

July 2007

Vol. 68, No. 4

# *The* Alabama Lawyer

## Parting Ways:

What a Lawyer and Law Firm Need to Consider When a Lawyer Leaves the Firm

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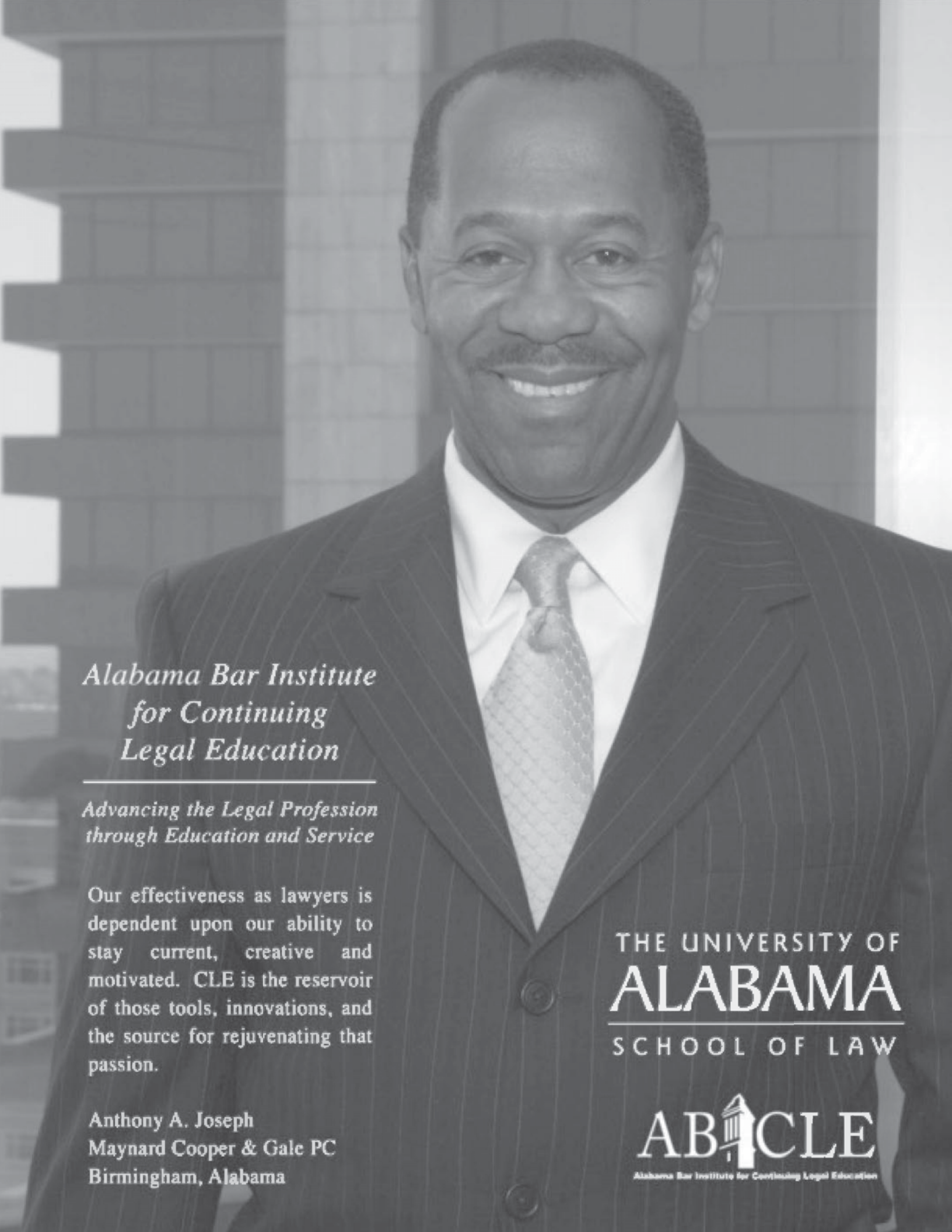
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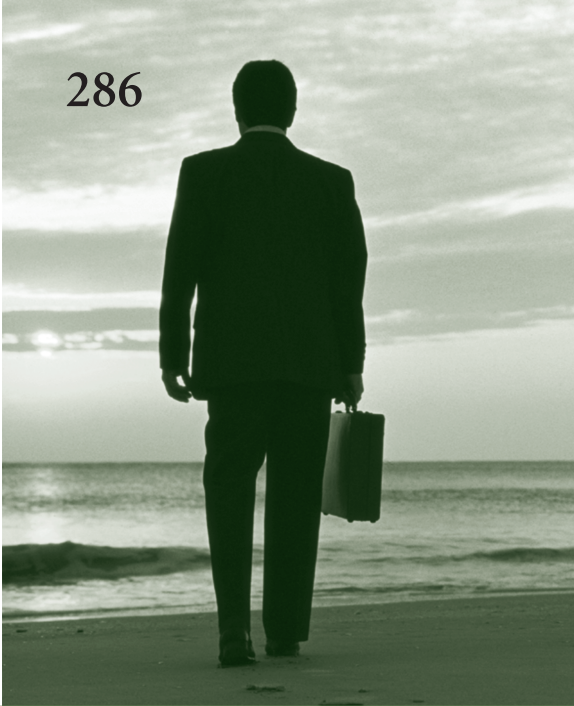
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# The Alabama Lawyer

July 2007 Vol. 68, No. 4

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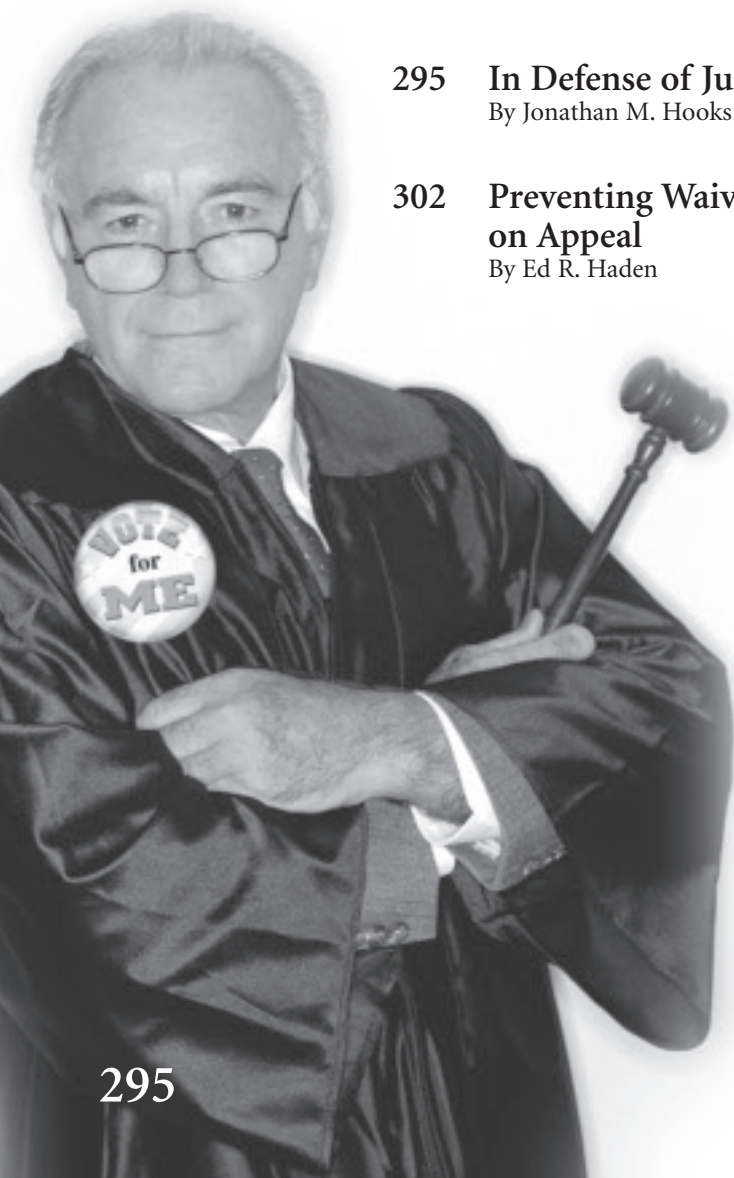
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Fournier J. "Boots" Gale, III



## Continuity and Commitment Keys to Success

Every year, as summer rolls around, the term of the ASB president begins winding down, coming to an end in July at the annual meeting. And, each year, the editor of *The Alabama Lawyer*, Robert Haker, and the soon-to-be president take a look back at the presidential term ending, reflecting on what has been accomplished and what's in store for the future. In this interview, Robert quizzes Fournier J. "Boots" Gale, the 2006-07 president of the Alabama State Bar.

**Robert Haker:** What are the accomplishments of your administration?

**Boots Gale:** We have continued the efforts that earlier bar presidents spent a good bit of time on—merit selection of appellate judges. To make any meaningful impact, we had to have consistency in the effort and carry it forward over administrations. I committed to former presidents Bill Clark, Doug McElvy and Bobby Segall that I would continue their efforts. They all spent a good bit of time trying to make progress in this area and we've continued that. Retired Justice Gorman Houston has headed a task force for at least three years; I asked him to do it again and he has been a real leader.

**R** What role has Chief Justice Sue Bell Cobb played in these efforts?

**BG** Chief Justice Cobb has been very cooperative and supportive. She met with our task force and discussed her ideas and plans for working together. She had a few different twists on the bill that the bar commissioners approved last year, and we're working with her. She introduced one bill in the legislature that is very consistent with our approach. It deals with merit selection for vacancies only, much like the judicial commissions currently operating in Jefferson County, Mobile, Huntsville, Tuscaloosa, and Baldwin County. Montgomery doesn't have it, but a lot of the major cities do and they operate only for vacancies. The



chief justice's bill would set this up in all judicial circuits for vacancies at the circuit and district court levels, requiring a vote of the people. A lot of voters are already familiar with the way it works, and those jurisdictions seem very happy with it. If we can get that passed we may get some momentum going for our overall efforts.

**RH:** If you're unsuccessful in the legislative efforts, will your successor continue to promote reform in the election process?

**BG:** I know that **Sam Crosby**, our president-elect, and **Mark White**, who is unopposed behind Sam, have pledged to keep working on it. It's going to take three, four years or longer. It's not something that will happen overnight. We have to keep working on it.

**RH:** Is the focus at the appellate court level and not the trial court level?

**BG:** The state bar's proposal only deals with appellate judges and pure merit selection.

**RH:** How are the task forces that you appointed performing?

**BG:** It's amazing to me how many lawyers in our state are willing to give of their time. The ASB staff calculated the time spent by lawyers in volunteer activities and it's estimated at over 0,000 hours. In January, we instituted our pilot mentoring program. **Pam Bucy**, of the University of Alabama School of Law,

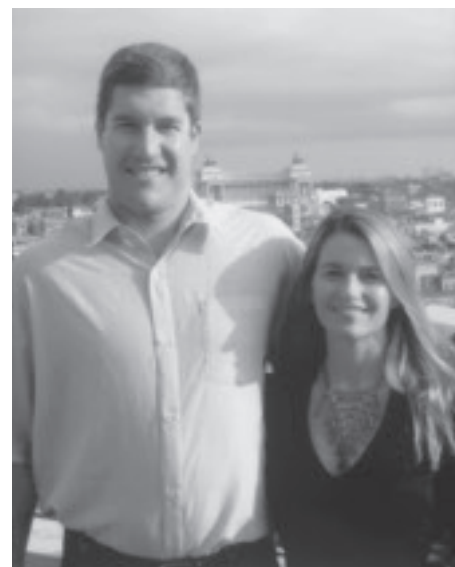


*Pictured left to right, during a recent family trip, are Adam Saphier, Jenny (Gale) Saphier, Boots, Louise, Cy (Gale) Partridge, and Shepard Partridge.*

and **Ted Hosp** of Birmingham led that effort. We had over 300 lawyers apply for 70 mentoring positions, winding up with a great mix from around the state. After this year we'll step back and determine what worked best. Another group that's been working very hard deals with quality of life. **Brannon Buck** of Birmingham and **Judge Tommy Bryan** are co-chairs of this committee. They have a proposal on a secure leave policy for attorneys, designating a two-week period to be blocked out for vacation. This would go through the unified court system, put it in the computer and that would be your secured leave. Frankly, I didn't think it would have much of a chance of being accepted but the judges liked it.

**RH:** Would that apply statewide or on a circuit-by-circuit basis?

**BG:** It would apply statewide. But it's going to take some work if it's implemented. The committee interviewed a number of judges and they're going to speak to the circuit court judges meeting



*Adam and Jenny Saphier*

this summer to present it in some detail. So far the judges seem very favorable toward it. There could be some abuse—you could have people try to delay hearings or trials—but the courts could control that. It's worked in other states. It is

really an aspect of the quality of life especially for young lawyers. They want to try to block out some time with their families. I'm also proud of the Judicial Scholarship Program. Our court system did not have the funds available to send circuit court judges for regular judicial education programs. **Stan Cash, Jere Beasley, Sam Franklin, Tom Warburton, and Teresa Minor** have been the primary leaders of this effort. To date, lawyers have contributed over \$100,000 to fund these judicial scholarships.

**RH:** There was a recent report advocating legal reform which ranks the ASB's disciplinary program as 7<sup>th</sup> among the 8 states. Are you familiar with this?

**BG:** I saw a summary of the report last week released by a group called HALT. I was very surprised and I disagree with those comments. I think this organization has some outdated or inaccurate data on our program. For example, this group claims that we "investigate" only one out of every five complaints, which is inaccurate. There are other misunderstandings of our programs. The highest grade given to any state was a B- and we were given a D+ along with 4 other states. We have one of the best operations in the country; **Tony McLain** and his staff do a great job as do our disciplinary panels. It's a tough job. It's not easy and you won't please everyone.

**RH:** This group criticized our lack of transparency. Do you think that the public is served by not being able to see our disciplinary process at work?

**BG:** There are some obvious confidentiality issues involved. Some complaints



*Louise and Boots celebrate another happy New Year!*

end up as private reprimands that receive no publicity and many are found without merit. But when a matter is serious enough to receive a public reprimand, suspension or disbarment they certainly are not hidden and are published in the press along with other public notices. We have a lay member on each disciplinary panel. It is a great program that serves the public as well as our bar.

**RH:** What has surprised you the most serving as ASB president?

**BG:** I've heard it for years, what a great staff we have, and you think, that's nice of people to say. But, that's been the most surprising thing to me—the high, high level of professionalism and dedication in this staff. At our last commissioners' meeting, staff members who had been with the bar for over ten years were recognized and it was over half of our total employees. That's a real testament to the organization that we have. People work here, they stay here, they do it right and they develop expertise. When you go to national bar meetings you see how well regarded our staff is. I have a real sense of admiration for them and that certainly has been one of the most pleasant parts of my tenure. They really are dedicated. We have a new head of communications this year, **Brad Carr**, who is fantastic. He brought with him many years of experience in other state bars, as well as the ABA, and has done a great job. I just can't be complimentary enough of all of the state bar staff.

**RH:** Are younger members of the ASB adequately served by the state bar and are minorities participating enough in it? What are the challenges in serving these segments?



*"Red-legged" partridge shoot – Spain, January 2007 (Boots is fourth from the left.)*

**BG:** All of this will require continued effort. Our at-large commission positions help us involve minority members and young lawyers. Also, the annual meeting planning effort normally is something that the president and **Ed Patterson** handle. But, I wanted input from younger members so we put together an informal committee, with **Buddy Smith** from Birmingham heading it up. He's working to make the convention more appealing to young lawyers and to more families. When we started practicing we didn't have all the specialty groups that now meet separately. For instance, several hundred attorneys attend the Environmental Law Section's annual meeting. We also have the Family Law Section, and their program "Divorce on the Beach," which is a great program and well attended. The Trial Lawyers Association and the Defense Lawyers have separate meetings. We're

trying to make the ASB Annual Meeting the centerpiece.

**RH:** What can the attendees expect at this year's convention?

**BG:** Activities are more affordable and family-friendly. There will be a fireworks display at the Thursday night reception. And, our substantive programs will be good. We've been lucky enough to convince your classmate, **Dean Charles Gamble**, to come back and speak at the Bench and Bar Luncheon—he's the highlight of any meeting he attends. Chief Justice Cobb will make her first state of the judiciary speech Saturday morning. We've got a good panel of state and federal judges, with **Dean John Carroll** to moderate that panel. And, we have some important awards to bestow but I don't want to give away secrets.

# President's Page

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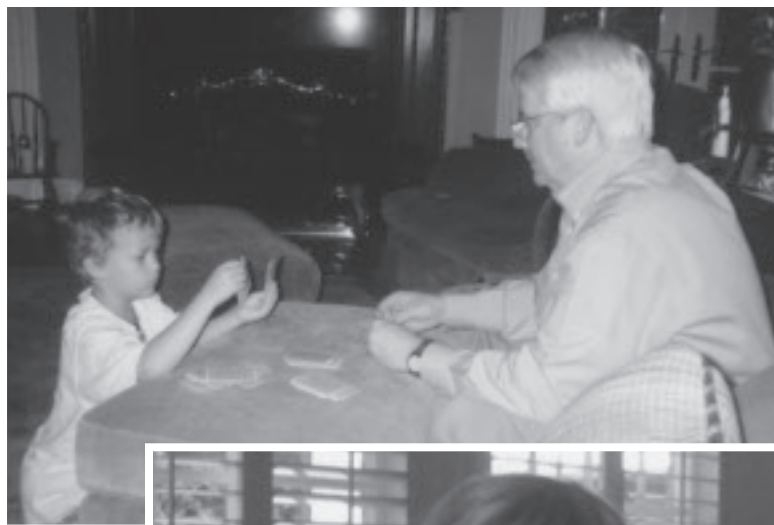
**RH:** What lies ahead for Boots & Ie?

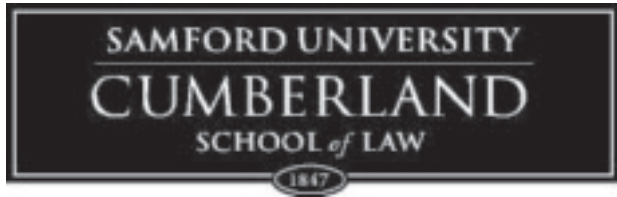
**BG:** I hope to remain active in every way possible. Our profession is a unique calling and we are fortunate to be part of it. I've been amazed at the level of commitment of the Board of Bar Commissioners. I was on the board a long time ago as a young lawyer, and the board was much smaller

then. Even as large as it is now, I'm amazed at the dedication of our commissioners. They study the matters that come before us, they work hard on a number of projects and they come together and function very well. That's been one of the real highlights. I just got back from a breakfast this morning that the Alabama Trial Lawyers Association asked the state bar to jointly

sponsor for Law Day. I joked with Sam Crosby, who was there, and told him that if he's not careful I'm going to give him this gavel in advance of the annual meeting. This position has taken a lot of time, but I've enjoyed it. It's been a real highlight of my career. It's great to serve with so many people who are working hard to keep our bar where it is. ■

*Boots with his grandchildren  
Right: Playing poker with Houston  
Below: Newest granddaughter Ava, born April 2007  
Bottom right: Ava's big sister Taylor  
Bottom center: Houston and Steele*





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Keith B. Norman



## Membership Files Go Electronic



In 2000, the Alabama State Bar began to address the ever-growing number of member files and the decreasing space in our file room to accommodate them all. We decided that the best solution was to store member files electronically. In 2001, we began scanning all *new* member files into a document management system that would store the scanned images in an online server. The document management system allows easy access of the stored files from any staff member's computer instead of physically going to the file room and pulling the actual file.

After assessing our experience with scanning and storing the new member files, the membership department recommended that we back scan *all* bar member files and eliminate the traditional paper file for each member. We visited state agencies and law firms that have scanning operations to learn about the difficulties as well as the benefits of conducting an in-house operation. We also contacted several companies that handle large scanning projects. Following our study of the pros and cons of each, we recommended that the Board of Commissioners authorize the outsourcing

of the back scanning of member files to Emerald Coast Software Company. The project was approved by the commission.

The actual scanning started in May 2006 and has been done under the supervision of **Mary Corbitt**, membership director, and her able assistants, **Emily Farris** and **Cathy Sue McCurry**. At the project's outset, we estimated that the nearly 19,000 member files (this figure includes active and inactive members) contained more than 1,000,000 documents that would have to be scanned. Thanks to the membership department and the Emerald Coast scanning team, the project has gone smoothly with very few problems. We anticipate that the scanning will be finished by this August and that as many as 1,425,000 documents will have been scanned.

In the near future, a Web-based application process will allow bar applications to be captured electronically. This will avoid the necessity of manually keying the information for each examinee who sits for the bar exam and later scanning that application if the examinee successfully completes the bar exam. As we fully embrace electronic storage of member files, we will soon address additional Web-based applications in other departments, particularly in CLE and Communications. Future electronic enhancements will help us to improve efficiency and better manage our resources. We are not contemplating becoming a "paperless" office. Yet, by taking advantage of electronic storage and retrieval, Web-based applications and the panoply of available electronic tools, we can improve the bar's operations to better serve our members and the public.



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## Rules Governing Admission to the Alabama State Bar

It is ordered that the first paragraph of Rule VII.D., Rules Governing Admission to the Alabama State Bar, be amended to read in accordance with the appendix attached to this order;

It is further ordered that the amendment of Rule VII.D. be effective immediately;

It is further ordered that the following note from the reporter of decisions be added to follow Rule VII:

“Note from the reporter of decisions: The order amending Rule VII.D., Rules Governing Admission to the Alabama State Bar, effective May 2, 2007, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 2d.”

