Tamula R. Yelling** have been promoted to partner.

Daniell, Upton, Perry & Morris PC announces that **David A. Busby** has joined as a partner.

Fish Nelson LLC of Birmingham announces the association of **Charley M. Drummond**.

Friedman, Leak, Dazzio, Zulanas & Bowling PC announces that **Charles E. Sharp, Sr.** has joined *of counsel*, **Joel A. Williams** has joined as a partner and **David T. Gordon** has become a partner.

Fuller & Willingham LLC announces that **Michael Fuller** and **Matthew K. Carter** have been named partner and member, and the firm is changing to **Fuller, Willingham, Fuller & Carter LLC**.

Hale Sides & Akins LLC announces that **David L. Veazey** and **Maria B. Campbell** are now associated with the firm.

Hand Arendall LLC announces that **Stephen N. Fitts, III** and **Katie L. Hammett** have been named members of the firm.

Johnston Barton Proctor & Rose LLP announces that **Angie C. Cameron** and **Lance J. Wilkerson** have become partners.

Kennedy Clark & Williams announces that **Walter G. Pettey, III** has joined the firm *of counsel.*

Lawrence T. King and **Champ Lyons** announce that **Lindsey O'Dell Simmons** has been named partner, and the firm's name is now **King, Lyons & Simmons, LLC**.

William B. Lloyd & Associates announces that **Cameron L. Hogan** has become a partner and the firm's name is now **Lloyd & Hogan**.

Maynard, Cooper & Gale PC announces that **Frank Ozment** has been named a shareholder, and **J. Walton Jackson** and **Shannon K. Oldenburg** have joined the firm.

Miller & Christie PC announces that **Matt Dye** has joined as associate.

Nall & Miller LLP announces that **Laura D. Eschleman** has been named partner.

Ogletree, Deakins, Nash, Smoak & Stewart PC announces that **J. Carin Pendergraft** and **Gordon L. Blair** have been elected shareholders, and **James Pennington** has become managing shareholder. The firm also announces that **Samantha Smith** has joined the firm.

Rudy, Wood, Winstead & Williams PLLC announces that **Samuel D. Payne** has become a partner.

Slaten & O'Connor PC announces the firm's name change to **Slaten Law PC**. The firm also announces that **Winston Whitehead Edwards** has joined as a partner, **Daniel Slaten** has joined as an associate and **W. E. Howard, III** has joined *of counsel*.

Smith, Spires & Peddy PC announces that **Tom Burgess, Ethan Dettling** and **Kerry Burgess** have joined the firm and **Tamera K. Erskine** has become a partner.

Speakman & Speakman and **Jackson Law Group PC** announce that **Steven Speakman** has assumed the office of Lee County District Judge and **Michael Speakman** and **Raymond Jackson** have formed **Speakman & Jackson LLC** at 108 N. Dean Rd., Auburn 36830. Phone (334) 821-0091.

Starnes Davis Florie LLP announces that **W. Drake Blackmon** has been named a partner.

Micki Beth Stiller announces that **Alicia Jo Reese** has joined the firm and the firm's name is now **Stiller Disability Law**.

Wallace, Ellis, Fowler & Head announces that **William R. Justice** has become a partner and **Joshua D. Arnold** has joined as an associate.

Wallace, Jordan, Ratliff & Brandt LLC announces that **Susan E. McPherson** has rejoined as an associate.

Webster, Henry, Lyons, White, Bradwell & Black PC announces that **Kimberly S. DeShazo** has been named partner.

Whitaker, Mudd, Simms, Luke & Wells LLC announces that **James M. Strong** and **Douglas H. Bryant** have become members.

NO GECKOS
NO CAVEMEN
NO TALKING BABIES

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BIRMINGHAM ■ HUNTSVILLE ■ MOBILE ■ MONTGOMERY

July 13-16
The Grand Hotel Marriott Resort, Golf Club & Spa
Point Clear, Alabama

The Spruell family: Bruce, Taylor, Cameron and Alyce

COME JOIN US! at the Grand for the 2011 ASB Annual Meeting!

Our family looks forward to welcoming you to the Grand Hotel at Point Clear for what promises to be another great program we've put together for our members. The diverse amenities and relaxing atmosphere of the Grand Hotel provide the perfect setting for you and your family to come and play while you are inspired by Michael Tigar, learn the inside story of the BP oil spill claims process from lawyers involved first-hand, gain some great insight into new tips on social networking and practice management, get involved in various section activities, or just enjoy networking with old friends and making new ones.

You know the food and the fun alone will be worth the trip. The fellowship and programs are the reasons you can't miss it! We look forward to seeing you there.

Alyce Spruell
President
Alabama State Bar

Michael Tigar has held full-time academic positions at UCLA and the University of Texas, and has been a lecturer at dozens of law schools and bar associations in the U.S., Europe, Africa and Latin America. He is a 1965 graduate of Boalt Hall, University of California, Berkeley, where he was first in his class, law review editor-in-chief and a member of the Order of the Coif. He has authored or co-authored 14 books, three plays and scores of articles and essays. He has argued seven cases before the U.S. Supreme Court, filed about 100 federal appeals and tried cases in all parts of the country in state and federal courts. His clients have included: Angela Davis, Sen. Kay Bailey Hutchison, *The Washington Post*, Terry Nichols, and Fernando Chavez. He has chaired the ABA's Section of Litigation and is chair of the Board of Directors of the Texas Resource Center for Capital Litigation.

Professor Thomas D. Morgan teaches antitrust law and professional responsibility at George Washington University School of Law in Washington, DC. He is an author of articles and widely-used casebooks in both subjects and he also writes about administrative law, economic regulation and legal education. A lecturer and consultant to law firms on questions of professional ethics and lawyer malpractice, Prof. Morgan was selected by the American Law Institute as one of three professors to prepare its new Restatement of the Law Governing Lawyers, and by the American Bar Association as one of three professors to draft revisions to its *Model Rules of Professional Conduct*.

Jack Newton is co-founder and president of Clio, a leading provider of web-based practice management software. Newton holds an M.Sc. in computer science from the University of Alberta, and has more than 10 years of experience building start-ups and web applications. He holds three software-related patents in the U.S. and EU. He has also spoken at CLE seminars on how practice management systems can be used to help a lawyer practice ethically and competently. He has written and spoken on Software-as-a-Service (SaaS) in general, and specifically on the ethics, privacy and security issues relating to the use of SaaS in the legal market.

Richard Granat is currently president of Epoq, US, Inc., and DirectLaw, Inc., private companies which operate intelligent legal form websites and license technology to law firms that enable them to become "virtual law firms." He also operates a virtual law firm located in Maryland from his home in Palm Beach Gardens, FL. Granat is co-chair of the eLawyering Task Force of the Law Practice Management Section of the American Bar Association and serves on the ABA Standing Committee on the Delivery of Legal Services and the Council of the Law Practice Management Section. He earned his law degree from Columbia University School of Law.