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

## Appendix Rule VII. Admission of Foreign Attorneys *Pro Hac Vice*

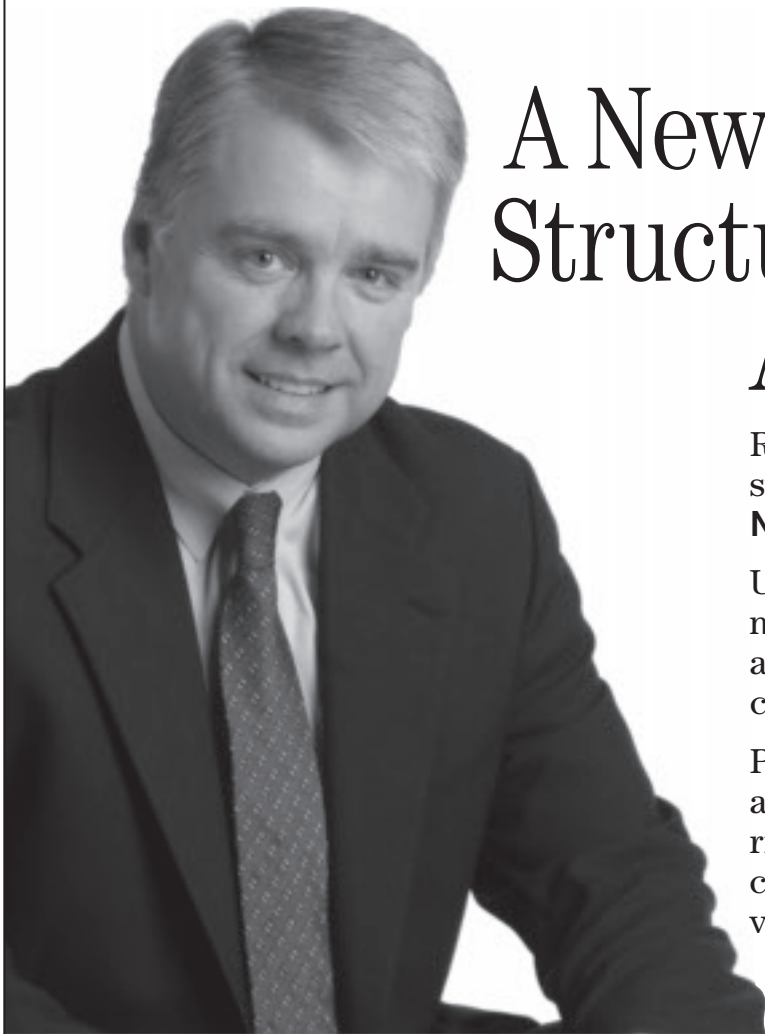
D. Verified Application. In order to appear as counsel before a court or administrative agency in this state, a foreign attorney shall file with the court or agency where the cause is pending a verified application for admission to practice (a form for such an application follows this rule), together with proof of service by mail, in accordance with the *Alabama*

*Rules of Civil Procedure*, of a copy of the application and of the notice of hearing upon the Alabama State Bar at its Montgomery, Alabama office. In the event application is made before any defendant in an action has appeared, a copy of the application and notice must also be served upon such defendant. The copy of the application and the notice of hearing served upon the Alabama State Bar shall be accompanied by a nonrefundable \$0 filing fee. The notice of hearing shall be given at least 21 days before the time designated for the hearing, unless the court or agency has prescribed a shorter period.

## Mandatory Registration, Authorized House Counsel

Since October 2006, the Alabama State Bar has been accepting applications for the new authorized house counsel rule (Rule IX of the Rules Governing Admission to the Alabama State Bar). This rule applies to lawyers who are not admitted to practice in Alabama, but are serving as house counsel to businesses located in Alabama. This is a mandatory registration and the **deadline for compliance is October 27, 2007**. Please contact any house counsel you know and inform them of this rule. A copy of Rule IX, the registration form and instructions are available on the bar's Web site, [www.alabar.org](http://www.alabar.org). For more information, contact the bar's membership department at (334) 269-1515. ■





# A New Cash Option for Structured Settlement Annuity Holders

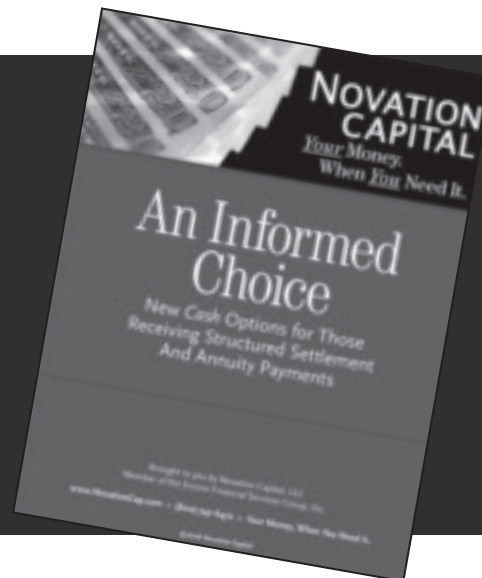
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# Memorials



**Bachelor, James Thomas**  
Prattville  
Admitted: 1981  
Died: May 3, 2007

**Eshelman, Elizabeth Davis**  
Birmingham  
Admitted: 1964  
Died: April 10, 2007

**Frank, Fred, Jr.**  
Cullman  
Admitted: 1980  
Died: February 12, 2007

**Inge, William Bullock, Jr.**  
Mobile  
Admitted: 1959  
Died: March 29, 2007

**Turner, Ellen Thompson**  
Mobile  
Admitted: 1990  
Died: March 31, 2007

## JOHN THOMAS KING

Birmingham attorney John Thomas King died January 24, 2007 at the age of 83. A native of Adamsville, he was the son of Circuit Judge Alta L. King and Donna Collins King.

He displayed leadership early in his life, being elected president of the student bodies at both Phillips High School (1940) and the University of Alabama (1948), where he graduated with honors with a degree in accounting. He entered the University of Alabama School of Law in 1948, and received his L.L.M. degree in 1951. His college education was interrupted when he volunteered for the United States Army during World War II, and served in the Pacific Theater of Operations from 1943 to 1946.

Following law school, he served as an Assistant United States Attorney for the Northern District of Alabama. In 1954, he went to Washington, D.C. as Chief Administrative Assistant for U.S. Congressman George Huddleston, Jr. from Birmingham. While serving in there, he was urged to return home and run for mayor of Birmingham, which he did in 1961 and again in 1963. In vigorous campaigns, he offered fresh, dedicated and visionary leadership, though he was not successful in his bids.

In 1970, he ran for state senator and was elected, serving the people of Jefferson County and the State of Alabama in this capacity from 1971 to 1975. The Alabama State Bar turned to Senator King time and again to sponsor and promote legislation important to the legal community. Senator King was instrumental in the passage of the *Alabama Rules of Civil Procedure* in 1973, and was one of several co-sponsors. Among other legislation he sponsored was requiring lobbyists to register and file statements of accounts with the Secretary of State; amending the Corrupt Practices Act to include those non-profit corporations which lobby for candidates or for or against ratification of constitutional



amendments; creating the State Board of Public Accountancy; requiring city and county boards of education to provide group health insurance for teachers; raising funds for capital outlay for the Hospital of the University of Alabama, Birmingham (UAB), and for nurses' scholarships at UAB; and naming the "Spain Tower" at UAB.

In 1982, he was again called into public service when Lieutenant Governor-Elect Bill Baxley asked him to chair a distinguished panel of 35 former Alabama senators to rewrite the rules of the Alabama state senate.

In addition to his public service, Senator King was engaged in the private practice of law, receiving his 50-year practicing pen from the Birmingham Bar Association and the Alabama State Bar in 2001. He especially enjoyed his litigation practice and was respected as an avid cross-examiner. He also cherished the years practicing law

and teaching and trying cases with his three sons, Jefferson County Circuit Judge Tom King, Jr., Jefferson County Probate Judge Alan King and attorney David R. King. During 1961 to 1994, he was an arbitrator of labor management disputes, where he authored over 600 opinions and was proud that his opinions often appeared in national publications.

Senator King served as chairman of deacons at two churches, Huffman Baptist Church and later at The First Baptist Church of Birmingham, the church where he was baptized as a youth. He was active in numerous civic organizations, where he often served as president or chair, including the Muscular Dystrophy Association, Northeast Branch YMCA, Birmingham Brotherhood Association and East End Optimist Club. He was a member of the East End Rotary Club.

In addition to his parents, he was preceded in death by his loving wife of almost 60 years, Norma Tibbetts King. ■

## Notices

- **Amber Ztar Weaver Emmons**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2007 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 07-05A) by the Disciplinary Board of the Alabama State Bar.
- **Gregory Miles Hess**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2007 or, thereafter, the allegations contained therein shall be

deemed admitted and appropriate discipline shall be imposed against him in ASB No. 07-05A) by the Disciplinary Board of the Alabama State Bar.

- **John Scott Starkey**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2007 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 04 28 A) 05-08, 05 09 05 2A) 05 2A) 05-0A) 05 A) 05 A) 05-0A) 05 A) 06 47A) and 06 A) by the Disciplinary Board of the Alabama State Bar.

## Reinstatement

- The Disciplinary Board, Panel III, upon reviewing the petition for reinstatement of Tennessee lawyer **Robert Jeffery Kelsey**, ordered that Kelsey be reinstated to the practice of law in the State of Alabama, effective March 22, 2007. Kelsey was suspended September 7, 2004 for non-compliance with MCLE. P et. No. 03-06

Hutchinson admitted that he participated in a sham divorce and that representations made during the course of the divorce proceedings were fraudulent. Hutchinson admitted that the divorce proceedings were undertaken in an effort to shield marital assets from bankruptcy. Hutchinson also admitted that during the course of the bankruptcy proceedings, he made material misrepresentations to the court in his bankruptcy petition and failed to disclose material facts to the bankruptcy court. R rule 23; Pet. No. 07-9 ASB No. 05 20A)

## Disbarment

- Montgomery attorney **George Ellis Hutchinson** was disbarred from the practice of law in the State of Alabama effective March 16, 2007, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Hutchinson's consent to disbarment. At the time Hutchinson consented to disbarment, proceedings were pending against him in which

## Suspensions

- Dothan attorney **Charles David Decker** was intermly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective April 26,

2007. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Decker had willfully neglected client matters, failed to communicate with clients and failed to account for client funds held in trust, and that such conduct was continuing and causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(A); Pet. No. 07-26]
- Decatur attorney **Amber Ztar Weaver Emmons** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a) of the *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated March 2, 2007. The Disciplinary Commission found that Emmons's continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a); Pet. No. 07-14 ASB No. 07-14]
  - Birmingham attorney **Janice Y. Pierce Groce** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a) of the *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective March 2, 2007. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Groce had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 07-08]
  - Effective February 9, 2007, attorney **Broox Garrett Holmes, Jr.** of Mobile has been suspended from the practice of law in the State of Alabama for non-compliance with the 2005 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 06-08]
  - Dothan attorney **A. Gary Jones** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a) of the *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated February 23, 2007. The Disciplinary Commission found that Jones's continued practice of law is causing or is likely to cause, immediate and serious injury to his clients or to the public. [Rule 20(a); Pet. No. 07-06]
  - Effective February 9, 2007, attorney **Sally Marie Page** of Princeton, New Jersey has been suspended from the practice of law in the State of Alabama for noncompliance with the 2005 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 06-20]
  - Birmingham attorney **Kenneth Jerome Robinson** was summarily suspended from the practice of law in the State of

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Alabama pursuant to Rule 204 ) *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated February 28 2007. The Disciplinary Commission found that Robinson's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. Rule 20(a) Pet. No. 07-4 ASB nos. 07-2A ) and 06 7A )

- Effective February 9 2007, attorney **Daniel Pinson Rosser** of Birmingham has been suspended from the practice of law in the State of Alabama for non-compliance with the 2005 Mandatory Continuing Legal Education requirements of the Alabama State Bar. CL E No. 06 2B
- Effective February 9 2007, attorney **Samuel Tyrone Russell** of Huntsville has been suspended from the practice of law in the State of Alabama for non-compliance with the 2005 Mandatory Continuing Legal Education requirements of the Alabama State Bar. CL E No. 06 2A
- Tuscaloosa attorney **Charles Gregory Tyler** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 204 ) *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, dated November 0, 2006. The Disciplinary Commission found that Tyler's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. Rule 20(a) Pet. No. 06 B; ASB nos. 06 0A ) and 06 20A )

## Public Reprimands

- Florence attorney **Elizabeth Vickers Addison** received a public reprimand without general publication on April 6, 2007 for violations of rules 7.3 and 8.4 ) *Alabama Rules of Professional Conduct*. Addison employed an investi-

gation agency to assist her with investigations in about 6 different cases, four of which were referred to Addison. Addison claims she never asked the investigator to directly solicit cases on her behalf, however, she allowed the investigator to have copies of fee contracts, business cards and other forms. In one case, the investigator presented a contingency fee agreement, an authorization for employment records, a medical authorization and a direct-pay authorization, all bearing Addison's name, to at least one of the persons he solicited. [ASB No. 06-24(A)]

- On February 6, 2007, Birmingham attorney **Lucien Bernard Blankenship** received a public reprimand without general publication for violations of rules 1.15(a), 1.15(f) and 8.4(g), *Ala. R. Prof. C.* On January 11, 2005, Blankenship issued a check in the amount of \$3,500 made payable to Wilson Jewelry Company for the purchase of a diamond ring. The check was drawn on Blankenship's client trust account and was returned for insufficient funds. In April 2005, a subpoena was issued requesting Blankenship's trust account records for the period of October 1, 2004 to December 31, 2004. In June 2005, Blankenship produced a copy of his check register and bank statements but he failed to include any other information. The records that Blankenship did produce revealed questionable trust account activity such as the payment of personal expenses from his trust account. Blankenship later explained that the payment of these personal expenses was accomplished with funds that consisted of fees that he had already earned. Blankenship failed to transfer the funds to a separate account. As a result of Blankenship's response, he was asked to provide supporting documents evidencing that the funds that he dispersed from his trust account were actually earned fees. Blankenship was requested to provide supporting documentation such as settlement statements

and contracts but he initially failed to provide same. Blankenship later stated that he would provide this documentation under separate cover. Ultimately, Blankenship only provided a single settlement statement. Although none of Blankenship's clients reported the loss or delay of funds, it was determined that Blankenship failed to keep his clients' property separate from his own. Blankenship repeatedly used his trust account to pay personal expenses without first transferring the funds into an account that was maintained solely for his personal use.

Blankenship failed to hold the property of his clients separate from his own and failed to maintain a separate account to hold client funds. ASB No. 05 A )

- Phenix City attorney **Larry Joel Collins** was ordered to receive a public reprimand with general publication for violations of rules 1.3, 1.4 ) 8.4A ) and 8.4B ) *Alabama Rules of Professional Conduct*. In April 2005 Collins was retained to represent a client in a divorce action in which the client was named as the defendant. The client paid Collins a retainer fee of \$1,500. During the representation Collins did not appear at the divorce trial nor did he inform his client of the trial date of June 5 2005 After taking testimony and evidence, the court entered a final decree of divorce on July 1, 2005. In the decree, the court granted the plaintiff's complaint for divorce and denied Collins's client's counterclaim due to her failure to appear at trial and prosecute the claim. The decree also awarded custody of the client's minor son to the father and the client was ordered to pay \$496 a month in child support and retroactive child support in the amount of \$ 0. Collins admitted he did not retrieve the client's file from her previous attorney until May 2005. The case action summary demonstrated that Collins did not enter a notice of appearance until July 2005, after he was informed by the client that a

divorce decree had been entered in the case. After the client informed Collins of the divorce decree he filed a motion for a new trial. The motion for a new trial was denied on October 8, 2005. Collins did not inform the client the motion for a new trial was denied until October 28, 2005. *Alabama Rules of Professional Conduct*, Rule 3.1(a), 4.1(a) and 8.4(a).

- Mobile attorney **Herndon Inge, III** was ordered to receive a public reprimand without general publication for violations of rules 3.1(a), 4.1(a) and 8.4(a), *Alabama Rules of Professional Conduct*. Inge was also ordered to write and issue a letter of apology to the complainant. Inge was retained to represent a client in a divorce action. The client was a joint owner of a business. The bookkeeper/tax preparer for the client's business received a subpoena *duces tecum* from Inge which required her to appear in court on April 6, 2005 and produce the general ledger and all

backup documents for the business from January 1, 1993 to present. After the court date was postponed, Inge telephoned the bookkeeper/tax preparer on April 8 and informed her that she was required to have the documents described in the subpoena *duces tecum* delivered to his office that same day. The bookkeeper/tax preparer informed Inge that the earliest she could deliver the documents would be April 11. Later that day, on April 8, the bookkeeper/tax preparer telephoned Inge's office and left a message on the answering machine stating that due to tax season she would be unable to deliver the documents until April 19. Inge telephoned the bookkeeper/tax preparer on April 12 asking about the documents. The bookkeeper/tax preparer stated that she had left a message on April 8 explaining that she would deliver them by April 19. She then stated that she did not believe the subpoena *duces tecum*

required her to deliver the documents to Inge personally and that, in any event, she would not be able to deliver the documents until April 19. When Inge was told this, he called her a "smart\*\*\*." The bookkeeper/tax preparer requested that he not use profanity when speaking with her but despite this request he once again called her a "smart\*\*\*." Inge then expressed concern to the bookkeeper/tax preparer that she was not providing him with complete documentation and was perhaps withholding information made available to the other side. Inge also told the bookkeeper/tax preparer that he knew the law better than she did and that if she was playing games, she would be fired when his client was awarded the business. Inge then threatened to file contempt charges and have her put in jail if she failed to provide the documents to him by April 19. [ASB No. 05-126(A)] ■

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Are you watching someone you care about self-destructing because of alcohol or drugs?  
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Maybe they're telling you it's none of your business.

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**F**or every one person with alcoholism, at least five other lives are negatively affected by the problem drinking. The Alabama Lawyer Assistance Program is available to help members of the legal profession who suffer from alcohol or drug dependencies. Information and assistance is also available for the spouses, family members and office staff of such members. ALAP is committed to developing a greater awareness and understanding of this illness within the legal profession. If you or someone you know needs help call Jeanne Marie Leslie (ALAP director) at (334) 834-7576 (a confidential direct line) or 24-hour page at (334) 224-6920. All calls are confidential.

# Billy Melton, Lawyer

BY CHARLES F. CARR

Fifteen years ago, I was practicing law in Birmingham. A trucking client asked that I defend them in Conecuh County, Alabama. I had tried a couple of non-jury cases in Evergreen, but the severity of the case demanded that I associate local counsel in Evergreen.

I never limit my search of local counsel to defense lawyers when defending a corporate client. My client deserves the best and I look only for the best lawyer in the area. After talking to several lawyer friends around the state, Billy Melton's name kept coming up. Although I knew he primarily represented injured plaintiffs, I made a call to Billy.

I had my pitch already planned before he answered the phone. "Billy, this plaintiff has somehow hired a lawyer down in Mobile," I said. "You really need to consider helping me try the case and the word will get out that these people don't need to go to Mobile to find the best lawyer."

The phone was silent for a moment and then Billy responded. "You know, I think I will do it."

"Alright, my client will need to know your hourly rate," I said.

"\$1,000," he responded.

As a young litigator, I was stunned. "Billy, you know that an insurance company is not going to let me pay you a flat fee. They will require an hourly rate. I can probably get you a higher rate than they are paying me."

"Well, that's fine," he said. "It will be \$1,000 for the first hour and the rest is free."

I didn't get to hire Billy in that case and Billy didn't seem to mind. He was on the other side of me in several other cases after that. After each case, I knew that I had made the right choice in trying to hire Billy those many years before. Every case is his biggest case and his client gets his money's

worth when they hire him. And, as an extra special bonus, they will get the best dressed gentleman in Conecuh County.

After spending some time with him at his office in Evergreen, I was enjoying a few relaxing hours in his home visiting with Billy and his wife, Nancy. I couldn't resist the urge to ask Nancy the question that I would always dread if someone should ask my wife.

"Nancy, I know you love your husband, but what is that one trait of his that you would change if you could?" I asked.

She thought long and hard and I fully expected her to come back with, "Nothing. He is absolutely perfect."

Right before the statute of limitations was about to run, however, she said, "Well, perhaps if he just wasn't quite so inflexible."

What a perfect word to describe Billy Melton, yet in the kindest sort of way. Some might call him stubborn. My momma's expression of "hard-headed" would certainly come to mind. Nancy gave it the more genteel "not quite so inflexible."

Although his full name is William Dudley Melton, if you are poised to enter the front door of his office building in downtown Evergreen, just a stone's throw away from the new courthouse that is under construction, the embossed sign on the brick wall says simply "Billy Melton, Lawyer." Billy greeted me wearing a pretty coat and tie. The last time I had seen him he was also wearing a coat and tie and also wearing a silk pocket square in the coat pocket. An hour or so later I was looking through some old newspaper articles in his office and saw a picture of the deacons of the First Baptist Church of Evergreen. As I recall, only two or three of the large number of deacons photographed have on a coat. Billy is the only one with a coat, a tie and, yes, another silk pocket square in his

coat pocket.

I told Billy that I used to wear a coat and tie when I practiced law in Birmingham, but my new Mobile lawyers talked me into giving up that habit when I moved south. Billy was inflexible. "Everyone expects their lawyer to be dressed in a coat and tie," he said.

Billy is inflexible about his politics too. He is a self-described "yellow-dog Democrat." He understands that this may not be the best of times for the Democratic Party in Alabama. "Every dog has his day," Billy muses. He does slip into some nostalgic reminiscing about the "real Democrats" such as Franklin D. Roosevelt, Lister Hill, Richard Russell, Howell Heflin, etc. He searches to find someone in the other party that compares to these famous Democrats, and has difficulty calling up any names. Billy believes that if the national scene had more Republicans like Richard Shelby and Jeff Sessions, he might have a different opinion.

Billy dabbled in politics and learned quickly the dangers of the game. He was elected as a state representative at a very early age. He was one of the youngest men to ever serve in the Alabama house. However, after a short term in the Alabama State Senate, he supported the Alabama Judicial Article which would take criminal court authority away from several very powerful probate judges in his senatorial district. He was baptized early in political suicide but Nancy would have been proud of him. He was inflexible, and announced that he would not run for the senate again.

I wondered about the Melton philosophy on politics and politicians. In a nutshell, Billy concluded that politicians had a hard time telling the public bad news.

"The public doesn't want to hear bad news. Politicians often hide the bad news or 'spin' it into something that the public





Billy Melton, back row, far right, poses with family members at the wedding of his son, Richard, and daughter-in-law, Jennifer. Also pictured are, front row, left to right, grandchildren Mary Dudley Berry, Lathram Olivia Berry and Tyler Rieves Berry, V. Back row, left to right, are Tyler Rieves Berry, IV (son-in-law); Nancy Dudley Berry (daughter); Jennifer Stewart Melton (daughter-in-law); Richard P. Melton (son); and Nancy Miller Melton (wife).

Billy Melton has served as vice chairman and chairman of the Farrah Law Society and on the Law School “Campaign for Alabama” Steering Committee. He also served on the board of directors of the Alabama Law School Foundation.

Billy Melton has been “flexible” in his belief that you must return more than you receive in the practice of law and he continues to practice those beliefs today.

Billy was born in Pine Apple, Alabama. If you “Google” Pine Apple, one is urged to click on a hyperlink to find “lodging, restaurants, etc.” I couldn’t resist. The hotels listed included the Holiday Inn Express in Thomasville and the Days Inn in Camden. I kept looking but found no hotel in Pine Apple. I came away from the site with the knowledge that Pine Hill is in Wilcox County and that the estimated population in 2003 was 9

Several years ago, however, Pine Apple was the home of Billy Melton. His father was one of the first members of the Alabama Highway Patrol and ultimately a post commander for the Alabama Highway Patrol.

Billy went to public schools in Evergreen and played football at Evergreen High School. Later he was “the third-string quarterback” for the early 1960’s Auburn Tigers. He was a pretty good kicker which let him get some action on the gridiron while at Auburn. One of his most loyal friends is the great Tucker Frederickson who played with Auburn and the New York Giants.

Billy is married to the former Nancy Miller. Nancy is the granddaughter of T. R. Miller of the lumber family in Brewton. Long ago I fell in love with her brother Richard’s golf course, Steelwood, located just outside of Loxley, Alabama. ■

or ‘spin’ it into something that the public can digest,” he said.

I turned the tables. “Aren’t you ‘spinning a story’ when you represent a less than candid plaintiff?” I asked. Billy didn’t hesitate. “I don’t represent them if they need a ‘spinner.’ You see, I see them when they come into my office parking lot. I can see them through my window but they can’t see me. If they put on a neck brace before they walk in, I am not the lawyer they need.”

Billy Melton doesn’t receive lawyer jokes very well, either. If a doctor tells him one, he immediately asks whether the doctor would like to hear some jokes about his profession.

Make no mistake about it. Billy Melton loves the law and he loves the lawyers who practice law. He has spent many years serving the First Baptist Church as deacon, Sunday school teacher, trustee and historian. He has spent just as many years serving his bar association.

As a sole practitioner whose livelihood depended upon him working his cases up, Billy has devoted untold hours serving as a bar commissioner, as a Pattern Jury Charges Committee member, as a member of the state bar Board of Disciplinary Appeals and as a judge on the Alabama Court of the Judiciary. No sole practitioner has likely given so much of himself to fellow lawyers in this state.

He has served as an editorial board member of *The Alabama Lawyer* and the *Alabama Trial Lawyers Journal*.



**Charles F. Carr**

Charles F. Carr was a founder of the Carr Allison firm which has offices in Alabama, Florida and Mississippi. He practiced law in Birmingham and Mobile and now is in the Carr Allison Dothan office and resides in his native city of Enterprise.

# SAVE THE DATE

## Cumberland’s Annual Seminars

Developments and Trends in Health Care Law: *September 14*

Annual Bankruptcy Law Seminar: *October 5*

Annual Workers’ Compensation Seminar: *November 9*

Employment Law Update: *December 7*

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A PRACTICAL APPROACH TO

# Increasing Professionalism

BY THOMAS J. METHVIN





## Introduction

There is no doubt that as a profession, the legal community is increasingly being held in disrepute across the country. The Florida survey showed that 44 percent of respondents had no respect for lawyers. This number was up from 25 percent in

<sup>1</sup> The modern-day cynics range from the poorest individuals who are shut out of the system and cannot find adequate representation to the corporate executive who feels that the system is inherently flawed. There is no “stereotypical” detractor. The critics come from all age groups and various racial and ethnic backgrounds and cut across all social and economic classes. Although most of the formal grievances filed against attorneys each year routinely fall into categories of

criminal law, family law, personal injury, collections, and bankruptcy, other areas of the legal profession are receiving an increasing number of complaints as well.<sup>2</sup>

The question has now become, “What can the legal profession do about it?” When faced with such a complex and widespread issue, it is easy to see why some individuals feel that no one person can rebuild that which has taken years to deteriorate. That type of mindset is not accurate and is, in fact, the antithesis of the approach that the legal profession should be emphasizing. All the television advertisements and public service announcements in the world will not be able to restore the faith that some have lost in the legal profession. The proper respect and integrity will only be regained when a noticeable difference is rooted in positive action.

## A Short History Lesson

As Alabamians, many of us have been faced with, or forced to deal with, certain aspects of the blighted history of the state and its segregationist past. However, what many people don't realize is that during the state's most tumultuous time in history, Alabama also offered the nation a unique and profound piece of civility of which all Alabamians can be proud. Alabama is considered by many as the birthplace of the Confederacy, the birthplace of the Civil Rights movement—and—the birthplace of the *Professional Code of Conduct* that governs the actions of lawyers.

In 1827, Thomas C. Jones<sup>3</sup> first proposed to the Alabama State Bar that it develop a regulatory code outlining the professional standards and conduct expected of lawyers practicing in Alabama. The Alabama State Bar appointed Mr. Jones as chair of a three-person committee that took up this cause. Over several years, that committee went through numerous drafts before the Alabama State Bar finally adopted the code in 1827.<sup>4</sup>

Mr. Jones realized early on that the regulatory code had to be broad enough to encompass all the various fact patterns that are presented by the law; yet, it had to be simple and straightforward in its drafting to be practical and useful. Mr. Jones's regulatory code drew national attention and praise and was later the basis for the code of conduct that the American Bar Association drafted in 1908. That same code is the basis for the rules that govern lawyers' actions even today.<sup>5</sup>

The members of the Alabama State Bar can again be a leader in the legal profession by effecting a more positive and dignified culture. This change should be evident not just to the practitioners, but to those who call upon the services the profession offers.

## A Common-Sense Approach to Increasing Professionalism

Lawyers are not just *members* of the legal system. Instead, we are appropriately referred to as *officers* of the court and are therefore responsible to the judiciary for our professional and often private activities. In almost every jurisdiction within the United States, the legal profession has been granted the power of self-government. With this great power comes great responsibility.

Every year the vast majority of complaints against lawyers revolve around two common themes: 1) inadequate lawyer-client communications and 2) poor law office management.<sup>6</sup> A renewed focus by all lawyers in bettering themselves in these two simple categories will directly affect the profession's image and the quality of the representation.

It goes without saying that as a counselor, the attorney has an obligation to keep his or her clients informed on the status of their case. Even though the legal profession has experienced great technological advances over the last decade, the time-honored tradition of a telephone call or simple letter is the best and



most expected way to meet this duty. The importance of this common-sense step cannot be understated since lack of communication is routinely the most common complaint lodged by all categories of clients.<sup>7</sup>

Many problems associated with inadequate lawyer-client communications start in the initial meeting with a prospective client. In trying to allure or impress a potential client, attorneys sometimes highlight best-case scenarios and spend little time discussing the possible pitfalls of various legal options. Attorneys typically spend even less time on sensitive issues such as the fee arrangement. It is critical that after the initial meeting with a client, or as soon as representation has been established, he or she understands the fee arrangement and the risks involved with their case. The short time it takes to make these issues a priority will go a long way in defusing future problems or at least in providing the foundation for resolving disputes if they arise.

The second category of most commonly cited grievances can be linked to how attorneys operate their office. In the last few decades, the increased marketing of legal services and competition for developing client relationships has pushed many firms into using a business model approach to practicing law. Under a business model approach, decisions are often made based on what is profitable rather than what is in the client's best interest. The problem is that providing adequate legal representation to clients does not always fit well into the typical business model.

It is paramount that attorneys make sure their own interests do not conflict or jeopardize a client's interest. If this means having to turn down representation to prevent a conflict, then that is the prudent and proper course. Unfortunately, in today's legal environment, this is becoming more of a problem, not less of one.

The most common problem associated with the business model approach is the attorney who takes on the obligation to represent more clients than he or she can handle. Inevitably, the issue becomes one of impending deadlines and they are either missed or forced to be extended. Even extended deadlines create problems. When clients have pending legal issues they are typically the most important things going on in their life at that time. Too often, an extended deadline is a perpetuation of that source of conflict when what may really be needed is finality. Attorneys should not wait until they miss a deadline or get sued to see the signs of poor office management. If attorneys find they are constantly seeking extensions of deadlines it is a sign that they should evaluate more closely their ability to provide adequate legal services. Providing both timely and quality legal services are fundamental elements to regaining the profession's lost stature.

## Attorneys Should Avoid Being a Mouthpiece for Their Own Criticism

Serious discussions about what is appropriate or inappropriate within the legal profession is not the same thing as joining in the chorus of those that attack, spread disinformation, perpetuate myths and assign false blame about the legal profession. When people outside the legal community hear attorneys recite the deplorable myths, some level of credibility is attributed to those falsehoods and the system is therein weakened. Under the *Alabama Code of Professional Courtesy*,<sup>8</sup> the state bar specifically directs that:

§ A lawyer should not make unfounded accusations of unethical conduct about opposing counsel, and

§ A lawyer should never intentionally embarrass another lawyer and should avoid personal criticism of another lawyer.

Similarly, the Middle District of Alabama entered a *General Order* on January 8, 2009 concerning the *Standards for Professional Conduct* that explicitly states that an attorney is not to "attribute bad motives or improper conduct to other counsel or bring the profession into disrepute...."<sup>9</sup>

In today's litigation environment, it has become all too common to replace sound legal arguments with personal attacks and mischaracterization of the facts. Recently, the Nevada Supreme Court chided one of its own attorneys for making just such disparaging remarks about the legal profession and the merits of the opposing party's claims.<sup>10</sup> Apparently, in his closing arguments, it was part of this lawyer's legal strategy to play into the idea that personal injury suits were always frivolous and that litigation of this type was a waste of public resources and time.<sup>11</sup> The court further recognized that the attorney made these same type of arguments in cases where he had admitted his client's own liability.

Notwithstanding the impropriety of asking a jury to base their decision on something other than the facts, this type of conduct is troubling and disruptive. In the end, although a client may receive some improper benefit from such remarks, the profession is the one who suffers and takes a serious blow to its credibility and reputation. As officers of the court, such improper inferences can never be condoned and must be dealt with for the profession to maintain the level of respect it rightfully deserves.

*The time-honored tradition of a telephone call or simple letter is the best and most expected way to keep a client informed of his or her case.*

# We Should Strongly Consider the Various Proposals on how the Judges of Our Highest Court Are Elected

Perhaps the most recently criticized aspect of the legal profession within Alabama has been the way supreme court judges are elected. It is almost impossible to avoid the perception that something is grossly wrong when one looks at the sheer amount of money that is being raised, and that must be raised, to have competitive candidates. Based on the 2006 election, the Alabama Supreme Court candidates raised more than \$11.5 million.<sup>12</sup> Although Alabama is typically not considered one of the “wealthier” states by commercial standards, it is consistently one of the top states in holding the costliest judicial elections. This is a tradition that all members of the state bar should work to end.

Luckily, Alabama has had some very good leadership on this issue and there is some building momentum for change. The Alabama State Bar has offered a specific proposal to change the way we elect our judges and has taken great strides to educate the public in this effort. Similarly, Chief Justice Sue Bell Cobb has undertaken this worthy cause and has made it a priority to keep moving forward with this issue. The legal profession cannot let this momentum evaporate. Locally, this issue could be one of the biggest agents for change in perception of the profession since the adoption of Thomas Goode Jones’s code of conduct in 1887. However, the leaders in the state bar and the judiciary need everyone’s help. Each attorney must seek to educate their clients, family members and community on the need to accept some form of these proposals. The legal profession in this state will only effectuate change when the individual members decide that is what they want and incorporate that transformation into their daily practice.

## Professionalism Can Be Increased by Providing Access to Those Who Are Shut Out of the System

In the last several years, this country has seen the very best of the legal community as it has stepped forward, and consistent

with its obligations, provided countless hours of free legal services to thousands of needy victims of terrorism and natural disaster. However, for all its efforts, there are still large segments of the population who go unrepresented and cannot get competent access to justice. Traditionally, those underserved by the profession are the poor, elderly and minority communities. According to the Alabama Law Foundation, there are over 75,000 individuals whose needs are going unmet. This really isn’t that surprising when you consider that Alabama has over 76,000 people living below the poverty line.

Still, there are other important groups that are underserved and rarely get attention. For example, small business owners and non-profit groups are in dire need of competent legal services but often cannot afford it.<sup>3</sup> The small business sector is a vital part of the new economy and is responsible for the creation of more jobs than even the larger corporate sector.<sup>4</sup> Similarly, non-profit groups are increasingly being looked at to shoulder the burden of providing educational, social, cultural, religious, and health services to the community. Unfortunately, these groups often are not eligible for the limited types of legal services available to others in the community. In some instances, the lack of available legal services has directly contributed to these groups’ failure.

The Alabama State Bar and groups such as Legal Services Alabama have done an outstanding job helping the traditionally underserved communities. However, there are not enough resources for them to handle even the majority of the individuals in need. It is, therefore, incumbent on the members of the legal profession to fill the void where it can. Rule 6.1 of the *Alabama Rules of Professional Conduct* provides that, “a lawyer should render public interest legal services.” Yet, this is only a voluntary requirement. The time may be approaching where the legal profession formulates a new way to help Alabama’s needy. By helping the very least of us, we are helping all of us.

## Conclusion

The legal profession must demonstrate that it is capable of self-regulation so that the public can maintain confidence in our system. “Without public confidence, the judicial branch could not function.”<sup>5</sup> Without public confidence in both the judges who hear disputes and the lawyers who present the arguments, the legal system is unable to dispense justice and its sole purpose for existence is compromised. Historically, when people do not trust the courts, they resort to other means to resolve their disputes. In this sense, the public’s confidence in the judicial system is essential to maintaining a functioning, democratic society. Adherence to the principles cited in our oath of professional conduct is directly related to our ability to maintain a positive

*There are still large segments of the population that go unrepresented and cannot get competent access to justice.*



public perception of the judiciary and to further ensure the civility and justice inherent within the system.

We must continue on the path that the leadership in the state bar and the supreme court have provided. However, continuing on that path is not just a collective journey. It is also a personal rededication to the values and premises that all lawyers have sworn to uphold. It is not enough to have great leadership on the issue of professionalism; it will only be sufficient when we internalize and incorporate those principles into our everyday practice. The future of our form of democracy depends on it. ■

## Endnotes

1. Leonard E. Gross. *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405, 1416 (1999).
2. The Mississippi Bar. *Professionalism Handbook*. p.1. 1995.
3. Thomas Goode Jones was a farmer, editor and later the governor of the State of Alabama from 1865-1894. In 1901, Theodore Roosevelt gave Thomas Goode Jones a recess appointment to the federal district court in Alabama. He was confirmed by the full Senate later that year.
4. See generally Carol Rice Andrews, Paul M. Pruitt Jr., and David I. Durham. *Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession*. Publication of the Bounds Law Library, no. 4. Tuscaloosa: University of Alabama School of Law, 2003. vii, 136 pp.
5. *Id.*
6. Center for Professional Responsibility of the American Bar Association. *Avoiding Client Grievances*. 1988.
7. See footnote 1.
8. Approved by the Alabama Board of Bar Commissioners on April 10, 1992.
9. See [www.almd.uscourts.gov](http://www.almd.uscourts.gov) last visited November 16, 2006.
10. Carri Greer Thevenot. "Court Ruling Might Yield Caution Among Lawyers." *Las Vegas Review Journal*. January 29, 2007. [www.reviewjournal.com](http://www.reviewjournal.com) last visited February 7, 2007.
11. *Id.*
12. Judge J. Scott Vowell. "Want Fairness?" *The Birmingham News*. Sunday, November 19, 2006.
13. Michigan State University School of Law Press Release. *MSU Law Clinic to Expand Services to Underserved Clientele*. April 12, 2006.
14. *Id.*
15. *In re Raab*, 763 N.Y.S.2d. 213, 218 (2003)



### Thomas J. Methvin

**Thomas J. Methvin** began his legal career with Beasley Allen in 1988. He has served as managing shareholder of the firm since 1998. Methvin is a past president of the Montgomery County Trial Lawyers Association and the Montgomery County Bar Association. He served as vice president of the Alabama State Bar for the 2005-2006 term and currently serves on the Executive Council of the ASB.

# LAW DAY 2007

With 200+ entries for the poster and essay contest combined, judges of the Alabama State Bar's Law Day 2007 annual competition came away with a vivid impression of what our legal system means to Alabama's youth.

Montgomery lawyers **Thomas B. Klinner** (Crumpton & Klinner) and **Gregg B. Everett** (Kaufman & Rothfeder) serve as co-chairs of the state bar's Law Day Committee.

Judges for the poster contest were: **Rob Hatchell**, WSEA-TV Ch. 12; **Judge Sharon Yates**, former presiding judge of the court of civil appeals; and **Kimberly Barnhart**. Judges for the essay contest were **Lt. Col. Susan Turley**, Judge Advocate General's



Left to right are **Marcia Daniel**, Alabama State Bar Law Day Committee staff liaison; **Tommy Klinner**, Law Day Committee Co-chair; **Governor Bob Riley**; and **Gregg Everett**, Law Day Committee Co-chair, as Gov. Riley declares May 1 as Law Day in Alabama.