Catherine Sanders Reach is the director of the American Bar Association's Legal Technology Resource Center. She has provided practice technology assistance for lawyers for more than 10 years with the LTRC. Prior to joining the ABA staff, she worked in library and information science environments for a number of years. Reach received a master's degree in library and information studies from the University of Alabama. Her professional activities include articles published in *Law Practice* magazine, *Law Technology News* and *GP Solo Magazine*, and her continuing research on the digital library appeared in the *AALL Law Library Journal*.

Stephanie Lynn Kimbro is the recipient of the 2009 ABA Keane Award for Excellence in eLawyering and has won the *Wilmington Parent Magazine* Family Favorite Attorney Award four years in a row for her virtual law office. She is the author of *Virtual Law Practice: How to Deliver Legal Services Online*, ABA/LPM Publishing (2010) and was named a "Legal Rebel" in 2010 by the *ABA Journal*. In addition to her virtual law practice, Kimbro is a consultant and technology evangelist providing assistance to other legal professionals interested in the online delivery of legal services.

Thomas W. Lyons, III is a partner in the Providence, RI firm of Strauss Factor Laing & Lyons where he concentrates in the areas of constitutional law, employment litigation, personal injury defense and business and commercial litigation. He earned his law degree from Case Western Reserve University. In 2006, he served as president of the Rhode Island Bar Association. Together with Connecticut attorney Fred Ury, Lyons has made standing-room-only presentations about the future of the practice of law to law-related and judicial organizations throughout the country.

Roland K. Johnson is immediate past president of the State Bar of Texas. Johnson practices with the Fort Worth firm of Harris Finley & Bogle PC. He is board-certified in civil trial law and practices commercial litigation, professional liability litigation and arbitration. Johnson has served on or been a board member of the Tarrant County Bar Association, and the State Bar of Texas Board of Directors and chair of the State Bar Professionalism Committee. He earned his J.D. from Baylor University.

Civics education has been the cornerstone of President Alyce Spruell's term. Stop by the iCivics booth in the foyer of the Conference Center and test your civic literacy. iCivics, a web-based education project to help us to be active participants in our democracy, is the vision of Ret. U.S. Supreme Court Justice Sandra Day O'Connor. You can play a number of interactive games, including "Do I Have a Right," "Supreme Decision," "Executive Command," "Argument Wars," "Immigration Nation," "Separation of Powers," and "Constitution and the Bill of Rights." This activity will be open to all bar members and their families. More information is at the iCivics display in the Grand Ballroom foyer across from the registration desk as you enter the Conference Center.

WEDNESDAY, JULY 13, 2011

NOTE: All functions are in the Conference Center unless otherwise noted. The Card Room, the Lagoon Room and the Sky Lounge are located in the historic main building above the lobby rotunda. Some events will be held outside.

11:00 am – 6:00 pm
Refreshments upon arrival
Grand Ballroom Foyer

Noon – 7:30 pm
2011 Annual Meeting Registration Opens
Grand Ballroom Foyer

OPENING PLENARY SESSION: Nine Principles of Litigation and Life
1:00 – 4:15 pm
(Includes 15-minute break, 3.0 hours CLE credit)
Grand Ballroom North
Presenter: Michael E. Tigar, emeritus professor of law, American University Washington College of Law, Washington, DC, and professor of law, Duke University School of Law, Durham, NC
Michael Tigar has stood at the forefront of the international quest for justice and human rights for a generation. His "Nine Principles" are drawn from his life's experiences and keen observation of his peers and his predecessors. His presentation, drawn from dramatic courtroom confrontations, sublime artistic renderings and life as we know it, is an inspiring guide to what it means to be a lawyer.
Presented by the Professional Education Group, a national continuing education provider

3:00 – 5:00 pm
Board of Bar Commissioners' Meeting
Azalea Salons C-F

4:15 pm
Young Lawyers' Section Business Meeting
Magnolia Ballroom 1

5:15 – 6:00 pm
Leadership Forum Alumni Wine and Cheese Reception
(For classes 1-7 and their spouse or guests)
Beachside Room

7:00 – 8:30 pm
South of the Border Family Night Fiesta
(For registrants and their families – $35 per person age 13 and above; children 12 and under free)
Julep Point and Grand Lawns (Magnolia Ballroom 4 backup in case of inclement weather)
Outstanding food and drink for adults and children. Grab your sombrero and maracas, and move to the beat of the music as the sun sets over Mobile Bay. Pinatas and fun and games for the little ones. Enjoy a great opening night party at Julep Point!

THURSDAY, JULY 14, 2011

7:30 am – 5:00 pm
Registration
Grand Ballroom Foyer

7:30 – 8:30 am
Alabama Law Foundation Trustees' Breakfast
Magnolia Ballroom 1

7:30 – 8:45 am
Senior Lawyers' Breakfast ($25 per person)
"Not Done Yet" – 65 Is the New 50
Sky Lounge, top-floor lobby, main building
Meet the new officers of the Senior Lawyers' Section and learn about exciting plans for the section.

7:30 – 9:30 am
Coffee Bar
Grand Ballroom Foyer

8:00 am – 5:00 pm
Legal Expo 2011
Grand Ballroom South
Come meet representatives from suppliers that tailor their products and services to the legal community. Be sure to enter your business card for daily drawings offered by the exhibitors.

New for 2011 – "The Crystal Ball Has Arrived" – Take a Look!

Everywhere you look people are using technology. We now are LinkedIn, we tweet, we blog, we facebook, we text. Smartphones, laptops, eReaders and iPads abound in sports arenas, in the park, on planes, at the coffee shop, and at countless other places. Consumers are accustomed to going online at their convenience to find and share information, shop, pay for goods and services,

book hotels, and just about everything else. And no matter what type of client you serve, it's likely they want to be able to use the same technologies for similar conveniences when they're working with you. What can you do ethically and effectively to meet these new client needs? Also, what are the major changes in the legal profession over the past 40 years, and what does the future of the legal profession look like? How does "being connected" help us or hurt us?

9:00 – 10:00 am
A Transforming Profession: A Look Back 40 Years and the Challenges Ahead (1.0 hour CLE credit) *repeated Friday 10:30 – 11:30 am

Beachside Room

Presenter: Thomas Morgan, Oppenheim professor of Antitrust and Trade Regulation Law, George Washington University Law School, Washington, DC

Professor Morgan, author of *The Vanishing American Lawyer* (Oxford Press, 2010), will help start us thinking about the changes lawyers face, and how we can deal with them. At least eight major changes have occurred in the legal profession since 1970.