Corps, Maxwell Air Force Base, and Montgomery attorneys **J. Flynn Mozingo** (Melton, Espy & Williams); **Dr. James F. Vickrey, Jr.** and **Samuel Partridge**. ■



Bottom row (l-r): **Emily Fleisig**, 1st Place Essay (grades 7-9), Hilltop Montessori School, Birmingham; **Lilli Gibson**, 2nd Place Poster (grades K-3), Advent Episcopal School, Birmingham; **Sam Newton**, 3rd Place Poster (grades K-3), Advent Episcopal School, Birmingham; **Marvin Royal**, 1st Place Poster (grades 4-6), Bear Exploration Center, Montgomery; **Zach Vines**, 2nd Place Poster (grades 4-6), Bear Exploration Center, Montgomery; **Conner Singleton**, 3rd Place Poster (grades 4-6), Bear Exploration Center, Montgomery; **Teddy Johnston**, 2nd Place Essay (grades 10-12), Heritage Academy, Morris Top row (l-r): **Drew Tatum**, 1st Place Essay (grades 10-12), Wilson High School, Florence; **Gregg Everett**, Kaufman & Rothfeder, Law Day Co-chair; **Tommy Klinner**, Crumpton & Klinner, Law Day Co-chair; **Marcia Daniel**, Law Day Liaison, Alabama State Bar

## Below is a list of all participating students in the 2007 poster and essay contests.

### Posters

#### GRADES K-3

Daniel McMahan  
Sadie Groves  
Afsaneh Faki  
Clarence Barr  
Pate Simmons  
Robert Derniston  
Parker Bryant  
Ben Dasher  
Erin Dickson  
Logan Masters  
Anthony Irwin  
Sam Newton  
Lilli Gibson  
Craig Cantley  
Meredith Hickey  
Josie Niedermeier  
Julianne Baker  
Will Dailey  
Stella Davis  
Alex Daugherty  
Cole Cassidy  
Dakota Coleman

#### GRADES 4-6

Ivy Cummings  
Megan Cummings  
Nicholle Smith  
Sidra McDonald  
Ivana Ellis  
Brandon Long  
Jake Little

Lindsey Woodruff  
Ryan Nowka  
Emme Long  
Dani Nosal  
Nathan Roark  
Tori Miller  
Alec Holloway  
Zach Vines  
Jeremy Hester  
Josh Styres  
Morgan Thompson  
Marvin Royal  
Alyssa Owens  
Cori Poe  
Lauren Saunders  
Conner Singleton  
Gabrielle Mills  
Kyle Shook  
Nicholas Yeend  
Will Sellers  
Lauren House  
Mikala McCurry  
Jalen Harris  
Christian Santiago  
Maya Smith  
Amira Calhoun  
Traylon McCurdy  
Kendall Moore  
Madison Foster  
Alexandria Sealy  
Emily Shanks  
Rachel Allen  
Tiera Bass  
Hannah Lacy

Tyra Wilson  
Brandon Mapp  
Bailey Duos  
Tanner Van Gilder  
Courtney Robinson  
Malaysia Smith  
Abby Norris  
Caleb Falcione  
Carter Rief  
Alex Sellers  
DeAnthony Johnson  
Bradley Cherry  
Taylor McCurdy  
Aysia Smith  
Chris Swett  
Brittany Stallworth  
Destiny Lowe  
Kalliah Bruce  
Nicholas Sauce  
Duija Patel  
Morgan Center  
Zach DeBardlebon  
Katie Martin  
Crystal Crittenden  
Brock Stevens  
Russ Miller  
Ryan Elmore  
Garrett Lanier  
Breia Sanders  
Samantha Harris  
Candace Baldwin  
Taylor Smith  
Seth Thornburgh  
Matthew DeVaughn

Nicholas Wismulek  
Camille Sanford  
Rebekah Bye  
Kailey Johnson  
Cheyenne Thorson  
Aetisia Peagler  
Rosemary Tidwell  
Dillon Lindsey  
Taylor Kennedy  
Jeff Moorer  
Jawan Gumbs  
Megan Hughes  
DiAngela Washington  
Anna Sadler  
Miya Brown  
DJ Eldridge  
John Johnson  
Caitlyn Lock  
Jamie Boyd  
Cait Sparks  
Stanley Lewis  
Caleb Baker  
Alex Cassaras  
Kaitlyn Beck  
Kasandrah Kinkaid  
Blake Blackmon  
Justin Cox  
Brandon Alloway  
Nakia Jackson  
Octavia Ware  
Doran Motley  
Patrick Mapp  
Peyton Sowell  
Lorrie Sanford

Erika Brooks  
Miranda Schufield  
Kennedy Evans  
Marshall Reiman  
Molly Brethauer  
Drew Patterson  
Natasha Sandella  
Celia Tebbitts  
Tyler Lewis  
Tori Patterson  
Devin Myrick  
Briana Beck  
Katie Gartner  
Eric Bailey  
Ashley Jones  
Brittany Bullock  
Joshua Deupree  
Kyle Renfro  
Heather Morrison  
Ja'Kim Hunter  
Brandon Phannavong  
Shaquante Moore  
Ethan Watkins  
Julia Talamonti

### Essays

#### GRADES 7-9

Morgan Crump  
Hannah Killen  
Matt McCravy  
Brooke Hanvey  
Jordan Holt

Dylan McKelvey  
Alison Davis  
Jonathan Marks  
Harlie Barkley  
Kelsey Russell  
Taylor Gist  
Molly Hughes  
Brittany Gooch  
Whitney Golrick  
Kaylon Lovelace  
Natalie Montgomery  
Krista Lanfair  
Kalyb Riley  
Elizabeth Higgins  
Maleah Givens  
Carley Hall  
Mary Jen Perkins  
Nathan Powell  
Jacob Stephenson  
Jacob Scott  
Jessie Wallace  
Seth Nuss  
Reese Ashwander  
Alex Pettey  
Josh Patterson  
Justin Mercer  
Frances Aimee  
Renneboog  
Eddie Fernandez  
Tim Palone  
Riley Turner  
Emily Fleisig  
Leah Fox  
Nicholas Bogus

#### GRADES 10-12

Teddy Johnston  
Sarah Frisbie  
Chelsea Cernosek  
Leanna Kennemer  
Amy Neugent  
Drew Tatum  
Jordan Rowe  
Adriane Hannah  
Whitney Cockburn  
Alesha Willis  
Alyssa Bates  
Katelyn Durham  
Joshua Tyler Phillips  
Eric Oakley  
Amanda Williams  
Andrew Suddith  
Lori Daniel  
Holly Rochester  
Rebecca Keeton  
Corey Krieger  
Brad Sellers  
Jessica Conrad  
JD Jackson  
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Steve Keeton  
Matthew Grigsby  
Jamie Wesson



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# Parting Ways:

## What a Lawyer and Law Firm Need to Consider When a Lawyer Leaves the Firm

BY D. JASON BRITT

Many firms in today's market boast that they have a collegial and family-like environment that promotes a balance between work and family.<sup>1</sup> But, regardless of the great work environment that many firms now provide, it is not uncommon for lawyers to leave those firms to head toward "greener" pastures.<sup>2</sup> Why? Well, only the departing lawyer can answer that question. However, this is not the real question on which to focus. The more important question that needs to be addressed is, "How do I handle the separation in the right way for my clients, my former associates and myself?"

Therefore, the crux of this article is to point out the major issues that need to be addressed when a lawyer leaves a firm to ensure the separation is handled in the right way for all parties involved (the law firm, the departing lawyer and the clients) so that their interests are protected to the fullest extent possible.

### What Are the Departing Lawyer's Financial Obligations to the Firm?

It is no secret that law firms derive substantial value from intangible assets such as intellectual capital, human capital, relationship capital, reputation capital,

and, finally, goodwill.<sup>3</sup> The main intangible asset of a law firm is the goodwill of the lawyers.<sup>4</sup> When lawyers leave the firm, they take their professional goodwill with them. Therefore, the departure of a lawyer from a firm can leave the lawyer and the firm at odds with each over future financial obligations, particularly when the departing lawyer leaves to start a new firm as opposed to leaving to join an established firm.

If you have a well-thought-out firm agreement or employment contract, then many potential problems could be completely alleviated.<sup>5</sup> However, the potential problems that come when a lawyer leaves a firm will only be alleviated when the firm agreement addresses the following topics:

1. Determine what the firm owes the withdrawing lawyer for equity;
2. Establish a payment schedule detailing how the lawyer's equity will be repaid;
3. Agree what the firm will owe the withdrawing lawyer for his/her inventory of contingency matters, accounts receivable and work-in-process;
4. Determine whether the withdrawing lawyer is responsible for unfunded firm liabilities;
5. Address the timing and tax consequence and potential impact of

future Internal Revenue Service (IRS) audits; and

6. Address the limitation or right of the withdrawing lawyer regarding access to client files, firm software, disclosure of proprietary information, copying of firm documents, removal of firm property, inducement of other firm employees to leave, and the right of the firm to exclusive use of the firm name.<sup>6</sup>

If the financial issues described above are addressed in the firm agreement or employment contract, then the departure will be less stressful for all of the parties involved.<sup>7</sup>

However, what happens when the firm does not have a well-thought-out firm agreement or employment contract.<sup>8</sup> Well, there can be problems. At this point the continuing financial obligations depend largely on your status in the firm.

Generally, since an associate is simply an employee of the firm he/she has no continuing financial obligations. The only time an associate should have a continuing financial obligation to the firm is when the associate entered into some type of contractual arrangement.

A withdrawing partner, on the other hand, is a completely different story. Partners do have fiduciary obligations. According to the *Code of Alabama* §10-8A-404 (1975): "[A] partner owes to the

partnership and the other partners . . . the duty of loyalty and the duty of care.”<sup>9</sup>

In addition to the fiduciary duties mentioned above, a partner may also have existing contractual obligations if the partner signed a personal guarantor or suretyship agreement on behalf of the firm with respect to its business affairs including, but not limited to, lines of credit, leases, etc.<sup>10</sup>

As always, regardless of your status in the firm, it is advisable for you to check your firm agreement, personal guarantees, lines of credit and lease documentation to determine the extent of your liability.<sup>11</sup>

## Are There Any Administrative Issues that Need to Be Addressed When a Lawyer Departs from the Firm?

There are numerous administrative issues that need to be addressed when a lawyer departs from a firm. Among them:

1. Make sure there is an agreement on how departing case files will be

physically removed from the firm. Do not allow files to leave the firm until the client has given approval.

2. Stop or transfer subscriptions of the departing attorney.
3. Cancel online services and collect password/ID cards.
4. Identify and act upon changes needed in signage, firm letterhead, Web site, e-mail address, marketing material, electronic filing systems, etc.
5. Notify Martindale-Hubbell, the Alabama State Bar and other professional services.
6. Notify the mailroom and receptionist of mail and phone transfer procedures.
7. Collect and inventory all keys, swipe cards, passwords, credit cards, and unused business cards.
8. Oversee the removal of personal effects from the office.
9. Notify professional liability insurance carrier and inform departing lawyer of any continuing coverage (or lack thereof).

0. Advise the lawyer concerning termination of benefits programs and issue CBRA notification, as appropriate.

1. Terminate computer access.
12. Cancel or transfer cell phone contracts, as appropriate.<sup>12</sup>

The proper preparation will save the departing lawyer, the firm and the client from much unneeded stress.

## What Is the Impact on the Client When a Lawyer Leaves the Firm?

When lawyers part ways it is frequently compared to a divorce, “right down to the custody battle over the clients.”<sup>13</sup> Therefore, it is easy to see that the impact of a lawyer leaving the firm can be tremendous on a client.

To ensure that the client’s interests are protected, the lawyers involved in the split need to make sure that the lawyer-client relationship is properly severed.<sup>14</sup> In order to sever this relationship you



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The 2006-07 occupational licenses and special memberships expire on September 30, 2007. Payment of license fees and membership dues for 2007-08 is due in the Alabama State Bar office by October 31, 2007 and are considered delinquent after that date. Occupational licenses purchased after October 31st will have a 15 percent late fee penalty added to the license fee.

Payments may be mailed to the Alabama State Bar or made online at [www.alabar.org](http://www.alabar.org). Contact the Membership Department by e-mail, [ms@alabar.org](mailto:ms@alabar.org), or via telephone at 334-269-1515.

  
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must first perform an audit of the departing lawyer's pending cases. In the audit, the firm and departing lawyer should review each file for action dates; check statutes; review paralegal assignments; identify issues involved; bill work-in-process; and address accounts receivable (resolve client disputes)."<sup>5</sup>

Once you have determined who the clients are of the departing lawyer, you need to notify those clients in writing of the change.<sup>6</sup> In this notice the client must be given the following information:

1. An explanation for the lawyer's withdrawal and possible unavailability;
2. The time frame after which the departing lawyer will no longer be available;
3. The status of client's matter;
4. The client's right to choice of counsel;
5. The identity of person to contact regarding client's file;
6. An accounting for client's property in the firm's possession, whether received directly from client or third person; and
7. The status of fees earned and amounts owed.<sup>7</sup>

Once the client has an opportunity to review this notice, the client must decide who will represent him or her. Remember, the file belongs to the client, not the firm or the lawyer working on the case.<sup>18</sup> If the client decides to stay with the firm, it is very important to transfer the case to another lawyer within the firm so that the clients' interests are still protected.<sup>19</sup> If, however, the client decides to stay with the departing lawyer, the firm should insist upon a discharge letter from the client, file a withdrawal notice with the court, if applicable, and notify key departments in the firm such as accounting and records.<sup>20</sup>

## Are There Any Potential Malpractice Issues that Need to Be Addressed?

When a lawyer leaves a firm there is potential for great exposure to liability issues. In fact, one of the most frequent sources of liability is the failure of the lawyer to take care of old business.<sup>21</sup>

Therefore, it is vital to both the firm and departing lawyer to document how the transition will occur and keep the client informed during the entire process.

Many departing lawyers believe their actions are still covered by their prior firm's malpractice insurance; however, this is not necessarily true. Professional liability insurance policies are generally written on a claims-made basis.<sup>22</sup> This means that the insurance company will only provide coverage for claims made during the policy period.<sup>23</sup>

If you are leaving a firm, you should evaluate the following:

1. Check to see whether the policy of your former firm covers you after you are gone;
2. If a potential malpractice claim arises after you are gone, and you are relying on your former firm's insurance coverage, you will have to report the claim to the former firm—and be sure the firm reports it to its carrier—or the claim may not be covered; and,
3. Consider obtaining a malpractice insurance policy that provides prior acts coverage. Without the protection, a risk created years earlier while you worked at another firm could become a costly surprise later.<sup>24</sup>

## Conclusion

Lawyers have serious ethical and legal obligations to each other and their clients. If you decide to head toward that greener pasture, you need to make sure that you have answered the question: How do I handle the separation in the right way for my clients, my former associates and myself?

Remember, successfully departing a firm means knowing and doing much more than simply gathering up your belongings and as many client files as you can before you go. It is critical for both the departing lawyer and the law firm that there is careful planning and attention to detail with respect to future financial obligations, administrative, ethical and professional responsibility, and client issues. If there is good planning, then the chances of preserving the relationship with your former partner and clients will be greatly improved. ■

## Endnotes

1. Most law firm Web sites on that great void we call the World Wide Web promote this type of work environment because it leads to a better workflow and team-oriented approach to the practice of law. However, it begs the question: If the work environment is so good, then why are so many lawyers leaving?
2. Read the "About Members, Among Firms" section of *The Alabama Lawyer* and you will realize that many lawyers are changing firms or starting their own solo practice.
3. H. Edward Wesemann, "The Value of Partnership," *Accounting & Financial Planning for Law Firms* newsletter, [www.law.com/jsp/article.jsp?id=1147338329173](http://www.law.com/jsp/article.jsp?id=1147338329173), (May 12, 2006).
4. Brian F. Corbett, "Dividing an Interest in a Law Firm. A Discussion of the Various Approaches Used in Valuing a Law Firm upon Equitable Distribution," [www.wfu.edu/~palmitar/Law&Valuation/Papers/2000/Corbett-ED-law-firm.htm](http://www.wfu.edu/~palmitar/Law&Valuation/Papers/2000/Corbett-ED-law-firm.htm) (April 22, 2000).
5. Frank Kollman, "What Happens When Partners Part," *National Clothesline* [web.newsguy.com/natclo/0212/kollman.htm](http://web.newsguy.com/natclo/0212/kollman.htm), (December 2002).
6. David Goodwin, "When an Attorney Leaves," N.H.B. Assn., *Bar News*, [www.nhbar.org/publications/archives](http://www.nhbar.org/publications/archives), (November 2000).
7. *Id.* I am not saying this is the magic formula to avoid disputes but it will substantially lessen the threat of litigation evolving from a lawyer's departure.
8. I have learned, through personal experience and through my research for this article, that many lawyers do not have well-crafted partnership agreements. And, unfortunately, many lawyers do not even have a written partnership agreement.
9. It is important to point out that these obligations cannot be waived or eliminated in the partnership agreement; see generally, *Ala.Code* §10-8A-103(b) (3)-(5) (1975).
10. Mary Louise Hopson, "Parting Company When Lawyers Leave the Firm," [www.dallasbar.org/members/headnotes.asp?item=860](http://www.dallasbar.org/members/headnotes.asp?item=860), (accessed April 28, 2007).
11. *Id.*
12. See supra n.7.
13. Ann Massie Nelson, "Risk Management: Have License, Will Travel, Part IV: File Custody Disputes Are Common When Lawyers Leave Law Firms," Vol. 71 *Wis. Law. No.* 9, (September 1998).
14. See supra n.7.
15. See supra n.7.
16. Thomas J. Watson, "Breaking Up is Hard to Do," Vol. 79 *Wis. Law. No.* 12, (December 2006).
17. Angus G. Goetz, Jr., *Break Away Lawyers*, [www.michbar.org/opinions/ethics/Articles/oct98.cfm](http://www.michbar.org/opinions/ethics/Articles/oct98.cfm), (accessed April 28, 2007).
18. Ala. St. B. Op. 86-02 (1986). ("The Commission reasoned that the materials in the file are furnished by or for the client and are therefore the client's property. Building on this foundation, it would then follow that the files belong wherever the client wishes for them to belong. If the Client directs that the files be in the possession of a particular lawyer or law firm, then they should be in the possession of that individual. The only exception would be in the instance where the lawyer is asserting a valid 'attorney's lien' for services rendered for the client"); see generally, Alabama State Bar Op. 91-06 (1991).
19. See supra n.7.
20. See supra n.7.
21. Texas Lawyers' Insurance Exchange, "Changing Law Firms Can Create a Gap in Coverage/Malpractice Hazards," [www.tlie.org/riskmgmt/news/93isu2.htm](http://www.tlie.org/riskmgmt/news/93isu2.htm), (last updated July 7, 1999).
22. See supra n.17.
23. *Id.*
24. *Id.*

### Dis on Britt

D. Jason Britt is an associate with Morris & McAnnally LLC. He received his law degree from Thomas Goode Jones School of Law and his undergraduate degree from the University of West Alabama. He currently serves as vice chair of the Elder Law Section of the Alabama State Bar.

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# CIVIL ACTIONS AND BANKRUPTCY PROCEEDINGS: A Collision of Two

BY JUDGE WILLIAM R. SAWYER

When an individual who is a plaintiff in a civil action files a petition in bankruptcy, the results may be surprising to those lawyers who are not familiar with the Bankruptcy Code. Lawyers who represent plaintiffs in personal injury suits may run afoul of any number of provisions of the Bankruptcy Code in the event that their client files a petition in bankruptcy. In a notable recent case, a sitting judge in Alabama was prosecuted in federal court because he failed to recognize the impact of a bankruptcy proceeding on a civil action that he was litigating while he was in private practice. The purpose of this article is to discuss issues which frequently arise upon a bankruptcy filing. This article also suggests actions a lawyer may take to minimize his exposure to allegations that he has violated any number of criminal or civil statutes as well as ethical rules.

This discussion will center on what is, in my experience, the most common scenario. In this scenario, an individual has filed a civil suit sounding in tort. The plaintiff is an individual who has retained counsel on a contingency fee basis. After suit is filed, the plaintiff, retaining different counsel, files a petition in bankruptcy. The bankruptcy filing changes a number of relationships and, in

many ways, restricts the rights of the plaintiff and his lawyer to deal with the cause of action, as the cause of action may no longer be owned by the debtor.

## The Attorney–Client Relationship

When a lawyer accepts an engagement to represent a client, a number of relationships come into existence. First, an attorney–client relationship is established which is regulated by state law. The lawyer assumes duties to his client, and the client incurs an obligation to pay his lawyer pursuant to the terms of their contract, subject to any overriding considerations.<sup>1</sup> Second, as soon as the lawyer begins to perform services for his client, he becomes his client's creditor. Third, a lawyer may claim a lien on the client's cause of action to secure payment of attorney's fees.<sup>2</sup> The lawyer's retaining lien is a property interest which may make him the holder of a secured claim in the event a client files a petition in bankruptcy.



*The bankruptcy filing changes a number of relationships and, in many ways, restricts the rights of the plaintiff and his lawyer to deal with the cause of action, as the cause of action may no longer be owned by the debtor.*

# Very Different Worlds

## The Bankruptcy Filing

The moment a client files a petition in bankruptcy, federal law comes into play, which preempts any inconsistent state law. Upon the filing of a petition in bankruptcy, an estate is created.<sup>3</sup> This estate consists of all of the debtor's property, including any claims or causes of action he may own. Therefore, the cause of action becomes property of the estate, and the machinery of the bankruptcy court is set in motion. Counsel should bear in mind that it is the accrual of the cause of action which gives rise to the property interest. If a cause of action has accrued, that property interest becomes property of the bankrupt estate, even though a civil action may not yet have been filed.

In my view, proper disclosure of the debtor's assets and liabilities is the single most important concern. The debtor is under a duty to disclose his assets, including any claims or causes of action.<sup>4</sup> As a cause of action is personal property, it must be disclosed on Schedule B.<sup>5</sup> Claims and causes of action are usually disclosed on Line 21 of Schedule B as "Other contingent and unliquidated claims of every nature, including tax refunds,

counterclaims of the debtor, and rights to setoff claims. Give estimated value of each." If a civil action has been filed, the particulars should be disclosed in response to Question No. 4a in the Statement of Financial Affairs, which calls on the debtor to "list all suits and administrative proceeding to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. Married debtors filing under chapter 12 or 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed." We should bear in mind that even if a lawsuit has not been filed, a cause of action is nevertheless personal property which must be disclosed on Schedule B.

Unless a lawyer is working for free, or has been paid in full in advance, the lawyer is a creditor of his client. As debtors are under a duty to disclose both their assets and their liabilities, the indebtedness due to the lawyer must be disclosed. If the lawyer claims a lien upon the cause of action, the secured indebtedness due him must be shown on Schedule D. If the lawyer does not claim a lien, the client's indebtedness to his lawyer is an unsecured claim which

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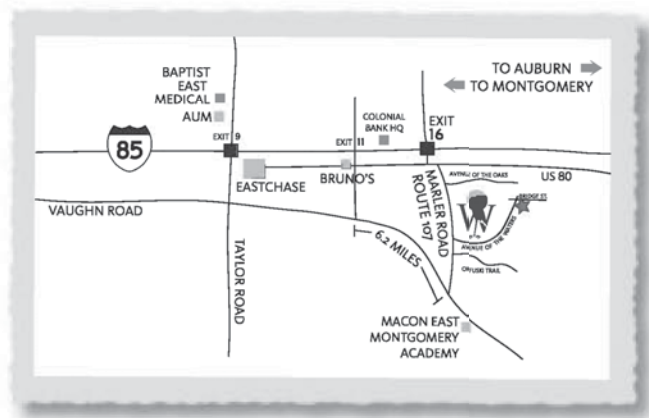
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must be disclosed on Schedule F. Lawyers should keep in mind that debtors are under a duty to disclose all of their debts, including those which have not been liquidated. If the lawyer is entitled to a percentage of the client's recovery, and if the cause of action has not been liquidated, the debtor is nevertheless obliged to disclose the contingent indebtedness. Indeed, the Schedules have a box to indicate whether an indebtedness is liquidated or not.

Once the cause of action becomes property of the estate, it comes under the control of the trustee.<sup>6</sup> In most cases, if the trustee elects to pursue the cause of action, the trustee will move to employ the debtor's lawyer.<sup>7</sup> Good communication between the lawyer, the trustee and the debtor will minimize problems here. As the lawyer is also creditor, it is a good idea to file a Proof of Claim.<sup>8</sup> If the lawyer does not timely file his Proof of Claim, and if the trustee elects to hire another lawyer, the lawyer may find himself unpaid.<sup>9</sup>

The filing of a petition in bankruptcy does not terminate the attorney-client relationship. However, it may divest the client of his interest in the cause of action, and it may divest the lawyer of his right to take action in a pending suit. Counsel should bear in mind that property of the bankrupt estate is under the control of the trustee and not the debtor.

## Abandonment

In some instances, once the trustee learns of a civil suit, she may decide not to proceed with it. The trustee may formally abandon the cause of action.<sup>10</sup> Moreover, if the lawsuit is properly disclosed, and if the trustee takes no action to administer the lawsuit, then it is abandoned by operation of law upon the closing of the bankruptcy case.<sup>1</sup> However, if a cause of action is not disclosed, it remains property of the estate, even after closure of the bankruptcy case.<sup>2</sup> If a trustee learns of an undisclosed lawsuit after the case is closed, she may reopen the bankruptcy case and take over the civil suit.

Some years ago, I was involved in a bankruptcy case where a debtor had failed to disclose his personal injury suit in his bankruptcy proceedings and did not disclose his bankruptcy filing to his personal injury lawyer. The defendant made an offer to settle the case for \$25,000, which the plaintiff rejected, and the case was scheduled for trial. A few days prior to trial, defense counsel learned of the plaintiff's bankruptcy filing. Defense counsel made a telephone call to the trustee who accepted the settlement offer, taking the \$25,000 as property of the estate. The trustee later brought suit to revoke the debtor's discharge on the grounds that he had concealed and attempted to convert property of the estate.<sup>13</sup>

## Nondisclosure

If the debtor discloses his cause of action, and if all of the interested parties act in good faith and take the necessary action, the matter at hand is usually concluded in a way acceptable to all concerned. The most serious consequences follow when the debtor does not disclose his cause of action and proceeds to litigate it as if he were still the true owner. The failure to disclose the existence of a lawsuit is always a bad idea.

Nondisclosure of a cause of action necessarily entails an omission on Schedule B and, if suit has been filed, an omission on the Statement of Financial Affairs.<sup>4</sup> A debtor who willfully omits a cause of action is subject to criminal prosecution, and may have his discharge denied.<sup>5</sup>

It is also a bad practice to "sandbag" the trustee. Unfortunately, some lawyers will file schedules indicating a cause of action with a value of unknown, unliquidated or \$1. I have seen instances where debtors have turned down settlement offers in the five- and even six-figure range, yet they will schedule the cause of action with a value of only \$1, contending that the actual amount is uncertain until judgment is rendered and has become final. It is a fraud on creditors to make a material understatement of the value of a cause of action.

## Retention

Once the plaintiff files bankruptcy and his cause of action becomes property of the estate, the lawyer should contact the trustee in bankruptcy and see if she is interested in retaining the lawyer to continue with the suit. If so, the trustee will move the bankruptcy court to approve her retention of counsel.<sup>16</sup> It will be necessary for counsel to provide a declaration setting forth all "connections" with the debtor, creditors and parties in interest. Sometimes lawyers will run into difficulty if they summarily state that they do not have any conflicts of interest while failing to disclose "connections" which counsel believe do not give rise to a conflict of interest. An undisclosed conflict of interest may result in the denial of all fees and may result in a report to the state bar. Counsel should accurately report all "connections" as defined by Rule 2014, thereby bringing to a head any disagreements as to whether there is in fact a conflict of interest early in the proceedings.

## Settlement

Counsel should remember that once their client files bankruptcy, creditors have an interest in the cause of action and the right to be heard on whether a settlement offer should be accepted. The Bankruptcy Rules have a simple procedure to obtain the Bankruptcy Court's approval to settle cases which will protect counsel from second guessing.<sup>7</sup> Counsel should make sure that a Rule 99 motion is filed and approved by the Bankruptcy Court before the settlement is consummated. Counsel who settle a cause of action which is property of the estate without proper authority may incur liability to the estate for conversion of estate property.

## Compensation

Before the lawyer is paid out of property of the estate, he must file an application for compensation.<sup>18</sup> Applications for compensation are routinely filed in bankruptcy courts and are not usually contested. If a lawyer who represents a debtor is not retained by the trustee, she still has a claim for services rendered prior to the bankruptcy filing. In such cases, a proof of claim should be timely filed.

# Chapter 13

In cases under Chapter 13 the debtor usually retains her property.<sup>9</sup> A Chapter 13 plan is filed and the trustee is charged with making disbursements under the plan. While there is conflicting case law, at least in the Middle District, I believe that counsel may safely proceed under the assumption that either the debtor or the trustee has standing to bring suit on a cause of action which is property of the estate.<sup>20</sup> In my experience, most civil actions are prosecuted by the debtor, subject to the Chapter 13 trustee's supervision, with the proceeds first going to fund the plan and any excess to be paid to the debtor. The most critical factors here are adequate disclosure on the schedules and candor with the Chapter 13 trustee's office and the Court.

## Conclusion

Counsel who represent plaintiffs in civil actions should bear a few things in mind. First, a cause of action becomes property of the estate the moment a plaintiff files a petition in bankruptcy. Second, the cause of action, which is now property of the estate, is not the plaintiffs' property to do with as she pleases, but rather is subject to regulation under the Bankruptcy Code. Third, and most important, is that claims and causes of action must be adequately disclosed in the bankruptcy papers and that the debtor should give truthful testimony at his meeting of creditors. ■

## Endnotes

1. Absent the bankruptcy filing, the contract between the lawyer and his client is subject to ethical rules limiting compensation to that which is reasonable. If the lawyer's services are "in connection" with the bankruptcy case, additional limitations arise under the Bankruptcy Code. 11 U.S.C. § 329.
2. *Ala. Code* § 34-3-61.
3. 11 U.S.C. § 541.
4. 11 U.S.C. § 521(a)(1)(B).
5. The Judicial Conference of the United States has promulgated a series of Official Bankruptcy Forms which must be filed in every bankruptcy case. The Schedules and Statements of Financial Affairs are filed under the penalties for perjury. Thus, counsel should pay close attention to the wording of the form to avoid an inadvertent violation.
6. *See* 11 U.S.C. § 704. Cases under Chapter 13 pose special problems which will be discussed in Part VIII below.
7. 11 U.S.C. § 327; Rule 2014, Fed. R. Bankr. P. Rule 2014.
8. In cases under chapters 7 and 13, proofs of claim must be filed not later than 90 days after the meeting of creditors. Rule 3002(c), Fed. R. Bankr. P. In cases under Chapter 11, the Court will set a claims bar date. If a creditor is going to file a claim it is always a good practice to do so promptly upon learning of the bankruptcy filing as the consequences for tardy filing can be disallowance of the claim.
9. If the lawyer has a valid lien for attorney's fees earned prior to the filing of the petition in bankruptcy, he may be protected by the doctrine of *Long v. Bullard*, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886). To minimize his difficulty in getting paid for the work done, the lawyer should file a proof of claim.
10. 11 U.S.C. § 554(a).
11. 11 U.S.C. § 554(c).
12. 11 U.S.C. § 554(d).
13. *See* 11 U.S.C. § 727(d).
14. A debtor is under a duty to file various statements and schedules on forms promul-

gated by the Judicial Conference of the United States. The bulk of the disclosures are contained on schedules A to J inclusive and the Statement of Financial Affairs. Official forms 6 and 7.

15. 18 U.S.C. §§ 152, 157 and 11 U.S.C. § 727(a)(4)(A).
16. 11 U.S.C. § 327(e), Fed. R. Bankr. P. Rule 2014.
17. Fed. R. Bankr. P. Rule 9019.
18. 11 U.S.C. § 330; Fed. R. Bankr. P. Rule 2016.
19. 11 U.S.C. § 1306(b).
20. Judge Albritton handed down a decision in 2004, finding that both the Chapter 13 trustee and the debtor had standing to bring suit on a claim which was property of the estate. *Looney v. Hyundai Motor Manufacturing Alabama, LLC*, 330 F.Supp.2d 1289 (M.D. Ala. 2004); *see also, Cable v. Ivy Tech State College*, 200 F.3d 467 (7th Cir. 1999).



### Judge William R. Sawyer

**Judge William R. Sawyer** was sworn in as a United States Bankruptcy Judge on May 24, 1999. He graduated from Valparaiso University School of Law in 1982 and from the University of Notre Dame in 1978. Judge Sawyer was in private practice with Clifford, Claudon, Alexa & Sawyer in Indiana from 1982 to 1986. He then was employed as a trial attorney at the United States Department of Justice, Tax Division from 1986 to 1989 and as an Assistant U. S. Attorney in the Southern District of Alabama from 1989 to 1999. Judge Sawyer was admitted to the Indiana State Bar in 1982 and the Alabama State Bar in 1991. He thanks Rebekah Pugh, his law clerk, for her assistance with this article.

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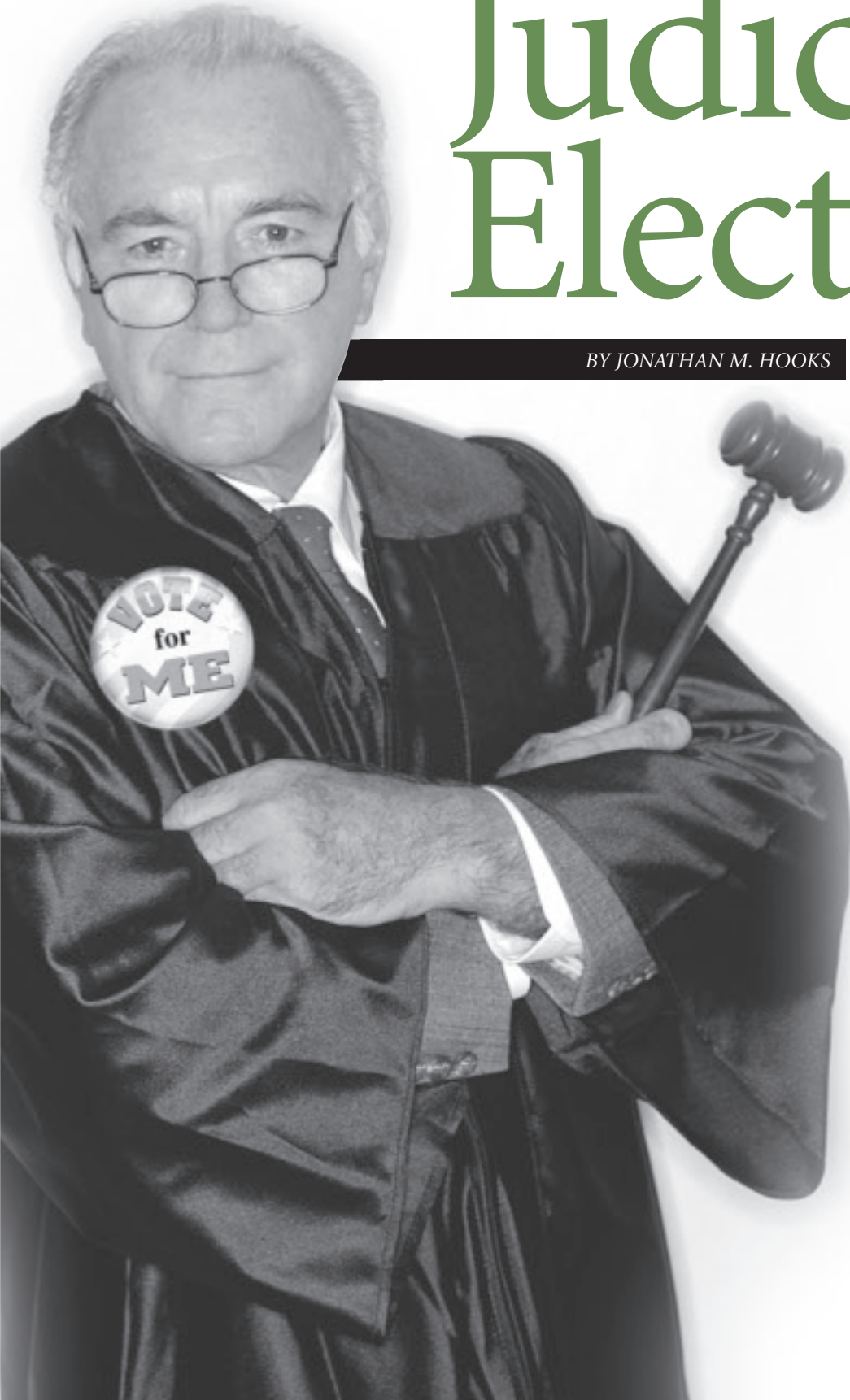
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# In Defense of Judicial Elections

BY JONATHAN M. HOOKS



This past fall, Alabamians re-elected three incumbent state supreme court justices, elected one new associate justice and ushered in a new era electing this state's first female chief justice. With these elections behind us, and in the wake of spent campaign coffers, deteriorating roadside campaign signs and tired volunteers, an old issue has surfaced once again within the Alabama State Bar: Should this state continue electing judges, or should we, as a state, choose a new method to put appellate judges onto our highest courts?

Since § Alabama has chosen appellate judicial candidates in a partisan, statewide, popular election.<sup>1</sup> In recent years, however, many attorneys and judges holding prominent positions in the bar have called for the current system to be scrapped in favor of a different procedure by which a judge could take the bench. This new approach, colloquially labeled by its proponents and referred to herein) as "merit selection," functions by allowing a nominating commission to recommend a small group of potential jurists for the consideration of the governor, who would then appoint one of the nominees.

Momentum clearly is building for this approach in some corners of the bar. A string of bar presidents has used the post to advocate merit selection,<sup>2</sup> and in 1997, and again in 2005, the Board of Bar Commissioners endorsed a merit selection plan. On April 24 of this year, a modified version of the bar's merit selection plan was introduced into the legislature, aimed not only at supreme court justices but also at members of the courts of civil and criminal appeals.<sup>3</sup> By the time this article is published, the issue of merit selection could potentially be slated to appear as a proposed constitutional amendment on a ballot near you. Why this growing distaste for judicial elections?

## Some Background

Recent campaigns for the supreme court often have been expensive and occasionally malicious. Following on the heels of the 1994 Hooper-Hornsby election controversy, Justice Harold See's 1996 campaign for the court was attacked in a nasty television commercial now known in this state's electoral lexicon as simply "the skunk ad."<sup>4</sup> The repugnance of this commercial may have been a factor in the race, in which Justice See prevailed and became the fourth conservative on a court long dominated by Democrats. With the subsequent replacement of retiring Justice Terry Butts with Republican Champ Lyons, control of the supreme court suddenly shifted to a

conservative (although not yet officially Republican) majority.<sup>5</sup> As the stakes rose, so grew the cost of successfully running for the court, as well as the tenor of many campaigns. Although races for lower appellate courts have continued a trend as relatively low-key in tone and involving relatively little money, the supreme court has continued its own trend: With the exception of a few no-contest elections, usually between a well-liked incumbent and a relatively unknown opponent, most recent supreme court races involve significant contributions and expenditures and occasionally an advertisement which crosses the lines of decency.

## Is the System Broken?

From the recent history recounted above, we see two elements which have played key roles in recent judicial campaigns: money and tone. These features are frequently cited as the precise reasons that Alabama should discontinue judicial elections. Proponents of merit selection argue that these are problems that will largely disappear under the proposed nomination/appointment regime.<sup>6</sup> Money is perhaps the central problem seen by advocates for merit selection. Earlier this year, in the March edition of this publication, former Alabama Law School Dean Daniel Meador explicitly stated the view held by many supporters of a merit selection process: "A major reason why this system [of judicial elections]

is bad is money—contributions of vast amounts of money in support of candidates for election to these appellate judgeships, an *evil* not present in any of the other selection systems."<sup>7</sup> Tone is not to be overlooked, however. From the skunk ad a decade ago to more recent television commercials, there certainly have been campaigns relying on overheated rhetoric to get traction in the polls.

That the electoral process is often accompanied by these elements, however, is a far cry from the notion that the process is terminally ill. Why, then, do advocates for merit selection see the process as broken? Why do they see the information and free speech contained in campaign advertisements, and paid for by interested contributors, as "evil?" There are two prominent reasons offered.

First, merit selection proponents argue that money gives the strong impression that Alabama's judicial branch is "for sale," or conversely, that a particular special interest has "bought" a particular candidate-turned-judge.<sup>8</sup> In support of this argument, supporters of merit selection note that races for the supreme court in Alabama consistently rank as some of the most expensive appellate races in the country. As a matter of first principles, however, one cannot rationally conclude that "justice is for sale" simply because of the *amount* of money. The 2006 race for chief justice of the Supreme Court of Alabama involved contributions of nearly \$ million,<sup>9</sup> a high figure to be sure, but a figure exceeded by, for example, Governor Riley alone in his 2006 reelection bid.<sup>10</sup> Some U.S. Senate and of

course) U.S. Presidential races dwarf these figures, sometimes in the course of a one-day fundraiser. Any principled argument that high-dollar campaigns are, or are suspect to be, corrupt would have to call for the appointment by commission of the governor, our U.S. senators and the President of the United States.

The perception that judicial candidates appear to be “bought” and justice seems to be “for sale” is understandable to some degree, because contributors are often attorneys or have an interest in judicial decisions reached on Decker Avenue. It is generally true that in large part, judicial candidates are funded by specific special interests; one is often bankrolled in part by the plaintiff’s bar, another by the defense bar. But the argument that these contributors have thus bought a candidate is incorrect, because it puts the cart before the horse.

With the rare exception of the occasional “stealth” candidate who has formed no coherent judicial philosophy, there are two primary and distinctive, and in many cases, wholly contradictory, viewpoints on how a judge should fulfill his duty. For purposes of an effective stereotype to illustrate this point, simply consider the general legal philosophy espoused by members of, say, the Federalist Society versus the philosophy of members of, say, the American Constitution Society. One’s general legal philosophy tends to strongly correlate with political affiliation; hence, your average Federalist Society sympathizer will tend to run as a Republican and hold judicial views advocating judicial restraint, whereas your average candidate agreeing with the American Constitution Society will tend to affiliate with Democrats and be slightly more inclined to take an activist role. Because political affiliation is such an effective shorthand

for judicial philosophy, a special interest group can support candidates more likely to decide cases in favor of that group. The fact that money follows philosophy, as opposed to special interests purchasing a candidate’s vote, is never better illustrated than when a judge “stings” his supporters by deciding a case against this contributor base. In short, a judge is not a robed Charlie McCarthy under the control of a special-interest ventriloquist. Although money is both convenient and effective as a polemical tool, we attorneys, of all people, should be able to look past such an emotionally-loaded argument and soberly consider whether it holds water.

The other reason offered for abandoning judicial elections, which intertwines the twin “evils” of money and tone, is that nasty campaign advertisements give the public ample reason to look at the field of candidates and conclude that “they’re all bums.”<sup>11</sup> That is, by the time we reach Election Day, the argument goes, all candidates have been exposed at every point of vulnerability, and they all have suffered some compromise of their integrity, ethics and/or morality. The most obvious reply to this argument is that not all campaigns expose skeletons or sling mud, and sometimes two opponents will entirely refrain from “negative advertising.” Second, we cannot overlook two complementary facts: political advertisements run by a candidate’s campaign are publicly attributed to that candidate, and dirtier ads usually hurt the source rather than the target. From this we see that more often than not, the public is savvy enough to sift through the rhetoric and make an informed decision as to whether or not the accusations against another candidate warrant voting for his opponent. Finally, this particular argument, like many raised in support of merit selection, cannot logically be limited to the

judiciary. To suggest that judicial candidates are alone in running ads that scandalize or attack opponents is to deny stark reality. We cannot diagnose judicial elections as broken by pointing to the skunk ad unless we are prepared to handle the implications of the “Daisy” ad, too.<sup>12</sup>

Considering all of the above, it seems likely that the problems accompanying judicial elections have been overstated. This does not mean, however, that there is no room to improve the system. The fundamental question is whether the proposed reform would, as a practical matter, enhance the judiciary’s reputation for fairness and impartiality and repudiate the notion (however unsupported) that “justice is for sale” in Alabama. Few people, including this author, would be against a reform effort aimed at improving our profession, if it truly accomplished that goal. In evaluating the merit selection plan, however, we, as members of the bar, must be certain that the actual plan proposed is worthy of being enacted into law. It is an old axiom that a well-defined problem is halfway solved. Likewise, a well-written bill is halfway enacted. Because this issue may soon be before us as citizens, and because this push for “reform” has not subsided, we would do well to evaluate the likely outcome of the proposed plan.

## Follow the Money

The heart of the bar’s plan is the elimination of elections so that a candidate no longer solicits and spends campaign contributions to advertise his candidacy to the general public. No election, so the argument apparently runs, no money; the elimination of money, in turn, would purportedly eliminate mud-slinging advertisements and perceived corruption. This

*...most recent supreme court races involve significant contributions and expenditures and occasionally an advertisement which crosses the lines of decency.*



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logic seems to operate on a naïve assumption, namely that the individuals ultimately recommended by the nominating commission will not have actually *sought* that nomination. That is, the bar's plan seems to assume that the elimination of elections will somehow result in the elimination of *ambition*. This unfounded belief ignores human nature. As it is, the overwhelming majority of people nominated by a merit selection commission will achieve that honor after very publicly throwing their hat in the ring to seek a vacated seat on the bench. Given that folks will seek nomination and appointment, then, how precisely *would* an interested candidate get his message across to members of the nominating commission? And how would his supporters translate their hopes into action? Put another way, in the pursuit to be one of the lucky three chosen by the nominating commission, and moreover, the governor's appointee, what might a candidate and his supporters do?