Sponsored by the Alabama State Bar

Additional programs and events held in the Conference Center

9:00 – 10:00 am
Are Claimants Now Required to Provide Social Security Numbers in Litigation? (1.0 hour CLE credit)

Magnolia Ballroom 2

Presenter: Melisa Zwilling, Carr Allison, Birmingham

Sponsored by the Alabama Defense Lawyers Association

9:00 – 10:00 am
What Can 100 Landowners Do with 1,000 Acres? Nothing! Heir Property in Alabama and Legislative Responses (1.0 hour CLE credit)

Azalea Salons A-B

Moderator: Cassandra W. Adams, director, Community Mediation Center, Cumberland School of Law, Samford University, Birmingham

Panelists: Robert McCurley, executive director, Alabama Law Institute and Drafting Committee Chair, National Conference of Commissioners on Uniform State Laws, Tuscaloosa; Robert Zabwa, research professor for Agricultural Sciences, Tuskegee University, Tuskegee; Morris Dees, chief trial attorney and founder, Southern Poverty Law Center, Montgomery; Craig H. Baab, senior fellow and national heir property project director, Alabama Appleseed Center for Law & Justice, Inc., Montgomery

This timely discussion will highlight the extent to which thousands of acres of Alabama land, much of it owned by low-wealth and African-American communities throughout the state, effectively is outside of the usual commercial development of land and is not working for the family owners or the county tax base. One legislative fix is the Uniform Partition of Heirs Property Act, recently approved by the ABA for consideration by all states.

Sponsored by the Alabama Appleseed Center for Law & Justice, Inc., Montgomery

9:00 – 10:00 am
Retaliation Claims under Alabama and Federal Law (1.0 hour CLE credit)

Magnolia Ballroom 3

Presenter: Scott Hetrick, Adams & Reese LLP, Mobile

Sponsored by the Labor & Employment Law Section

9:00 am – Noon
Cartoons by Deano Minton

By popular demand, he's baaack! Deano will make a free, personalized sketch for annual meeting registrants and their families. Be on the lookout for him in the Grand Ballroom Foyer of the Convention Center.

10:00 – 10:30 am
Visit the Legal Expo

Grand Ballroom South

10:30 – 11:30 am
Ethics and Security of Cloud-Based Technology for Lawyers (1.0 hour CLE or Ethics credit) *repeated Thursday 2:30 - 3:30 pm

Azalea Ballrooms C-F

Presenter: Jack Newton, co-founder and president of Clio, Vancouver BC, Canada

Clouding computing is one of the hottest trends in legal technology. Rather than installing and running software on your local computer, your software and data are hosted by a third party and made available over the Internet. While this new approach offers many benefits, lawyers in particular need to be aware of security – and privacy related to "best practices" prior to entrusting confidential client data to "the cloud."

Sponsored by the Alabama State Bar

10:30 – 11:30 am
Featured Workshop: The Future of the Legal Profession (1.0 hour CLE credit)

Beachside Room

***repeated Friday 9:00 – 10:00 am**

Magnolia Ballroom 4

Presenter: Thomas Lyons, III, past president, Rhode Island Bar Association, Providence, RI

Bar leaders, members, the judiciary and law schools must work together as we deal with the challenges that the legal profession is facing as a result of globalization, technology and the changing demographics among members of the bar.

Sponsored by the Alabama State Bar, the Future of the Profession Committee and the Alabama Lawyers Association

Hon. Joel F. Dubina

Hon. Champ Lyons

10:30 – 11:30 am
Waiver of Arguments on Appeal (1.0 hour CLE credit)
Azalea Salons A-B
Moderator: Jonathan M. Hooks, Bradley Arant Boult Cummings LLP, Birmingham
Panelists: Hon. Joel F. Dubina, chief judge, United States Court of Appeals for the Eleventh Circuit, Montgomery; Hon. Champ Lyons, Jr., former senior associate justice, Supreme Court of Alabama, Magnolia Springs; Madeline H. Haikala, Lightfoot Franklin & White LLC, Birmingham
Sponsored by the Appellate Practice Section

10:30 – 11:30 am
Criminal Defense Law Update (1.0 hour CLE credit)
Magnolia Ballroom 2
Presenter: Patrick M. Tuten, Huntsville
Sponsored by the Alabama Criminal Defense Lawyers Association

10:30 – 11:30 am
Visit My North Carolina Virtual Law Office and Remain at the Grand Hotel (1.0 hour CLE credit)
Azalea Salons D-F
***repeated Friday 11:45 am – 12:45 pm**
Magnolia Ballroom 4
Presenter: Stephanie Lynn Kimbro, Wilmington, NC
Kimbro has operated a virtual law practice since 2006 and delivers estate planning and small-business law to clients online. She is the recipient of the 2009 ABA Keane Award for Excellence in eLawyering.
Sponsored by the Alabama State Bar

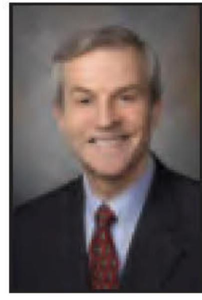
10:30 am – 12:30 pm
Featured Workshop: Business Valuation Case Studies for All Legal Professionals (2.0 hours CLE credit)
Azalea Salon C
Presenters: Mike Costello, principal, Decosimo Advisory Services, Chattanooga, TN; Brent McDade, managing director, Decosimo Advisory Services, Chattanooga, TN
Business valuations are used for a variety of purposes and are prepared for business entities of every type and size as well as in a variety of legal settings – mergers, acquisitions, reorganizations, liquidations, bankruptcy, marital dissolution, stockholder disputes, estate gift and income taxes, damages litigation, insurance claims, financing, buy-sell agreements, etc.
Sponsored by the Alabama State Bar

11:30 – 11:45 am
Visit the Legal Expo and Sponsor Break
Grand Ballroom South

11:45 am – 12:45 pm
Virtual Lawyering: What Lawyers Need to Know – A New Business Model (1.0 hour CLE credit) *repeated Friday 11:45 am – 12:45 pm
Beachside Room
Presenter: Richard S. Granat, president, Epoq, US, Inc. and DirectLaw, Inc., Palm Beach Gardens, FL
In the competitive environment that solos and small law firms face in the current economy, the keys to survival are to expand the strategic options available by opening new client markets, reducing the cost of services and delivering legal services in a way that distinguishes law firms from non-lawyer providers such as LegalZoom. eLawyering is not an automatic solution to economic challenges, but it may be a component of many future practices.
Sponsored by the Alabama State Bar