To answer this, we first have to understand what a candidate could not do. That is, what legal framework would regulate and limit unethical and corrupt efforts in a merit-selection system? The constitutional amendment proposed by the bar would eliminate the electoral process, but *would not replace that process* with any sort of framework designed to prohibit or frustrate attempts to improperly influence the nominating commission. Since elections are gone, no rational person would declare himself a "candidate" and follow campaign finance laws, so those limits would evaporate. Additionally, candidates and their supporters trying to sway the minds of public officials would not be constrained by lobbying laws, because the governing definition for lobbying only mentions practices designed to influence legislation, not practices aimed at having particular individuals placed in positions of power.<sup>13</sup> What would be the end result? If one's efforts to be nominated are governed by neither campaign finance laws nor laws constraining lobbyists, what does govern those efforts? What safeguards will ensure that key players avoid corrupt practices? The only limits left standing in the wake of a merit selection plan would be those created by the state's criminal code, prohibiting crimes such as bribery and extortion, and Canon 7

of the *Code of Judicial Ethics*, which applies to candidates for judicial office, whether popularly elected statewide or chosen "on the basis of a merit system election."<sup>14</sup>

Canon 7 requires that a candidate should maintain "the dignity appropriate to judicial office," and prohibits the candidate from "authoriz[ing] or knowingly permit[ing] any other person to do for the candidate what the candidate is prohibited from doing under [the Canons]."<sup>3</sup> But what, precisely, is beneath the "dignity appropriate to judicial office?" Can a judicial candidate buy dinner for one or more members of the commission, during which they discuss the candidate's judicial philosophy? As a candidate standing for election, he could hold a campaign rally where his campaign provides food. The difference is only one of degree, not of kind. If a merit-selection candidate could provide food, what about recreation? Some candidates for election hold rallies at recreational facilities, after which there is, say, skeet shooting or pony rides paid for by the candidate's campaign. There would be no difference, in kind, if a candidate treated one or more members of the commission to, say, a round of golf, or his supporters provided a weekend golf vacation during which the candidate addressed them about his judicial philosophy. The only difference between the electoral situations described above and the predicted moves of a candidate seeking nomination from the commission is that the merit-selection candidate can identify the precise individuals he must sway to his favor and offer significantly more perks for taking the time to consider his "merit" for office. Ultimately, as a matter of dollars, merit-selection proponents may have a point when they say that the new system would reduce the amount of money involved. But the possible scenarios contemplated above provide just a glimpse into the way this process could spiral out of control.

In the end, then, would the proposed merit selection plan end the alleged corruption inherent in judicial elections? Likely not. Rather, the plan very well could usher in an era in which judicial candidates are chosen in a more corrupt environment than exists today. It would

possibly do nothing to prevent the fact that money is expended in the pursuit of office, and additionally remove from public scrutiny the details of who is funding or subsidizing the office-seekers, what they are doing to win appointment, and what they are saying about their competitors. As with many laws passed without sufficient forethought, the hoped-for result may quickly vanish, replaced by a reality never sought or desired by even its most ardent proponents. And in this particular case, the result may end up more corrupt than the even the most egregious examples of corruption under the current system of electing judges.

The point here is not that the proposed merit-selection plan is some conspiracy to make judicial appointments the business of smoke-filled backrooms, nor is it that merit selection, per se, is always and in every case a bad idea. The point is that we must be cautious about the system we adopt to achieve our desired ends. For

instance, a nominating commission may well pass its own set of ethics provisions by which its members agree to refrain from any contact with potential nominees and/or their supporters except in very specific and limited instances. This would be very good. But a nominating commission may also choose not to adopt rules governing its practices, instead allowing members to act largely as they please. Campaign finance and lobbying laws, however imperfect, have been crafted largely in response to abuses of the system. The merit-selection plan would create a third system, heretofore untested within Alabama. Should the plan be adopted as currently conceived, we have no assurance that the new system would not eliminate the perceived corruption alleged to occur in the presence of money and dirty ads. Instead, we have a good-faith basis by which we may conclude that it could increase corruption by diverting money and half-truths underground and out of the eye-sight, and oversight, of the public.

## Questionable Constitutionality

As drafted, the merit-selection amendment also may suffer from a serious constitutional defect which, although it may not doom the entire system, could hold serious implications for the commission, and the first fruits of its work. Because Alabama is a “Section 5” state under the Voting Rights Act of 1965, any change that we make to any aspect of our election laws and practices must be pre-cleared by the U.S. Department of Justice (“DOJ”).<sup>16</sup> Pre-clearance is essentially the review by DOJ to ensure that this change will not disenfranchise minority voters. And it is for purposes of satisfying the DOJ’s pre-clearance requirements that the proposed merit-selection legislation recently introduced into the legislature affirmatively, and laudably, states:

“All appointments and elections of members to the Judicial Nominating

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Commission shall be inclusive and shall be made with due consideration to the geographic diversity of the state, including rural and urban geographic areas, and the gender, racial, and ethnic diversity of the state, and without regard to political affiliation.”<sup>17</sup>

In drafting the amendment, however, additional provisions were inserted, no doubt, to add some “teeth” to the bill’s diversity language. Specifically, of the nominating commission’s nine members (four non-attorneys, four attorneys and one judge),<sup>18</sup> at least one lawyer and at least one non-lawyer must be a minority, and at least one member of each of those groups must be a woman.<sup>19</sup> Within the nine-member commission, then, there are four “slots,” making up 44 percent of the commission, which must be reserved for individuals identified not by the content of their character, but by the color of their skin and/or their gender. These “slots” constitute an explicit racial/gender quota.

In Florida, where a merit-selection plan currently operates, a similar quota system imposed by an earlier version of the statute was struck down as an unconstitutional violation of the Equal Protection Clause.<sup>20</sup> Under the earlier statute, which established a judicial nominating commission, one-third, or 33 percent, of the slots were reserved for a woman or minority.<sup>21</sup> In *Mallory v. Harkness*, the U.S. District Court for the District of Southern District of Florida, citing the U.S. Supreme Court’s famous *Bakke* decision,<sup>22</sup> among others, held that the Florida statute constituted a quota system which neither advanced a compelling state interest nor was narrowly tailored to achieve such interest.<sup>23</sup> In *Bakke*, the Supreme Court had prohibited a quota system whereby slots or positions were held for individuals identified solely by a racial characteristic.<sup>24</sup> This prohibition has in no way been undermined by subsequent Supreme Court cases such as the recent *Grutter v. Bollinger* decision.<sup>25</sup> Putting aside entirely the issue of a gender-based quota and whether it would draw similar objections, the sheer existence of a racial quota is sufficient to call the constitutionality of the merit-selection amendment into question.

Although a severability clause will save the overall constitutionality of the bar’s proposed merit-selection bill, any court challenge would force the state’s hand. It would be forced either to spend money fighting a losing battle to defend the constitutionality of the provisions or to suffer the embarrassment of having to admit that the organization representing Alabama’s lawyers misapprehended the holding of a U.S. Supreme Court precedent older than the practicing attorney authoring this article. Perhaps, as The Florida Bar did in the *Mallory* case, the Alabama State Bar would take the second route, “announc[ing] that the Bar [w ill] not defend the challenged statute,” and later “disavow[ing] any interest in defending the statute.”<sup>26</sup> Either way, the legal profession in Alabama could come away with a bruised reputation.

## Final Thoughts

Despite their positive aspects, judicial elections are no panacea. Whether running for probate judge in a small Alabama county or for the state supreme court, dirty politics and bankrolling by special interests can and sometimes have derailed ethical, honest, bright and principled candidates who likely would have served honorably as superb jurists, and no doubt those same forces sometimes have ended too soon the tenure of worthy judges who were replaced by jurists of distinctively less merit. The notion that elections are a universal good is not held by this author. The notion that merit selection will end or even diminish the chances of corruption and odious politics, however, while a wonderful-sounding thought, seems to collapse upon closer scrutiny.

In *Federalist* No. 53 James Madison memorably wrote that “[i]f men were angels, no government would be necessary.” As mentioned earlier, a judicial nominating commission may in fact operate in such an ethical manner, establishing ground rules designed to eliminate many of the concerns voiced above. But we absolutely cannot rely upon this hope unless the people bind the members of any eventual nominating commission by law. And the people cannot bind those commission members unless

they receive and approve a bill containing explicit and firm safeguards preventing corrupt practices from taking root. As it exists in its current form, the proposed legislation does nothing to counter decidedly un-angelic practices that could germinate as the commission considers its first few vacancies and feels its way along a path not clearly laid before it.

We, as a profession, would do well to continue to consider whether there is a workable and effective method of improving the means by which we install judges to their positions. We should consider all variants of methods designed to choose our judges. Each has its benefits and drawbacks. In considering whether to and/or how we should proceed, we need to consider soberly and rationally both sides to all possibilities, thinking beyond the first stage and considering the ultimate implications of the system we consider adopting. By doing so, we may be surprised to see that the current system is perhaps flawed, but better than any alternative yet conceived. ■

## Endnotes

1. Ala. Const. of 1868, art. VI, § 11.
2. See, e.g., Fournier J. “Boots” Gale, III, President’s Page, “Alabama Ground Zero,” 68 *Ala. Law.* 8 (2007); Bobby Segall, President’s Page, “The Independence of Our Judiciary,” 66 *Ala. Law.* 324 (2005); Wade Baxley, President’s Page, “Merit Selection of Judges: A Concept Whose Time Has Come,” 60 *Ala. Law.* 366 (1999); Warren B. Lightfoot, President’s Page, “Non-Partisan Judicial Elections,” 58 *Ala. Law.* 70 (1997).
3. H.B. 710, 2007 Leg., Reg. Sess. (Ala. 2007).
4. See Glenn C. Noe, “Alabama Judicial Selection Reform: A Skunk in Tort Hell,” 28 *Cumb. L. Rev.* 215, 215 & n. 3 (1997-98) (citing Dale Russakoff, “Legal War Conquers State’s Politics; In Tort Reform Fight, Alabama Court Race Cost \$5 Million,” *Wash. Post*, Dec. 1, 1996, at A1), where the commercial is described as follows: “The ad depicted a picture of a skunk that faded into a picture of Harold See, the Republican candidate for Alabama Supreme Court justice.”
5. At this time, Justice Gorman Houston was a Democrat, but switched parties and ran for re-election as a Republican in 1998.
6. Daniel J. Meador, “Selecting Alabama’s Appellate Judges—A Better Way,” 68 *Ala. Law.* 135, 136 (2007), stating that the bar’s proposed merit-selection plan “would entirely eliminate money and character assassination from the process of selecting appellate judges.” See also, Bobby Segall, President’s Page, “Many Things But Never Boring,” 67 *Ala. Law.* 228, 234 (2006), stating that although “[p]olitics will also play a role,” the merit selection plan would help to “eliminate, or substantially diminish, the obscene



amounts of money that are spent and the terrible, mean-spirited and un-judgelike advertising campaigns that are conducted.”

7. Meador, *supra* n.6, at 136 (emphasis added).
8. Meador, *supra* n.6, at 136 (“The money fueling this selection system gives the unavoidable impression that seats on Alabama’s appellate courts are for sale.”); Segall, *supra* n.6, at 234 (“Very few people in our state believe judges who take a ton of money from one special interest group or another, and hope to get more funds for future elections, won’t be influenced in their decision-making.”); William N. Clark, President’s Page, “A Year in Focus,” 65 *Ala. Law.* 216, 218 (2004) (“Because of the process and the enormous costs involved in the elections, the attitude of some of the members of the public was that when that much money is put in, justice is for sale.”).
9. Eric Velasco, “State Considers New Way to Pick Judges,” *Birmingham News*, March 2, 2007, at A1.
10. Governor Riley raised and spent over \$11 million in his re-election bid. Charles J. Dean & Kim Chandler, “Riley Out-Raised Baxley 3-1 On His Way to Victory,” *Birmingham News*, Feb. 1, 2007, at A1.
11. Meador, *supra* n.6, at 136-37.
12. The “Daisy” ad was the famous 1964 television commercial paid for and run (only once) by President Lyndon B. Johnson’s presidential campaign, wherein a little girl is picking the flowers from a daisy when an atomic bomb is dropped from the sky and detonates,

mushroom cloud and all. The not-so-subtle implication of the advertisement was that the election of Barry Goldwater would result in a nuclear attack from the Soviet Union. If advertisements such as the skunk ad represent a malignancy within the election process requiring appointment by commission, logically, one must be prepared to say that the “Daisy” ad should have spurred the beginning of a process of appointing by commission the President of the United States.

13. *Ala. Code* 1975, § 36-25-1(17), which defines “lobbying” as “[t]he practice of promoting, opposing, or in any manner influencing or attempting to influence the introduction, defeat, or enactment of legislation before any legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body; . . . .”
14. Canons of Judicial Ethics, Canon 7.
15. *Id.*
16. 42 U.S.C. § 1973c(a).
17. Section 1, H.B. 710, 2007 Leg. Reg. Session (Ala. 2007), proposing the replacement of Ala. Const. 1901, Amend. 328, § 6.13, with a new § 6.13, in which the quoted language would be found in Part II.(b)(4)e.
18. Section 1, H.B. 710, 2007 Leg. Reg. Session (Ala. 2007). The committee membership would be set forth in Part II.(b) of proposed new § 6.13.

19. *Id.* See Part II.(b)(1) & (2) of proposed new § 6.13.
20. *Mallory v. Harkness*, 895 F.Supp. 1556, 1564 (S.D. Fla. 1995).
21. *Mallory*, 895 F.Supp. at 1558.
22. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
23. *Mallory*, 895 F.Supp. at 1560.
24. *Bakke*, 438 U.S. at 316-17.
25. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). In fact, *Grutter* explicitly affirmed the “clear” legal principle of *Bakke*.
26. 895 F.Supp. at 1558.



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# Preventing Waiver of Arguments on Appeal

BY ED R. HADEN

*This article originally appeared in the May 2007 issue. It is being reprinted with author's alterations.*

—Editor

Waiver can end your appeal before it begins.<sup>1</sup> The Supreme Court of the United States has stated that whether and how an appellate court applies the principles of waiver to deny review of an argument or issue is governed by “no general rule,” but is left “primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases.” *Singleton v. Wulff*, 48 U.S. 621 ¶6. The appellate court’s discretion, in turn, may be guided by the competing policies of fairness to the opposing party, the regard for the trial court’s role, the caseload of the appellate court, the importance of the issue, the practical realities of trial work, and the preferences of the individual judge writing the opinion, among others.<sup>2</sup>

In an adversarial system of justice it is generally considered fair to afford the opposing party the opportunity to respond.<sup>3</sup> Appellate courts are loath to reverse a trial court based on an argument that the trial court has not ruled upon. Moreover, because of heavy caseloads, appellate judges generally do not have the time to canvas the record or to conduct

extensive legal research to determine if a party’s argument should prevail.

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

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

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

# When and How to Raise Arguments

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

## Complaint

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

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

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

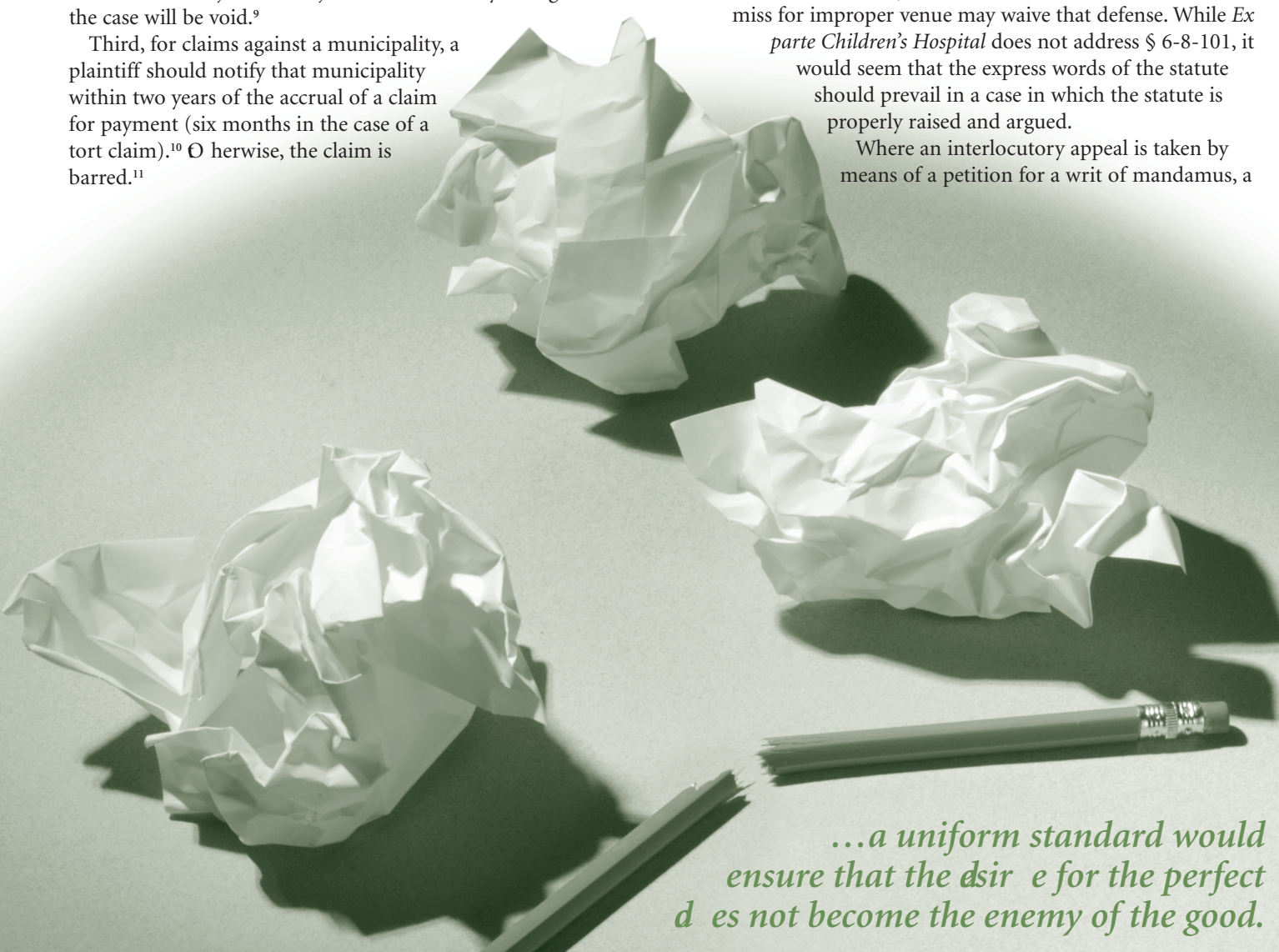
## Motion to Dismiss

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

## Interlocutory Appeals

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

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



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

statement of good cause should be included if the petition is not filed within 21 days of the ruling or order that is the subject of the petition.<sup>17</sup> Otherwise, the right to petition for relief is waived.<sup>18</sup>

## Answer

“Typically, if a party fails to plead an affirmative defense, that defense is waived.”<sup>19</sup> The Supreme Court of Alabama has explained:

Once an answer is filed, if an affirmative defense is not pleaded, it is waived. *Robinson v. [Morse]*, 3 So. 2d 1353 (Ala. 1977). The defense may be revived if the adverse party offers no objection (*Bechtel v. Crown [Cent.] Petroleum Corp.*, 4 So. 2d 79, 70 Ala. ) or if the party who should have pleaded it is allowed to amend his pleading (*Piersol v. ITT [Phillips] Drill Division, Inc.*, 445 So. 2d 559, 561 (Ala. 1984)); or if the defense appears on the face of the complaint (*cf.*, *Sims v. Lewis*, 34 So. 2d 2902 Ala. 1979 and *Williams v. McMillan*, 352 So. 2d 137, 9 Ala. 1977). See, also, 2A J. Moore, Federal Practice § 8.27 at 8.25 Fed. 19. But, specifically, a defendant “cannot revive [the waived affirmative defense] in a memorandum in support of a motion for summary judgment.” *Funding Systems Leasing Corp. v. Pugh*, 6 F.2d 9, 96 Fed. Cir. 96 )<sup>20</sup>

Further, counsel must be specific in identifying the affirmative defense. In *Pinigis v. Regions Bank*, No. 005 2006 WL 1304938, at \*5-7 (Ala. May 12, 2006), for example, the supreme court held that a party had waived an affirmative defense by pleading the “statute of limitations” instead of the more precise term “statute of repose.”

In addition to pleading affirmative defenses, counsel should remember to deny factual allegations in his answer. *Failure to do so could result in an effective waiver of a defense.* For example, in *Matthews v. Alabama Agricultural and Mechanical University*, 78 So. 2d 909 Ala. 2000) state university defendants did not file an answer or any other pleading denying the allegations in the plaintiff’s complaint. The plaintiff had alleged that the defendants had acted willfully, maliciously, fraudulently and beyond their authority, and the defendants presented no evidence that they were exercising a discretionary function. *Id.* Because the university defendants relied solely on the pleadings, the burden never shifted to the plaintiff to show that immunity did not apply. *Id.* The supreme court held that the defendants were not entitled to sovereign immunity or to discretionary-function immunity. *Id.*

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

## Summary Judgment

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

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

In addition, counsel must take care how he makes his argument to the trial court. If he intends to argue that a critical piece of evidence supporting his opponent’s summary judgment motion was not authenticated,

counsel must object in the trial court on that ground, or the objection is waived, absent a gross miscarriage of justice.<sup>25</sup>

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

Moreover, an argument to the trial court consisting of just one sentence may not be sufficient to preserve an argument for appellate review.<sup>27</sup>

## Challenges to Jurors’ Qualifications to Serve

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

## Objections to Evidence

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

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

however, that when a ruling on a motion *in limine* is “prohibitive” (i.e., prohibits the party opposing the motion from offering or mentioning the evidence at trial without obtaining permission from the judge), a proffer of evidence at trial will not be required.<sup>31</sup>

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

## Motion for a Judgment as a Matter of Law during Trial

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

Rule 60(d) of the *Alabama Rules of Civil Procedure* provides that a motion for JML “shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.”

## Jury Instructions

Submitting jury instructions is not enough to preserve error in the trial court’s failure to give those instructions.<sup>38</sup> Rule 51 of the *Alabama Rules of Civil Procedure* provides:

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

“By failing to object before the jury retires to deliberate, a party waives any error in the court’s instructions.”<sup>39</sup> With respect to the specificity of the grounds given, Rule 5 does not contemplate that the objecting party, in order to preserve for appellate review an erroneous instruction, deliver a discourse on the applicable law of the case.<sup>40</sup> On the other hand, a general objection based on “not giving the requested charges” is insufficient.<sup>41</sup>

## Post-Judgment Motions

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

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

In addition, Rule 60(b) of the *Alabama Rules of Civil Procedure* provides that to challenge the sufficiency of the evidence for sending a claim to the jury, a party must file a renewed motion for JML after the judgment is entered. In general, there

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must be a JML made at the close of the plaintiff's evidence and a renewed JML motion after judgment that makes the same arguments in order to avoid waiving the arguments.<sup>44</sup> There are two exceptions to this two-motion requirement. First, a post-judgment JML motion that challenges the sufficiency of evidence supporting an award of punitive damages does not require a JML motion at the close of the evidence.<sup>45</sup> Second, a post-judgment JML motion made regarding a pure question of law does not require a JML motion at the close of all the evidence.<sup>46</sup>

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

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

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

To challenge error made in the conduct or result of trial, a motion for a new trial must be made after the judgment. A request for remittitur (*i.e.*, to accept a lower damages amount or a new trial)<sup>51</sup> an argument regarding juror misconduct,<sup>52</sup> an argument that jury instructions were improper,<sup>53</sup> etc. should be made via a timely filed Rule 9 motion.

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

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

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

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

## Notice of Appeal

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

## Record on Appeal

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

*Federal Rule of Appellate Procedure* 0(c) (d) and (e) and *Alabama Rule of Appellate Procedure* 0(d) (e) and (f) generally provide that where a transcript or portion of the record is lost, the aggrieved party may file a motion to supplement or correct the record.<sup>61</sup> If the other party objects, however, the trial court will rule on whether any supplement or correction is warranted.<sup>62</sup> If your opponent and the trial judge fail to remember your cross-examination of the key witness the way you remember it, your case, like the record, may be lost.

## Acceptance of Payment/Benefit of Judgment on Appeal

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

## Cross-Appeal

If the appellee seeks to expand his rights beyond those provided in the trial court's judgment, the appellee generally must cross-appeal.<sup>66</sup>

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If there is dissatisfaction with any part of the judgment as entered, it may be wise to bring a cross-appeal.<sup>67</sup> No cross-appeal is required, however, if the judgment is “not really adverse to” the appellee.<sup>68</sup> Thus, for example, no cross-appeal is required where “a defendant prevails at trial and on appeal argues that the trial court improperly denied it a directed verdict.”<sup>69</sup>

## Brief on Appeal

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

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

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

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

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

Second, the argument in the brief must adequately connect the legal rule to the facts of the case. An argument is sufficient

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

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

The hospital and Pszyk do not demonstrate, they only presume, that the requirement of § 6-5-546 that an action under the AMLA be brought “in the county wherein the act or omission . . . actually occurred” likewise requires that the action be brought in the judicial division in which the act or omission actually occurred. Because the

hospital and Pszyk have not argued that § 6-5-546 requires that the Bessemer Division be treated as a separate county, they have not demonstrated a clear legal right to relief insofar as they argue that § 6-5-546 requires a transfer of the case to the Birmingham Division.<sup>82</sup>

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

In addition to making an argument that connects the legal rule to the facts in the case, if counsel wants the appellate court to overrule precedent, he must ask it to do so.<sup>84</sup> This allows for the parties to argue whether *stare decisis* should apply.<sup>85</sup>

Third, the adverse ruling by the trial court must not be harmless to the appellant. Rule 4 of the *Alabama Rules of Appellate Procedure* provides that there will be no reversal in a civil or criminal case unless “the error complained of has probably injuriously affected substantial rights of the parties.” Thus, for example, where the admission of testimony was error but not harmful to the appellant, the appellate court will not reverse.<sup>86</sup>

## Reply Brief

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

## Amicus Briefs

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

## Application for Rehearing

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

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

## Petition for Certiorari—Alabama

Issues must be set forth in the petition for certiorari and, if granted, argued in the supporting brief.<sup>93</sup> If conflict with a prior opinion is the grounds for the petition, the petitioner should quote the excerpts from the court of appeals' opinion that conflict with another prior opinion or should state that Rule 8 D 2 of the *Alabama Rules of Appellate Procedure* applies and should explain with particularity how the decision at issue conflicts with a prior opinion.<sup>94</sup>

## Petition to Certiorari—United States Supreme Court

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

## Law of the Case

Once a trial court has ruled on a matter adversely to a party, counsel for that party should appeal that ruling if his client is not prepared to live with it throughout the litigation. [A] legal

decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.<sup>97</sup> Further, if a judgment is vacated on appeal without addressing an argument raised in a party's brief, counsel for that party should raise the issue again on remand to avoid waiver in any subsequent appeal.<sup>98</sup>

## Conclusion

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

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

## Endnotes

1. This article owes much to the outstanding outline prepared by Associate Justice Bernard Harwood of the Supreme Court of Alabama, J. Bernard Harwood, *Preserving Error in Civil Cases*, CLE Outline (Dec. 17, 2004) [hereinafter "*Harwood*"], to a joint outline the author prepared with Associate Justice Harold See, Harold See and Ed Haden, *Preventing Waiver in Civil Cases*, CLE Outline (Feb. 9, 2007) [hereinafter "*See & Haden*"]; and to the assistance of Kristin Henson, an associate at Balch & Bingham LLP.
2. See, e.g., *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 625-29 (1st Cir. 1995) (listing considerations that might affect the general rules of waiver); *See & Haden*, at 2-3.
3. See *Ex parte Elba Gen. Hosp.*, 828 So. 2d 308, 314 (Ala. 2001) (internal quotations omitted) ("[F]airness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond . . ."); *Harwood*, at 1-2.
4. See, e.g., *Selma Med. Ctr., Inc. v. Fontenot*, 824 So. 2d 668, 693 (Ala. 2001) (Woodall, J., dissenting) (stating that "the Hospital did not present a flow-of-commerce argument to the trial court," where the majority ruled on that issue).
5. See generally *Crutcher v. Wendy's of North Ala., Inc.*, 857 So. 2d 82, 97 (Ala. 2003).
6. See, e.g., *Byrd v. Lamar*, 846 So. 2d 334, 341 (Ala. 2002) ("Because Byrd did not properly allege a fraudulent-misrepresentation claim in his complaint, we affirm the summary judgment . . .").
7. See *Ammons v. Tesker Mfg. Corp.*, 853 So. 2d 210, 216-18 (Ala. 2002) (affirming trial court's allowance of amendment of pleadings).
8. See Ala. Code § 6-6-227 (2005).
9. See *Terry v. City of Decatur*, 601 So. 2d 949, 950-51 (Ala. 1992).
10. See Ala. Code § 11-47-23 (1992).
11. See *Birmingham v. Davis*, 613 So. 2d 1222, 1224 (Ala. 1992) ("The Davis's claims are barred because the City of Birmingham was not given notice within six months of the accrual of those claims.").
12. See *Foster v. Foster*, 709 So. 2d 1301, 1302 (Ala. Civ. App. 1998) (addressing the defense of lack of personal jurisdiction).
13. *Id.*
14. See *Ex parte McInnis*, 820 So. 2d 795, 798 (Ala. 2001).

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15. See *Ex parte Puccio*, 923 So. 2d 1069, 1077 (Ala. 2005) (denying mandamus relief to defendant on a challenge to personal jurisdiction but noting that defendant could try again if further discovery demonstrated that personal jurisdiction did not exist).
16. *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So. 2d 759, 765 (Ala. 2004) (stating that "review by a petition for a writ of mandamus is not the sole means of review available to a party whose jury demand has been denied").
17. Rule 21(a)(3), Ala. R. App. P. ("If a petition is filed outside this presumptively reasonable time [i.e., generally 42 days], it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition . . .").
18. See *Ex parte Troutman Sanders, LLP*, 866 So. 2d 547, 549-50 (Ala. 2003).
19. *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 777 (Ala. 2004).
20. *Wallace v. Alabama Ass'n of Classified Sch. Employees*, 463 So. 2d 135, 136-37 (Ala. 1984).
21. See *Winkleblack v. Murphy*, 811 So. 2d 521, 530 (Ala. 2001).
22. *Id.*
23. See *Turner v. Westhampton Court, LLC*, 903 So. 2d 82, 88 (Ala. 2004) ("Because the [appellants] failed to raise before the trial court [at the summary judgment stage] the only argument that they raise on appeal . . . they have waived that argument, and we will not address it.").
24. *Liberty Nat'l Life Ins. Co. v. Univ. of Alab. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003) (citations omitted).
25. See *Kelly v. Panther Creek Plantation, LLC*, 934 So. 2d 1049, 1053 (Ala. 2006).
26. See *Stokes v. Ferguson*, No. 1031956, 2006 WL 2383249, at \*2 (Aug. 18, 2006).
27. See *TFT, Inc. v. Warning Sys., Inc.*, 751 So. 2d 1238, 1243 (Ala. 1999) (holding that one-sentence assertion in trial brief was insufficient to preserve argument for appeal).
28. See *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).
29. See *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 52 (Ala. 2001).
30. *Owens-Corning Fiberglass Corp. v. James*, 646 So. 2d 669, 673 (Ala. 1994); see also *Stamp v. Jackson*, 887 So. 2d 274, 279 (Ala. Civ. App. 2003) (same); *Harwood*, at 2-6.
31. Charles Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age*, 33 Ala. L. Rev. 1, 16 (1981). See *Harwood*, at 10-13 (quoting *Boros v. Baxley*, 621 So. 2d 240, 244 n.3 (Ala.) (quoting, in turn, Gamble), cert. denied, 510 U.S. 997, 114 S. Ct. 536 (1993)); see also *Ex parte Sysco Food Servs. of Jackson, LLC*, 901 So. 2d 671, 674 (Ala. 2004).
32. See, e.g., *Bostrom Seating, Inc. v. Adderhold*, 852 So. 2d 784, 797-98 (Ala. Civ. App. 2002) ("The failure of a party to make an objection at trial waives that objection."); *Harwood*, at 2-6.
33. See *Evans v. Fruehauf Corp.*, 647 So. 2d 718, 719-20 (Ala. 1994) (holding that a party must offer contested evidence at trial "and obtain a specific adverse ruling in order to preserve the issue for appellate review").
34. *Nichols v. Southeast Prop. Mgmt., Inc.*, 576 So. 2d 660, 662 (Ala. 1991).
35. See *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 774 (Ala. 2004).
36. See *Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 561 (Ala. 2002).
37. *Id.*
38. See *Regions Bank v. Plott*, 897 So. 2d 239, 246 (Ala. 2004).

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39. *Adriatic Ins. Co. v. Willingham*, 567 So. 2d 1282, 1282 (Ala. 1990) (citations omitted).
40. *Ware v. Timmons*, No. 1030488, 2006 WL 1195870 (Ala. May 5, 2006). See Rule 51, Ala. R. Civ. P. cmt. ("Grounds must be stated in other than general terms but the requirement of 'distinctly' stating grounds as is required by the federal rule, has not been preserved. The word 'distinctly' has been deleted not for the purpose of opening the door for general objections, but rather, to avert undue requirements of specificity under an unnecessarily technical appellate construction of the word 'distinctly.'").
41. *Northeast Ala. Reg'l Med. Ctr v. Owens*, 584 So. 2d 1360, 1364 (Ala. 1991).
42. See *Green v. Taylor*, 437 So. 2d 1259, 1260 (Ala. 1983) (stating that "[b]ecause the Greens did not timely file a motion to set aside the dismissal of their action, the question of whether the trial court erred in that regard is not properly before us" and holding that "other issues presented for our review cannot be considered because they are of an interlocutory character").
43. See *id.*
44. 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2357, at 344-45 (2d ed. 1995).
45. *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1032 (Ala. 1993), *cert. denied*, 511 U.S. 1128, 114 S. Ct. 2135 (1994).
46. *A.T. Stephens Enters., Inc. v. Johns*, 757 So. 2d 416, 419 (Ala. 2000) (allowing a ruling on a JML motion made at the close of the plaintiff's evidence where there was not a JML motion made at the close of all the evidence and stating "issues relating to the sufficiency of the evidence require a motion at the conclusion of all the evidence, but issues relating to pure questions of law do not").
47. *Harris*, 630 So. 2d at 1027.
48. *BellSouth Mobility, Inc. v. Cellulink, Inc.*, 814 So. 2d 203, 213 (Ala. 2001).
49. Justice Champ Lyons, Jr. & Deborah Alley Smith, *Post-Judgment Motions*, CLE Outline, at 6-7 (Feb. 2005).
50. *Ex parte James*, 764 So. 2d 557, 559 (Ala. 1999).
51. Rule 59 (f), Ala. R. Civ. P.
52. See *Keibler-Thompson Corp. v. Steading*, 907 So. 2d 435, 443 (Ala. 2005).
53. See *Parker Bldg. Serv. Co., Inc. v. Lightsey*, 925 So. 2d 927, 933 (Ala. 2005).

54. *Johns*, 757 So. 2d at 421.
55. See *Green Tree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366, 1369-70 (Ala. 1988).
56. See, e.g., *Pope v. MCI Telecomm. Corp.*, 937 F.2d 258, 266 (5th Cir. 1991) ("[W]hen an appellant chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.") (internal quotation marks omitted), *cert. denied*, 504 U.S. 916, 112 S. Ct. 1956 (1992).
57. See Rule 3(c), Ala. R. App. P. ("The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Such designation of judgment or order shall not, however, limit the scope of appellate review."); see also *Clements v. Webster*, 425 So. 2d 1058 (Ala. 1982) (stating that notice of appeal did not limit appeal to either final judgment or order denying new trial).
58. See *Empiregas, Inc. of Ardmore v. Hardy*, 487 So. 2d 244, 251 (Ala. 1985) ("[T]his Court will not assume error, and the burden is on the appellant to affirmatively demonstrate from the record that an error was committed by the trial court.") (Internal quotation marks omitted), *cert. denied*, 476 U.S. 1116, 106 S. Ct. 1973 (1986).
59. See *Smith v. Village of Maywood*, 970 F.2d 397, 399 (7th Cir. 1992) (after court of appeals denied appellee's motion to dismiss appeal for appellant's late filing of transcript, appellee had burden to supplement record to support her position).
60. *United States v. Coveney*, 995 F.2d 578, 586-88 (5th Cir. 1993).
61. See *Perkins v. Perkins*, 465 So. 2d 414, 415 (Ala. Civ. App. 1984) ("When the official record is unavailable, reconstructions of the record on appeal by the parties is an accepted procedure.").
62. See Rule 10(c), Fed. R. App. P.; Rule 10(d), Ala. R. App. P.; *Pickett v. Pickett*, 792 So. 2d 1124, 1126 (Ala. Civ. App. 2001) ("No Alabama caselaw addresses whether a party to an appeal may challenge a trial court's approved statement of the evidence.").
63. *Bentley Sys., Inc. v. Intergraph Corp.*, 922 So. 2d 61, 70 (Ala. 2005).
64. *Rice v. State Farm Fire & Cas. Co.*, 578 So. 2d 1064, 1064-65 (Ala. 1991).
65. *Bentley Sys.*, 922 So. 2d at 70.
66. See 19 Moore's Federal Practice § 205.04[2] (3d ed. 2004) ("If an appellee argues error below that calls into question the merits of the judgment, that claim must be made by cross-appeal; if an appellee merely urges affirmance of the judgment, even though based on arguments made in the alternative or rejected or ignored below, no cross-appeal is necessary."); see also *El Paso Natural Gas Co. v. Neztosias*, 526 U.S. 473, 479, 119 S. Ct. 1430, 1435 (1999); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1926); *Ex parte P&H Constr. Co.*, 723 So. 2d 45 (Ala. 1988).
67. See *id.* 19 Moore's Federal Practice § 205.04[2] (3d ed. 2004).
68. *Compare Hawkins v. League*, 398 So. 2d 232, 235 (Ala. 1981) (holding that a cross-appeal was not required of an issue "not really adverse to" the appellee), *with Hitt v. State of Ala. Pers. Bd.*, 873 So. 2d 1080, 1088 (Ala. 2003).
69. *Williams v. BIC Corp.*, 771 So. 2d 441, 445 (Ala. 2000).
70. *Smith v. Equifax Servs., Inc.*, 537 So. 2d 463, 465 (Ala. 1988).
71. *Id.*
72. *Hinds v. Hinds*, 887 So. 2d 267, 272 n.2 (Ala. Civ. App. 2003).
73. See *Harris v. State*, 23 So. 2d 514 (Ala. 1945); see also *Keith v. City of Birmingham*, 49 So. 2d 227 (Ala. 1950); 5 Am Jur. 2d *Appellate Review* § 616 (1995); cf. United States National Institute of Trial Advocacy commentary Fed. R. App. P. 28 ("An issue not raised in appellant's opening brief may be deemed waived—mentioning it in a footnote is not enough!").
74. *Reynolds v. Colonial Bank*, 874 So. 2d 497, 503 (Ala. 2003) (holding that the absence of subject matter jurisdiction may be raised for the first time on appeal); see also *Bowdoin v. State*, 884 So. 2d 865, 867 (Ala. Civ. App. 2003) ("While no party on appeal raised this issue to this court, issues of jurisdiction are of such magnitude that this court can consider them *ex mero motu*"). But see *Jefferson County Comm'n v. ECO Preservation Servs., L.L.C.*, 788 So. 2d 121, 127 (Ala. 2000) (overruling application for rehearing and reasoning that "[t]his lack-of-jurisdiction argument was not raised before the trial court or before this Court on original submission").
75. *Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251, 1253 (Ala. 1983). See *Totten v. Lighting & Supply, Inc.*, 507 So. 2d 502, 503 (Ala. 1987) ("[T]his Court is not under a duty to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to an appeal.").
76. *Kyser v. Harrison*, 908 So. 2d 914, 917 (Ala. 2005) (internal quotation marks omitted).
77. See *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 94, 93 So. 548, 555 (1921) ("The plumbing company's defense was conducted separately, and these appellants have no right to the benefit of an objection taken [o]n behalf of the plumbing company only.")
78. *Bentley Sys., Inc.*, 922 So. 2d at 85.

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79. See, e.g., *Adams-Arapahoe Joint Sch. Dist. v. Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) ("An issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal.").
80. See *Callaway v. Whittenton*, 892 So. 2d 852, 858 (Ala. 2003).
81. *Ex parte Children's Hosp. of Ala.*, 931 So. 2d 1, 8 (Ala. 2005).
82. *Id.*
83. *Spradlin v. Spradlin*, 601 So. 2d 76, 78-79 (Ala. 1992).
84. See *Ex parte Hanna Steel Corp.*, 905 So. 2d 805, 808 (Ala. 2004).
85. *Id.* at 810 (Lyons, J., concurring in result).
86. See *Chandler v. State*, 910 So. 2d 108, 112 (Ala. Civ. App. 2004) (holding in condemnation of land case, "we conclude that the trial court's admission of Clemmons's testimony amounted to harmless error and that, therefore, the judgment based on the jury's verdict is due to be affirmed").
87. *Giambone v. Douglas*, 874 So. 2d 1046, 1057 (Ala. 2003) ("[I]t is well-settled that [an appellant] may not raise an issue for the first time in a reply brief filed on appeal.").
88. See *Jackson v. Nicholson*, No. 04-7116, 2005 WL 466065, \*3-\*4 (Fed. Cir. Mar. 1, 2005); Charles Alan Wright, *et al.*, 16A Federal Practice & Procedure § 3974.3 (3d ed. 1999) ("[A] reply brief is allowed . . . to address new issues raised in the appellee's brief . . .").
89. See *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (holding appellant waived argument where its reply brief failed to respond to appellee's contrary assertions and did not otherwise point to any evidence disputing those assertions).
90. See *Anderson v. Smith*, 148 So. 2d 243, 245 (Ala. 1962) (because "[a]n amicus curiae is limited to the issues made by the parties to a suit," an issue waived by aggrieved party "cannot be injected" by amicus into appellate proceedings).
91. Rule 29, Ala. R. App. P. ("The [amicus] brief shall follow the form prescribed for the brief of an appellee.").
92. See *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347, 351-52 (Ala. 1997).
93. *Kelley v. Osborn*, 113 So. 2d 192, 192 (Ala. 1959); Rule 39(b)(4), Ala. R. App. P.
94. See 39(a)(1)(D), Ala. R. App. P.
95. *Howell v. Mississippi*, 543 U.S. 440, 444, 125 S. Ct. 856, 859 (2005).
96. *Id.*
97. *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). See *Yates v. El Bethel Primitive Baptist Church*, 847 So. 2d 331, 333 (Ala. 2002). But see *Ex parte Third Generation, Inc.*, 855 So. 2d 489, 491 n.4 (Ala. 2003) ("[O]ne of the difficulties with TGI's law-of-the-case argument is *Ala. Code* 1975, § 12-2-13, which appears to negate any binding effect of the 'law-of-the-case' doctrine as it applies to this Court. . . .").
98. *United States v. Smith*, 401 F.3d 497, 498-99 (D.C. Cir. 2005) (stating that the defendant's "election not to re-raise the challenge below means that he has failed to preserve it for appellate review.").
99. See Rule 1, Ala. R. App. P., cmt. ("As is the case with the ARCP, it is the policy of these rules to disregard technicality and form in order that a just, speedy and inexpensive determination of every appellate proceeding *on its merits* may be obtained.") (Emphasis added.)