11:45 am – 12:45 pm
Ins and Outs of Social Networking (1.0 hour CLE credit)
Azalea Salons D-F
***repeated Friday 10:30 – 11:30 am**
Magnolia Ballroom 4
Presenter: Catherine Sanders Reach, director, Legal Technology Resource Center, American Bar Association, Chicago, IL
The advent of the Internet has made social networking easier than ever, but with the endless number of online networking choices, it can become downright confusing. This is an overview of various networking options.
Sponsored by the Alabama State Bar

Hon. John E. Ott


Hon. R. Bernard Harwood

11:45 am – 12:45 pm
Good and Bad Practices in Mediation: What Mediators Do that *Lawyers Like* (Dislike) and Vice Versa (1.0 hour CLE credit)
Azalea Salons A-B
Moderator: Judge John L. Carroll, dean and Ethel P. Malugen Professor of Law, Cumberland School of Law, Samford University, Birmingham
Panelists: Philip E. Adams, Jr., Adams, Umbach, Davidson & White LLP, Auburn; Hon. John E. Ott, U.S. Magistrate Judge, Northern District of Alabama, Birmingham; J. Cole Portis, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery; Hon. R. Bernard Harwood, Rosen Harwood PA, Tuscaloosa
Sponsored by the Dispute Resolution Section and the Litigation Section of the Alabama State Bar

11:45 am – 12:45 pm

Overview of Intellectual Property Law: Patents, Copyrights, Trademarks (1.0 hour CLE credit)

Beachside Room

Presenters: Paul M. Sykes, Bradley Arant Boult Cummings LLP, Birmingham; Russell C. Gache, Maynard Cooper & Gale PC, Birmingham; Stacey Ann Davis, Baker Donelson Bearman Caldwell & Berkowitz, Birmingham

Sponsored by the Intellectual Property, Entertainment & Sports Law Section

12:30 – 1:00 pm

Bloody Mary and Mimosa Reception Honoring 2011 ASB Award Winners

Grand Ballroom Foyer

Congratulate some of the 2011 ASB award winners.

Sponsored by ISI Alabama, Inc., an Alabama State Bar Member Benefit Provider

1:00 – 2:00 pm

Annual Bench & Bar Luncheon and Awards Program ($36 per person)

Grand Ballroom North

Presiding: Alyce M. Spruell, Spruell & Powell LLC, Tuscaloosa, president, Alabama State Bar

Invocation: Navan Ward, Jr., Beasley Allen Crow Methvin Portis & Miles PC, Montgomery, president, ASB Young Lawyers' Section

Special presentations:

- Judge Walter P. Gewin Award
- Judicial Award of Merit
- Alabama State Bar Award of Merit
- Alabama State Bar Pro Bono awards
- Commissioners' awards
- President's Award
- Bill Scruggs, Jr. Award

2:30 – 3:30 pm

The Future Is Now: Technologies to Serve Today's Clients (1.0 hour CLE credit)*repeated Friday 2:30 – 3:30 pm

Magnolia Ballroom 4

Presenter: Catherine Sanders Reach, director, Legal Technology Resource Center, American Bar Association, Chicago, IL

Today, legal services are being delivered by lawyers and non-lawyers – via the Internet. Client expectations are changing, and lawyers must adopt technologies to meet these changing needs.

Sponsored by the Alabama State Bar

2:30 – 3:30 pm

Marketing Your Law Firm Online (1.0 hour CLE credit)

Beachside Room

Presenter: Mark Weinstock, senior director of Law Firm Marketing Sales, LexisNexis, Tampa, FL

This is a discussion of the best practices and insights into websites, search engine optimization (SEO) and social media.

Sponsored by LexisNexis

2:30 – 3:30 pm

Ethics and Security of Cloud-Based Technology for Lawyers (1.0 CLE Ethics credit) *repeat

Azalea Salons C-F

Hon. William B. Ogletree

Hon. J. Michael Joiner

Hon. Brian Huff

2:30 – 4:30 pm

Featured Workshop: Suspension of a Lawyer for Failure to Follow through with Client Matters, Referral to Lawyer Assistance Program and Mock Reinstatement (2.0 hours CLE Ethics credit)

Azalea Salons A-B

Speakers: Robert Lusk, assistant general counsel, Alabama State Bar, Montgomery; Kimberly Jane Davidson, Birmingham

Panelists: Hon. William B. Ogletree, 16th Judicial Circuit, Gadsden; Hon. J. Michael Joiner, 18th Judicial Circuit, Columbiana; Hon. Brian Huff, presiding judge, Jefferson County Juvenile Court, Birmingham; Jonathan S. Cross, Fischer Goldasich & Aughtman LLC, Birmingham; D. Leon Ashford, Hare Wynn Newell & Newton LLP, Birmingham

This unique program begins with a brief suspension of a lawyer for failure to follow through with client matters. The disciplinary panel will order the lawyer to participate in the Lawyer Assistance Program. A mock reinstatement hearing will be presented with members of the Lawyer Assistance Program Committee playing various roles. A panel discussion will follow and questions and comments will be welcomed.

Sponsored by the Alabama State Bar Lawyer Assistance Program

2:30 – 4:30 pm

Children's Poolside Ice Cream Social

Tom Sawyer's Playground at the Grand Pool (recommended for all children aged 10 and under)

Ice cream and other goodies will be served. Clowns will make balloons, paint faces and entertain all.

3:45 – 4:45 pm

Ethical and Technological Issues of Delivering Legal Services Online (1.0 hour CLE Ethics credit) *repeated Friday 2:30 – 3:30 pm

Beachside Room

Presenter: Stephanie Lynn Kimbro, Wilmington, NC

Known as a technology evangelist, Kimbro teaches virtual law practice as a faculty member of Solo Practice University, a web-based legal education community.

Sponsored by the Alabama State Bar

4:00 – 5:00 pm
The Wine Experience ($40 per person; 10-person minimum – 30-person maximum)
Card Room, main building
The Grand's beverage manager will walk you through the different flavor categories and techniques to find the perfect match for you. Learn about progressive wine lists.

American Board of Trial Advocates

5:00 – 6:00 pm
Cocktail Reception for the Alabama Chapter of the American Board of Trial Advocates (for ABOTA members)
Beachside Room
Sponsored by the Alabama Chapter of the American Board of Trial Advocates
Joseph S. Miller, president, Starnes Davis Florie LLP, Birmingham

5:00 – 6:30 pm
15th Annual Alabama State Bar Volunteer Lawyers Program Reception (no ticket required)
Sky Lounge, top-floor lobby, main building

6:00 – 8:00 pm
University of Alabama School of Law Alumni Reception ($30 ticket required; no charge for children under 13)
Azalea Salons A-B

6:30 – 8:00 pm
Samford University, Cumberland School of Law Alumni Reception ($30 ticket required)
Lagoon Room, second-floor lobby, main building

7:00 pm
Vanderbilt University Law School Alumni Dinner
Wash House Restaurant, 1711 Scenic Highway 98, Point Clear
RSVP to Cecilia J. Collins at *cjc@johnstoneadams.com.*

7:30 – 8:30 pm
Dessert Reception for Alumni and Friends (no charge)
Beachside Room
The Thomas Goode Jones School of Law is hosting a dessert reception for alumni and friends of the school of law.
Sponsored by the generosity of the Thomas Goode Jones School of Law

8:00 pm
Melting Pot Party at the Point
Azalea Salons C-F
Enjoy food, drinks, music, dancing, and collegiality. Everyone is welcome.
Sponsored by the Alabama State Bar, the Future of the Profession Committee, the Alabama Lawyers Association and law firms throughout the state

FRIDAY, JULY 15, 2011

7:30 – 8:30 am
Early Morning Breakfasts

- **Past Presidents' Breakfast**

Magnolia Ballroom 3

- **The University of Alabama Chapter of the Order of the Coif Breakfast ($25 per person)**

Sky Lounge, top-floor lobby, main building

- **Sixth Annual Leadership Forum Alumni Breakfast ($25 per person)**

Lagoon Room, second-floor lobby, main building
Attorneys who might be interested in applying to Class 8 are invited to "attend and see what it's all about."

- **Inns of Court Coffee (no charge)**

Magnolia Ballroom 2
Sponsored by the Cumberland School of Law

7:30 – 9:30 am
Coffee Bar
Grand Ballroom Foyer

7:30 am – Noon
Registration
Grand Ballroom Foyer

8:00 am – Noon
Legal Expo 2011
Grand Ballroom South
(Check the board to see if you have won a prize.)

Repeat Sessions – "The Crystal Ball Has Arrived" – Take a Look!

9:00 – 10:00 am
The Future of the Legal Profession (1.0 hour CLE credit) *repeat of Thursday's program
Magnolia Ballroom 4

10:30 – 11:30 am
Ins and Outs of Social Networking (1.0 hour CLE credit) *repeat of Thursday's program
Magnolia Ballroom 4

11:45 am – 12:45 pm
Visit My North Carolina Virtual Law Office and Remain at the Grand Hotel (1.0 hour CLE credit) *repeat of Thursday's program
Magnolia Ballroom 4

2:30 – 3:30 pm
The Future Is Now: Technologies to Serve Today's Clients (1.0 hour CLE credit) *repeat from Thursday's program
Magnolia Ballroom 4

9:00 – 10:00 am
Deepwater Horizon Disaster, One Year Later
Beachside Room

A panel discussion of the unique legal issues involved, developments and status

Panelists: Jeffrey A. Breit, Breit Drescher Imprevento & Walker, Norfolk, VA; R. Cooper Shattuck, legal advisor to Gov. Bentley and chair of the Governor's BP Oil Spill Task Force, Montgomery; Gregory H. Hawley, White Arnold & Dowd PC, Birmingham; Rhon E. Jones, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery; Hon. Luther J. Strange, III, attorney general of Alabama, Montgomery

Sponsored by the Alabama State Bar

9:00 – 10:00 am
2011 Workers' Compensation Case Law Update (1.0 hour CLE credit)
Magnolia Ballroom 1

Presenters: Beverly Smith Williamson, Zeanah Hust Summerford & Williamson LLC, Tuscaloosa; J. Vincent Swiney, II, Wettermark Holland & Keith LLC, Birmingham

Sponsored by the Workers' Compensation Law Section

Hon. Sarah H. Stewart

Hon. Abdul K. Kallon

Hon. Robert S. Vance, Jr.

9:00 – 10:00 am
Hot Topics in Commercial Litigation (1.0 hour CLE credit)
Azalea Salons A-B

Moderator: Wilson F. Green, Fleenor Green & McKinney LLP, Tuscaloosa

Panelists: Hon. Sarah H. Stewart, circuit judge, 13th Judicial Circuit, Mobile; Hon. Abdul K. Kallon, U.S. District Judge, Northern District of Alabama, Birmingham; Hon. Robert S. Vance, Jr., circuit judge, 10th Judicial Circuit, Birmingham

Sponsored by the Business Torts & Antitrust Law Section

9:00 am – Noon
Joint Presentations – Polygamist Polytrials: "Billable Hours for the Soul" Drive Lawyers to West Texas (1.0 hour CLE credit) and 2011 Family Law Case Law Update (1.5 hours CLE credit followed by 30-minute business meeting)
Azalea Salons C-F

Presenters: Roland K. Johnson, Harris Finley & Bogle PC, Fort Worth, TX; Hon. J. Gary Pate, circuit judge, 10th Judicial Circuit, Birmingham

An added component to the traditional case law update by Judge Pate features a past president of the State Bar of Texas who details how the removal of 416 youths from a polygamist compound tested the state's civil justice system.

Sponsored by the Family Law Section and CLE Alabama

10:00 – 10:30 am
Visit the Legal Expo
Grand Ballroom South

10:30 – 11:30 am
A Transforming Profession: A Look Back 40 Years and the Challenges Ahead (1.0 hour CLE credit) *repeat of Thursday's program
Beachside Room

10:30 – 11:30 am
Leasing Issues under Alabama Law (1.0 hour CLE credit)
Azalea Salon C

Presenter: Marie A. Moore, Sher Garner Cahill Richter Klein & Hilbert LLC, New Orleans, LA

Moore practices in the areas of commercial leasing and real estate, construction, lending and general commercial transactions. She is a 1978 graduate of the University of Alabama School of Law where she was a member of the Order of the Coif and associate editor of the *Alabama Law Review.* She was a law clerk to the Hon. Robert S. Vance of the U.S. Court of Appeals for the 5th Circuit.

Sponsored by the Real Property, Probate & Trust Law Section

10:30 – 11:30 am
Updates on the Alabama Family Law Trust (1.0 hour CLE credit)
Magnolia Ballroom 3

Presenters: B. Alan Zeigler, Birmingham; Clayton K. Davis, Davis & Neal, Dothan

As the population continues to age, the Alabama Family Law trust is a useful tool in estates and Medicaid planning. Board members of the Family Law Trust will review the latest information.

Sponsored by the Elder Law Section

10:30 – 11:30 am
Legislative Update and Annual Meeting (1.0 CLE credit)
Azalea Salons D-F

(Followed by the Alabama Law Institute 2011 meeting)

Sponsored by the Alabama Law Institute

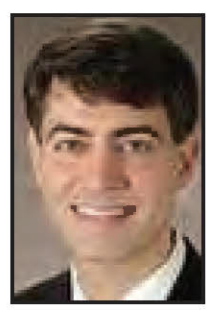
11:00 am – 1:00 pm
Cooking Demonstration ($35 per person; 10-person minimum)
Sky Lounge, top-floor lobby, main building

Join a Grand chef in one of the hotel's fun and informative cooking demonstration classes.

11:45 am – 12:45 pm
Virtual Lawyering: What Lawyers Need to Know – A New Business Model (1.0 hour CLE credit) *repeat of Thursday's program
Beachside Room

James Sumner

Sen. Cameron Ward


Rep. Paul DeMarco

11:45 am – 12:45 pm
Alabama's New Public Ethics Laws – What Lawyers Need to Know (1.0 hour CLE credit)
Azalea Salons A-B

Speakers: James Sumner, executive director, Alabama Ethics Commission, Montgomery; Senator Cameron Ward, District 14, Alabaster; Representative Paul DeMarco, District 46, Jefferson County, Parsons Lee Juliano PC, Birmingham; Hugh R. Evans, III, general counsel, Alabama Ethics Commission, Montgomery

Sponsored by the Section of Elections, Ethics & Government Relations Law

12:30 – 1:00 pm
Women's Section Reception Honoring Alyce Spruell
Card Room, second-floor lobby, main building

Sponsored by the Women's Section and the Alabama State Bar

1:00 – 2:00 pm
Ninth Annual Maud McLure Kelly Award Luncheon ($36 per person)
Lagoon Room, second-floor lobby, main building

This year's award is being given posthumously to Carol Jean Smith, Montgomery.

Sponsored by the Women's Section

1:00 – 5:30 pm
Lawyers in Pursuit of Birdies at Lakewood (LIPOBAL) ($150 per person – includes boxed lunch)
Lakewood Golf Course

Contact ASB General Counsel Tony McLain *(tony.mclain@alabar.org)* or Bar Commissioner Derrick A. Mills *(dmills@mrblaw.com)* for an afternoon of golf.

2:00 – 3:30 pm
Alabama Access to Justice Commission Meeting (No CLE credit)
Magnolia Ballroom 2

2:00 – 4:00 pm
Build-A-Bear Special Event – Children's Party
Azalea Salons C-F

Each child will make an animal of their choice at no charge. Clothes and shoes for your "new best friend" will be available for sale, so bring a little extra money. Popcorn, candy and drinks will also be served. Recommended for all children 12 and under. **You must bring your ticket(s) to gain admission.** Cartoons by Deano will also be a feature of the party. Some "famous friends" may make an appearance.

Sponsored by the Alabama State Bar

2:00 – 5:00 pm
Family Tennis Tournament ($25 ticket required)
Lakewood Club at The Colony

The fourth annual Family Tennis Tournament will be held at the new tennis facility. This tournament will be a Round Robin. Partners will be drawn and players will rotate partners after each match of four games. All family tennis players are encouraged to participate in this event, but a partner is not required when registering to play. Contact Birmingham attorney Laura S. Chain *(lchain@whitearnolddowd.com)* if you have questions.

Sponsored by Regions Morgan Keegan Trust

2:30 – 3:00 pm
Women's Section Business Meeting
Magnolia Ballroom

2:30 – 3:30 pm
Ethical and Technological Issues of Delivering Legal Services Online (1.0 hour CLE Ethics credit) *repeat of Thursday's program
Beachside Room

Presenter: Stephanie Lynn Kimbro, Wilmington, NC

2:30 – 5:00 pm
Sailing on the "Joshua" ($35 ticket required - Minimum of 20, maximum of 40)
Marina, Grand Hotel

Meet at 2:15 at the Marina, Grand Hotel. Drinks and snacks provided

4:00 – 5:00 pm
The Perfect Cocktail ($40 per person - Minimum of 10, maximum of 30)
Card Room, second-floor lobby, main building

Join the Grand Hotel's beverage manager for this fun session as you learn how to make some hand-crafted, well-balanced cocktails made from absolutely fresh juices.

6:00 – 8:30 pm
Silent Auction Fundraiser (No ticket required)
Grand Ballroom Foyer

(Proceeds benefit the Lawyer Assistance Foundation and the Justice Janie L. Shores Scholarship Fund)

The auction is organized under the leadership of Sherrie Phillips, Montgomery, and Jeanne Marie Leslie, Montgomery.

Sponsored by the Alabama State Bar, Lawyers Helping Lawyers Committee and the Women's Section

6:30 – 9:00 pm

A Grand Garden Party – President's Closing Night Family Celebration ($45, ages 18 and up; $25, ages 13-17; children, 12 and under, free)

Grand Ballroom North and South

We come together to thank Alyce Spruell and her husband, Bruce, for sterling leadership this past year as president of the Alabama State Bar. We have planned an outstanding evening to include drinks and a fabulous themed dinner with décor and lighting. The famed "Dave Ellis Band" will provide music especially crafted with the entire family in mind from the youngest to the oldest. Large screens throughout the room will televise you and your friends as you pose for photos. As always, we will throw in a few surprises which you have to be present to experience.

6:30 – 9:30 pm

Cartoons by Deano at the Grand Garden Party

Grand Ballroom North and South

9:00 pm

Fireworks over Mobile Bay

It wouldn't be summer in the South without a fireworks show!

SATURDAY, JULY 16, 2011

7:00 – 8:00 am

Legal Run-Around

The 1-Mile Fun Run/Walk and 5K Run will start and end directly across the street from the main entrance to the Grand Hotel. The registration table will be located near the entrance sign. First-place male and female attorney winners in the 5K will receive a complimentary registration to the 2012 Annual Meeting. Advance registration is required. T-shirts will be awarded to all participants who complete the course.

Sponsored by Freedom Court Reporting, Inc.

7:30 – 8:45 am

Christian Legal Society Breakfast ($20 per person)

Beachside Room

Moderator: Samuel N. Crosby, Stone Granade & Crosby PC, Daphne

Presenter: Hon. Sonja F. Bivins, federal magistrate judge, U.S. District Court, Southern District of Alabama, Mobile

Sponsored in port by Stone Granade & Crosby PC, Daphne, and Spruell & Powell LLC, Northport

7:30 – 9:30 am

Coffee Bar

Grand Ballroom Foyer

8:30 – 9:15 am

Silent Auction Wrap-Up

Magnolia Ballroom 2

Pick up or pay for items.

9:15 – 11:15 am

Grand Convocation: State of the Judiciary (2.0 hours CLE credit)

Grand Ballroom North

Presiding: Alyce M. Spruell, Spruell & Powell LLC, Northport, president, Alabama State Bar

Brief State of the Judiciary Address

Presenter: Chief Justice Sue Bell Cobb, Supreme Court of Alabama, Montgomery

Special presentations:

- Announcement of the 2011 Hall of Fame Class
- Recognition of 50-year members
- Recognition of retiring commissioners
- Local Bar Achievement awards
- Most improved Judicial Circuit and Section VLP Participation awards
- Recognition of alumni of Alabama State Bar Leadership Forum (Classes 1-7)
- Chief Justice's Professionalism Award
- Drawing for iPad2
- Grand Prize Getaway presented by ISI Alabama, Inc.

The program concludes with the installation of James R. Pratt, III as the 135th president of the Alabama State Bar.

11:15 am

Board of Bar Commissioners' Meeting

Azalea Salons C-F

11:30 am – 1:30 pm

Presidential Reception Honoring James R. Pratt, III, 135th president of the Alabama State Bar

Magnolia Ballroom 4

Everyone is cordially invited to stop by and wish Jim well as he assumes the presidency.

Sponsored by Hare Wynn Newell Newton LLP, Birmingham

Maximum Attainable MCLE Credit-At-A-Glance

Wednesday	3.0 credit hours
Thursday	5.0 credit hours
Friday	5.0 credit hours
Saturday	2.0 credit hours
Wednesday – Saturday	15.0 credit hours

NOTE: A grand total of 40 hours of CLE credit programming is offered during the annual meeting. CLE materials and general meeting and bar information will be placed on USB flash drives available to all attorneys at registration. Some workshops and seminars will have paper handouts of CLE materials in addition to the flash drive. New

for 2011 – we will provide the CLE seminar materials via weblink one week prior to the seminar. Print the pages you want and bring them with you.

A Special Thank-You to Our Exhibitors and Sponsors

The Alabama State Bar thanks our sponsors and exhibitors for their continued support and generosity.

Exhibitors

ABA Retirement Funds Program*
Alabama Bench & Bar Historical Society
Alacourt.com
Attorneys Insurance Mutual of the South
Baker & Baker Reporting & Video Services, Inc.
CLE Alabama
Clio
CollegeCounts 529 Fund
Comprehensive Investigative Group
Deep South Language Services
Easy Soft*
Freedom Court Reporting, Inc.
GEICO*
GILSBAR
Henderson & Associates Court Reporters
ISI Alabama*
Jackson Thornton
LawTech Partners
Legal Services Alabama
LexisNexis
Merrill Corporation
Polycom
West
*Denotes an Alabama State Bar Member Benefit Provider

Legal Expo 2011 Door Prizes (as of 4-18-11)

GRAND PRIZE – 6–Night, 7–Day Retreat to the Parc Soleil in Orlando, Florida. Resort accommodations and Disney tickets included
$5,000 value – Compliments of ISI Alabama

- iPad

$729 value – Compliments of CLE Alabama

- (2) $100 Contribution to New or Existing Alabama CollegeCounts 529 Fund Account

$200 value – Compliments of CollegeCounts 529 Fund

- Gift Certificate

$200 value – Compliments of Baker & Baker

- Kindle

$149 value – Compliments of Henderson & Associates Court Reporters, Inc.

- Visa Gift Card

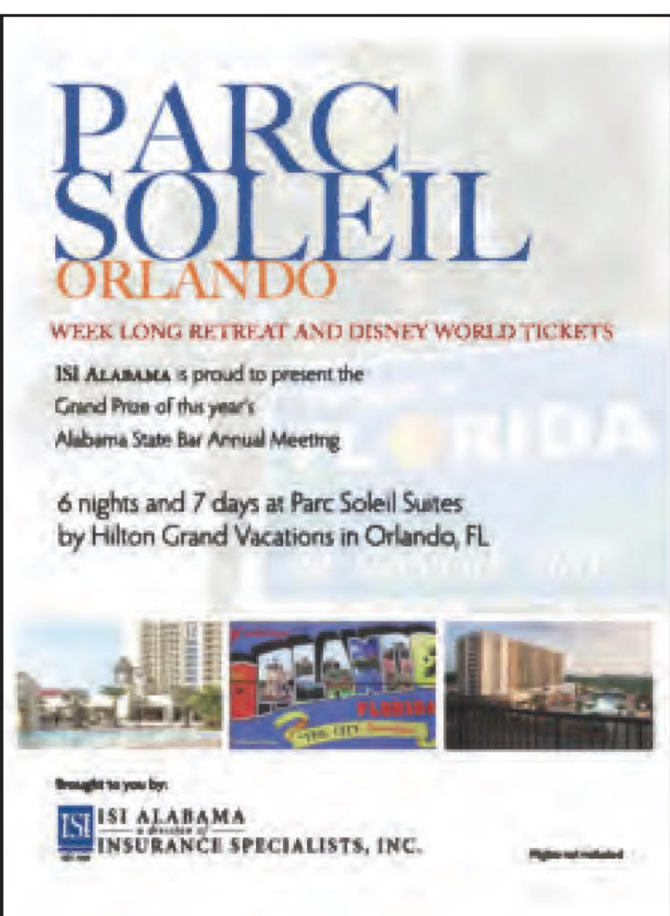
$100 value – Compliments of Easy Soft, LLC

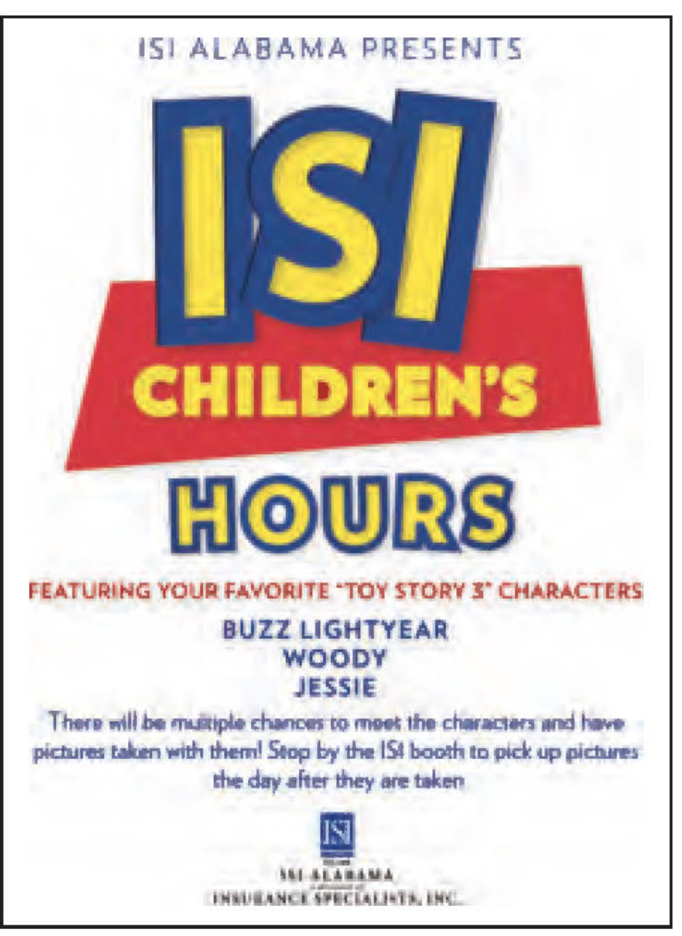
- Visa Gift Card

$50 value – Compliments of GILSBAR

- Gift Certificate for One Page Translation English/Spanish Dictionary

$50 value – Compliments of Deep South Language Services





I. ADVANCE REGISTRATION FORM

Online Registration Available at *www.alabar.org*

Please Print

Name (*as you wish it to appear on name badge*) --

Bar ID: -- Firm Name --

Check if applicable: ☐ Bar Commissioner ☐ Past President ☐ Local Bar President ☐ Justice ☐ Judge ☐ 50-year member

Office Phone -- Cell Phone --

Business Mailing Address --

City -- State -- ZIP --

E-mail --

Spouse/Guest's Name --

Child/Children's Name(s) and Age(s) --

Please indicate any dietary restrictions: ☐ Vegetarian ☐ Allergies ☐ Other --

Please send information pertaining to services for the disabled: ☐ Auditory ☐ Visual ☐ Mobility

REGISTRATION FEES (Advance Registration)

(A limited number of partial registration-fee scholarships are available to first-time attendees of the 2011 Alabama State Bar Annual Meeting and those attorneys with a demonstrated need for financial assistance. Minorities, women and solo practitioners are encouraged to apply. For additional information, send an e-mail to scholarships@alabar.org.)

	By June 30	After June 30	Fees
☐ Alabama State Bar Member	$450	$500	$______
☐ Full-Time Judge	$250	$300	$______
☐ Non-Member (Does Not Apply to Spouse/Guest or Legal Expo Vendors)	$550	$600	$______
TOTAL REGISTRATION FEE			$______

II. OPTIONAL EVENT TICKETS

(You must be registered to purchase or request tickets to optional events for guest/family.)

Wednesday, July 13	No. of Tickets	Cost Per Ticket	Total Cost
South of the Border Family Night Fiesta			
Adults and Children 13 and over	___@	$35.00	$______
(children 12 and under free)	___@	No charge	N/C
Thursday, July 14			
Senior Lawyers' Breakfast	___@	$25.00	$______
Bench & Bar Luncheon	___@	$36.00	$______
Poolside Ice Cream Social (for children 10 and under)	___@	No Charge	N/C

University of Alabama School of Law			
Alumni Reception	___@	$30.00	$______
(children 13 and under)	___@	No Charge	N/C
The Wine Experience	___@	$40.00	$______
Samford University Cumberland School of Law Alumni Reception	___@	$30.00	$______
Thomas Goode Jones School of Law			
Dessert Reception for Alumni and Friends	___@	No Charge	N/C
(open to all registrants their families)			
Vanderbilt School of Law Alumni Dinner	___@		

Wash House Restaurant – Contact Cecilia J. Collins at *cjc@johnstoneadams.com* for further details

Friday, July 15

Inns of Court Coffee	___@	No charge	N/C
Order of the Coif Breakfast	___@	$25.00	$______
6th Annual Leadership Forum Alumni Breakfast	___@	$25.00	$______
9th Annual Maud McLure Kelly Award Luncheon	___@	$36.00	$______
Cooking Demonstration with the Grand Chef	___@	$35.00	$______
Lawyers in Pursuit of Birdies at Lakewood (LIPOBAL)	___@	$150.00	$______

My golf handicap is _____ Preferred foursome:___________________, ___________________, ________________, _________________

Build-A- Bear Special Event–Children's Party			
(for children 12 and under)	___@	No Charge	N/C
Sailing on the "Joshua"	___@	$35.00	$______
4th Annual Family Tennis Tournament	___@	$25.00	$______
Indicate Level: Beginner Intermediate Advanced			
The Perfect Cocktail	___@	$40.00	$______
President's Closing Night Family Celebration: A Grand Garden Party			
Adults 18 and over	___@	$45.00	$______
Children 13-17	___@	$25.00	$______
Children 12 and under	___@	No Charge	N/C

Saturday, July 16

Freedom Legal Run-Around			
5K Run	___@	No Charge	N/C
1 Mile Fun Run/Walk	___@	No Charge	N/C
Christian Legal Society Breakfast	___@	$20.00	$______
Total Event Tickets			______
TOTAL FEES TO ACCOMPANY FORM			$______

III. PAYMENT

MUST Accompany Registration Form. Checks for Registration/Tickets Should Be Made Payable to the Alabama State Bar.

Mail Registration Form and Check To:

2011 Annual Meeting, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

PLEASE BILL MY CREDIT CARD:

☐ VISA ☐ MasterCard ☐ American Express

Card Number ______________________ Expiration Date ______________________

Cardholder's Signature ____

Advance Registration Forms Must Be Received No Later Than July 6, 2011

Cancellations with full refund, minus a $50.00 handling fee, may be requested through noon, Wednesday, JULY 6, 2011

NOTE: In order to claim CLE credit for the annual meeting, you must be registered for the meeting.

ALABAMA STATE BAR
2011 ANNUAL MEETING
JULY 13-16, 2011

HOTEL RESERVATION FORM

Room reservations **MUST BE MADE DIRECTLY WITH THE ALABAMA STATE BAR**
To ensure your accommodations, reservations should be received
NO LATER THAN FRIDAY, June 13, 2011

Please reserve __________room(s) for ________person(s)

Name ____

Bar ID: ______________________________

Company or Firm ____

Address ____

City, State ____ ZIP __________

Phone ____

E-mail ___________________________________

All reservations are accepted on a guaranteed basis only. A credit card guarantee of your first night's room charge is required to confirm this reservation. Reservations received after **June 13, 2011** will be subject to space and rate availability **CHECK-IN TIME IS 4:00 P.M. CHECK-OUT TIME IS 11:00 AM.** Hotel room rates are subject to a 15% amenity fee and all applicable state and local sales and occupancy taxes (6%) at the time of check-in.

ARRIVAL:
Date____________________ Time: __________

DEPARTURE:
Date____________________ Time: ______________

Room Rates

$263.00 plus tax per night (single and double occupancy)

Room Type Request: KING______ DOUBLE/DOUBLE______ Special Requests:______________________________

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

Circle Type of Credit Card : American Express MasterCard Visa Discover

Name____

Credit Card Number____

Expiration Date________________________ Signature_____________________________________

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

Please mail to: Alabama State Bar 2011 Convention, P. O. Box 671, Montgomery, AL 36101