**Ed R. Haden**

Ed R. Haden is a partner in the Birmingham office of Balch & Bingham LLP. Before joining the firm, he served as the Nominations and Constitutional Law Counsel on the U.S. Senate Judiciary Committee for Chairman Orrin Hatch and as Chief Counsel of the Courts Subcommittee for Senator Jeff Sessions. Haden also clerked for the Honorable E. Grady Jolly of the U. S. Court of Appeals for the Fifth Circuit and served as a staff attorney for the Honorable Harold See of the Supreme Court of Alabama.



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Attendees of the recent American Bar Association's Bar Leadership Institute included, front row, left to right, Karen J. Mathis, ABA president; Samuel Crosby, Alabama State Bar president-elect; Beth Carmichael, Birmingham Bar Association executive director; Kathleen Miller, Mobile Bar Association president; and Lee Benton, BBA president-elect. Behind them are Ian Gaston, MBA president-elect; Keith Norman, ASB executive director; and William Neukom, ABA president-elect.

- Joining some 300 other emerging leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI) in March was **Samuel N. Crosby** of Daphne, president-elect of the Alabama State Bar.

The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer organizations and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff and other experts on the operation of such associations. Crosby joined ABA President Karen J. Mathis of Denver and ABA President-Elect William H. Neukom of Seattle in sessions on bar governance, finance, communications and planning for a presidential term.

- The **Honorable Alan King**, probate judge of Jefferson County, has made the following appointments:

**Doris H. Williford** will serve as the county administrator for Jefferson County. She is a member of the Birmingham Bar Association and the Alabama State Bar, as well as the ASB Elder Law Section.



Williford

**Julia Smeds Roth** will serve as the county guardian and conservator for

Jefferson County. Roth is a member of the American Bar Association, the Alabama State Bar and the Birmingham Bar Association.



Roth

- Haskell Slaughter Young & Rediker LLC announces that **R. Scott Williams** has been elected to the board of directors of the American Bankruptcy Institute.

The firm also announces that **Romaine S. Scott, III** has been named as 2007-08 co-chair for the Uniform Commercial Code Committee of the American Bankruptcy Institute. As a co-chair, he will help produce committee programs at the ABI's 2007 Winter Leadership Conference and the 2008 Annual Spring Meeting. With more than 1,000 members, the ABI is the largest multi-disciplinary, non-partisan organization dedicated to research and education on matters related to insolvency.



Williams



Scott

- Sirote & Permutt shareholder **Katherine N. Barr** was recently invited to become a Fellow of the American College of Trust and Estate Counsel, one of only 28 attorneys in Alabama to achieve this distinction.



Barr


- Former state Senator **Bradley Byrne**, a Republican from Fairhope, has been appointed chancellor of the state's two-year college system. Byrne formerly practiced with the Mobile firm of Adams & Reese. **Richard P. Carmody**, a partner at Adams & Reese, has been appointed to serve a two-year term on the 11<sup>th</sup> Circuit Admissions Council of the American College of Bankruptcy. A Circuit Admissions Council is appointed for each of the 11 federal judicial circuits and is responsible for the review and evaluation of prospective Fellows and for recommending them to the Board of Regents for election to the college. He is the only attorney in Alabama currently serving on this council.



Byrne



Carmody

- **Faulkner University's Jones School of Law** won the St. Louis regional competition with an undefeated 5 0 record at the American Bar Association's National Appellate Advocacy Competition. The Jones 2007 National Appellate Advocacy Team consists of third-year law student John Craft from Montgomery, and second-year law students Christy Olinger from Selma and Matt Bell from Broken Arrow, .
- **Cooper and Christine Shattuck** recently received the Order of the Samaritan, the highest honor from the University of



Cooper and Christine Shattuck

Alabama School of Law's Public Interest Institute for their work with Hurricane Katrina victims. Christine is a graduate of the University of Alabama and is a paralegal at RosenHarwood. She also serves as executive director of the Tuscaloosa County Bar Association. Cooper is a partner at RosenHarwood and a graduate of the University of Alabama School of Law. He serves as an adjunct professor there, as well as on the ASB Board of Bar Commissioners. After being approached by Professor Kuehn, director of the Law School's Clinical Program, Cooper and Christine began a program where law students, under the supervision of local attorneys, would volunteer time to assist evacuees with legal problems arising from the hurricane or exacerbated by it. They recruited enough attorneys to supervise approximately 100 students involved in the program.

- Historic Savannah Foundation announces that **Mark C. McDonald** was selected from a nationwide pool of arts leaders to participate in a two-week intensive leadership advancement program called the Executive Program for Nonprofit Leaders-Arts at Stanford University.



McDonald

Each year, National Arts Strategies (NAS), a national nonprofit organization dedicated to strengthening the arts and culture sector through leadership education, selects 50 outstanding arts and culture leaders to participate in EPNL-Arts through a competitive process based on nominations from leading foundations, corporations and individual arts patrons.

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NAS was founded over 20 years ago by the Ford, Rockefeller and Mellon foundations. For more information, visit [www.artstrategies.org](http://www.artstrategies.org).

- Samford University's Cumberland School of Law honored attorneys **J. Anthony McLain** and **George Courtney French**, and retired Cumberland professor **Frank W. Donaldson** during a March alumni weekend event.



McLain

McLain, general counsel for the Alabama State Bar, was named 2007 Distinguished Alumnus. The 1977 Cumberland graduate was cited for his leadership of the state bar and his emphasis on ethical advocacy. He is a past president of the Cumberland National Alumni Association and a member of the law school advisory board.

French, a partner in the Birmingham firm of Fuston, Petway & French, was named Volunteer of the Year. A 1998 Cumberland graduate, French was cited for his role as a counselor, coach and mentor, and in recruiting and inspiring minority students at Cumberland.

Donaldson, a Cumberland professor for more than 40 years and a former U.S. Attorney for the Northern District of Alabama, was named Friend of the Law School. He was noted as being a "stalwart of civility" who has shown many how to be better people and lawyers.

The awards were presented by Cumberland Dean John L. Carroll.

Also at the event, Birmingham attorney **J. Mark White** was named Cumberland National Alumni President for 2007-09. A 1974 law graduate, he is a partner in the firm of White, Arnold, Andrews & Dowd, PC.



White



J. Anthony McLain

## Name of a Law Firm May Not Contain the Names of Members of the Law Firm Who Are **Not Partners**

**U**nder old DR 1-102(C), a lawyer could not hold himself out as having a partnership unless the lawyers were, in fact, partners. Rule 7.5 of the current *Alabama Rules of Professional Conduct* did not expressly prohibit the false implication in advertising that a partnership existed.

### QUESTION:

With the current rule in mind, can the name of a law firm contain the names of members of the firm who may not be partners?

Alternatively, can the name of a law firm contain the names of members who are compensated by a percentage of their gross income produced for the firm rather than by strict salary?

### ANSWER:

The name of a law firm may not contain the names of members of the law firm who are not partners. Further, the name of the law firm may contain the names of members who are compensated by a percentage of their gross income produced for the firm rather than by strict salary, if they are partners.

### DISCUSSION:

Rule 7.4 of the *Alabama Rules of Professional Conduct*, states:

“A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

Rule 7.5(a), A.R.P.C., states, in part, that:

“A lawyer shall not use a firm name letterhead, or other professional designation that violates Rule 7.1.”

While Alabama did not adopt the provisions of Model Rule 7.5(d) which expressly prohibited the false implication in advertising that a partnership or organization of lawyers existed, prior opinions of the Disciplinary Commission have effectuated just such a prohibition. Further, the language of Model Rule 7.4 seems to be superfluous since any misleading designation would be prohibited either by Rule 7.1 or 7.5(a).

In Ethics Opinion 9 1 the Disciplinary Commission held that three attorneys who were not partners in the classical sense, i.e., sharing in fees billed to the firm's clients and also sharing in responsibility and liability, could not use their last names as a firm name since the same would be misleading and therefore unethical.

In RO-8- 5 the Disciplinary Commission held that an attorney and an associate who had not been admitted to the Alabama State Bar could not ethically open a bank account in the name of "A and B, Attorneys." The commission reasoned that while the proposed style of the bank account would be circulated to and observed by a limited segment of the public and thus not be as deceptive to the general public as would a letterhead or professional announcement, it would still be deceptive and misleading.

In RO-8 6 the Disciplinary Commission held that the use of an associate's name in the firm name, letterhead, billing, etc.,

was impermissible since the lawyer and associate were not entering into a formal partnership, financial or otherwise, thus making use of the firm name (including the associate's name) deceptive and misleading to the public. The commission qualified its holding by stating that if the lawyer and the associate were entering into arrangements where there would not be a partnership in the traditional classical sense, the associate's name could appear upon the letterhead, but not in the firm name. The South Carolina Bar, in opinion 86-12, held that a firm may not use an associate's name in the firm name because the relationship is not a partnership and could mislead the public.

Discussion of this issue should also include some mention of the use of trade names by a firm. Former EC 2-1 stated that:

"The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility and status of those

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practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.

For many years, some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.”

Further, Rule 7.5 of A.R.P.C., states, in part:

“A trade name may be used by a lawyer in private practice if it does not imply a connection with a government

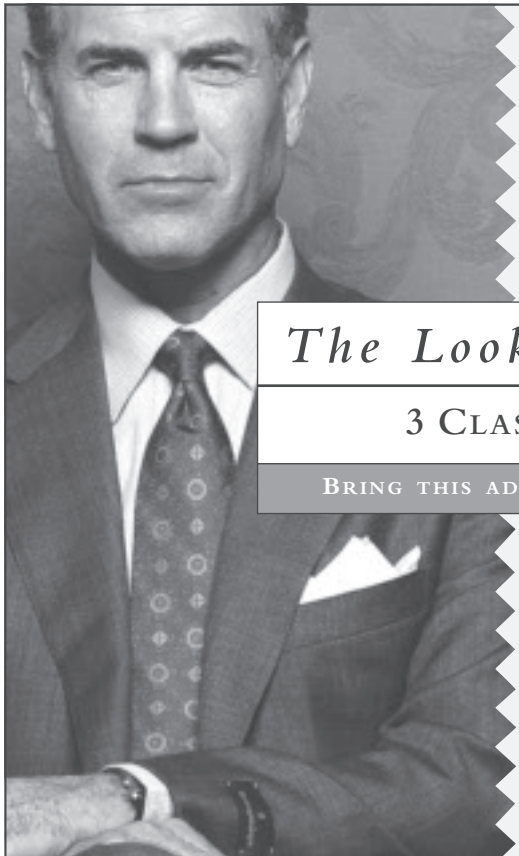
agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4.”

The Comment to Rule 7.5 shows the continuation of the policy of allowing the use of the name of a deceased partner in the firm name since such would constitute a trade name.

Interpretation of Rule 7.5 also recognizes that many traditional law firms bear the names not only of deceased partners, but former partners, not deceased, who are retired, “Of Counsel” or may have relinquished their position as a partner in the firm but are still a firm member. The continued use of this traditional name is obviously not misleading under such circumstances, and in no way violates the true spirit of the intent of Rule 7.5.

Lawyers should take care to be clear about the organization or entity of which their practice consists. The danger to be avoided is the possible misleading or deceiving of the general public as to the identity, status and responsibility of lawyers within the firm.

The situation proposed in the alternative question would likewise be governed by the above reasoning and authorities. R O  
9 04



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## 2007 Regular Session of the Legislature Status Report

	2004	2005	2006	2007
<b>BILLS INTRODUCED</b>	1397	1237	1431	1382
<b>Senate</b>	549	420	591	511
<b>House</b>	848	817	840	871
<b>BILLS PASSED</b>	317	327	655	12
(Local / one agency)				
<b>General Application</b>	25	6	250	3
<b>Resolutions</b>	1863	1781	1461	1098

*Entire session: 2004, 2005, 2006 • Two-thirds session: 2007*

At the writing of this article, the legislature is two-thirds of the way through the session. A comparison of how this year stacks up against the previous three years is indicated in the chart above.

The house has continued to move in a methodical way, having passed both the General Fund budget and the Special Education Trust Fund budget and granting pay raises to both teachers and state employees. The only items that have been adopted in both houses include HB-68, the Annual Codification Bill that officially places the previous year's acts in the *Code of Alabama*; HB-141, an appropriation to the Enterprise School System to rebuild their schools devastated by the hurricane earlier this year; HB-664 which provides economic incentives to industries that will employ 2,000 employees onsite and who makes a \$2.5 billion investment in Alabama; and, finally, HB-62, permitting firearm sales to nonresidents.

Many of the major items talked about during the election have yet to make it into law. Bills that have passed the house of representatives are a ban on PAC-to-PAC Transfers, permitting Sunday liquor sales in Class 4, 5 and 6 cities, Environmental Covenants Act and Apportionment of Estate Taxes.

Other high visibility items that have not passed either one of the houses include the state bar's merit selection of judges, the chief justice's bill on merit selection of judges for filling vacancies by the governor and non-partisan election of judges.

A supreme court committee has proposed a new "Children's Code" for Alabama but it is yet to be considered by either house. Other more highly visible items, such as prohibition of annual property appraisals, a new Open Records Act, a billion-dollar school bond issue and a moratorium on the death penalty have yet to be acted upon.

Of the 12 lawyers in the house of representatives, six of them are in their first four years, these being Representatives **Paul DeMarco, Tammy Irons, Chris England, Marc Keahey, Benjamin Lewis, and Earl Hilliard**. The senate newcomers are Senators **Arthur Orr, Bobby Singleton and Ben Brooks**. All are making an immediate impact on the legislature.

The following bills have passed one house of the legislature and are on the calendar of the second house, needing only a vote in the second house to become law.

- HB-56 Uniform Estate Tax Apportionment Act;
- HB-9 Ethics Training for public officials;
- HB-6 Banking Department further regulates where banks may be placed in businesses;
- HB-84 Administrative Procedure Rules will be reviewed every five years if they affect small businesses;
- HB-07 Alternate poll workers;
- HB-8 Electioneering Communications and paid political advertising require a disclosure of source of funding;
- HB-120 PAC-to-PAC Transfers
- HB-122 Ethics Law amended to define a lobbyist to include persons attempting to influence no bid contracts;
- HB-139 Change in County Commissioners' terms;
- HB-167 Competitive Bid Limit increased;
- HB-180 Funding appropriated to repair Judicial Building housing the Supreme Court;
- HB-224 Internet solicitation of children made a crime;


- HB-242 Requirement for a professional engineer to be licensed in Alabama before they can testify in court is deleted;
- HB-3 Write-in candidates in elections must register with Judge of Probate or Secretary of State prior to election;
- HB-358 Presidential preference primary Election Date when held on Mardi Gras to allow early voting in Mobile County;
- HB-9 To permit video testimony of child victims of sexual offense;
- HB-542 Revision of Article XII of the Constitution—Private Corporations; and
- HB-543 Revision of Article XIII of the Constitution—Banking.

The annual meeting of the Alabama Law Institute will be held during the Alabama State Bar's Annual Meeting on Friday, July 20, from 10:00 a.m. to 1:00 a.m., at the Grand Hotel in Point Clear. The topic of discussion will be "Alabama Industrial Development Incentives."

For more information, contact Bob McCurley, director, Alabama Law Institute, at P.O. Box 85 Tuscaloosa 35486-0085 fax 205 888 7474 phone 205 888 7474 Website [www.ali.state.al.us](http://www.ali.state.al.us)

**Robert L. McCurley, Jr.**

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



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# About Members, Among Firms

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

## About Members

**John Alley** announces the opening of his office at 1695 East University Dr., Ste. 101, Auburn 36830. Phone (334) 887-3600.

**Steven M. Brom** announces the opening of **The Brom Law Firm LLC** at 1 Chase Corporate Dr., Ste. 400, Birmingham 35244. Phone (205) 313-6455.

**Naomi G. Drake** announces the opening of **Naomi G. Drake PC** at 2210 Main St., Ste. B, Daphne 36526. Phone (251) 621-8734.

**Michael H. Johnson** announces the opening of the **Law Office of Michael H.**

**Johnson LLC** at 1130 22<sup>nd</sup> St. S., Ste. 3500, Birmingham 35205. Phone (205) 949-0115.

**Steven F. Long** announces the opening of his firm at 701 Lay Dam Rd., Clanton 35045. Phone (205) 280-4211.

**N. DeWayne Pope** announces the opening of **DeWayne Pope LLC** at The Steiner Building, 15 Richard Arrington Jr. Blvd. N., Ste. 301, Birmingham 35242 and his *of counsel* association with **Red Mountain Law**. Phone (205) 328-9445.

**Frank Hilton-Green Tomlinson** announces the opening of his office at The Steiner Building, 15 N. 21<sup>st</sup> St., Ste. 302, Birmingham 35203. Phone (205) 326-6626.

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## Among Firms

Adams & Reese LLP announces that Stephen A. Rowe has been named partner in charge of the Birmingham office.

American Appraisal Associates announces that Michael A. LeBrun has joined the company, located at 2839 Paces Ferry Rd. SE, Ste. 400, Atlanta 30339. Phone (404) 233-0503.

Attorney General Troy King announces that Tina M. Coker is now an assistant attorney general with the Capital Litigation Division, Ben M. Baxley is now an assistant attorney general with the Public Corruption and White Collar Crime Division, Andrew D. Arrington is now an assistant attorney general with the Violent Crimes Division and Richard D. Anderson is now with the Capital Litigation Division.

Peter H. Burke, W. Todd Harvey and Richard S. Frankowski have formed Burke, Harvey & Frankowski LLC at One Highland Place, 2151 Highland Ave., Ste. 120, Birmingham 35205. Phone (205) 930-9091.

Burr & Forman LLP announces that Sonya E. Eubank has joined the firm as an associate.

Carr Allison announces that Thomas S. Creel and Jeremy P. Taylor have been named shareholders, and William P. Lawler, Adam V. Vickers, Ann H. Weissmann, Brandi M. Kellis, Darren W. Kies, Missy Torgerson, Grahame M. Read, and Ben R. Graves have joined the firm as associates.

Fees & Burgess PC announces that Ryan G. Blount has become associated with the firm.

Lucian Gillis, Jr. announces the formation of Gillis & Creasy LLC in Atlanta.

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# About Members, Among Firms

Continued from page 321

Haskell Slaughter Young & Rediker LLC announces that Stanley Pollock has joined the firm of *counsel*.

Hoiles, Dasinger & Hollon PC announces that S. Russ Copeland has joined the firm.

Infirmiry Health System officials announce the association of E. Watson Smith as general counsel.

Dagney Johnson Walker and Kathleen Dinneen Johnson announce the opening of Johnson & Walker LLC at 2100 3<sup>rd</sup> Ave., N., Ste. 810, Birmingham 35203. Phone (205) 254-3143.

King & Spalding LLC announces that Adam G. Sowatzka has joined the firm of *counsel*.

Laney & Foster PC announces that Forrest L. Adams, II has been named a shareholder and John C. DeShazo has joined as an associate.

Lanier Ford Shaver & Payne PC announces that Angela Holt and George Kobler have become shareholders.

Missy Homan Hibbett announces her election as the circuit court clerk for Lauderdale County.

Legal Services Alabama announces that Adam Bourne has joined the Mobile office.

Lentz, Whitmire, House & Propst LLP announces that Christy Wallace Richardson has joined the firm as an associate.

Ludlum, Gil & Hilboldt LLC announces that Robert I. Hinson has joined the firm as an associate.

Maynard, Cooper & Gale PC announces that former Alabama Supreme Court Chief Justice Drayton Nabers Jr. has joined the firm as a shareholder.

Thomas W. McCutcheon and Joel R. Hamner announce the formation of

McCutcheon & Hamner PC at 226 West Alabama St., Florence 35630. Phone (256) 764-0112.

Meacham Early & Fowler PC announces that Lindsay B. Erwin has joined the firm as an associate.

Penn & Seaborn LLC announces that John William Partin has joined the firm as an associate.

Phelps, Jenkins, Gibson & Fowler LLP announces that Robert S. Plott has been named partner.

Laura J. Crissey announces that she has joined Regions Morgan Keegan Trust as vice president and trust officer in the Tuscaloosa office located at 800 22nd Ave., Tuscaloosa 35401.

Steiner, Crum & Byars PC announces that Henry J. Walker Jr. has joined the firm of *counsel*.

Stewart Howard PC announces that Andrea McClellan Dowdy has joined the firm as an associate.

Glennon F. Threatt and Nakita R. Blocton announce the formation of Threatt & Blocton LLC at Two N. 20<sup>th</sup> St., Ste. 920, Birmingham 35203. Phone (205) 251-8747. The firm also announces that Rodney F. Barganier is of *counsel* and Nyaa Parson-Hudson has joined as an associate.

Gregory E. Vaughan and Ron A. Address, Jr. announce the formation of Vaughan Address LLC at 61 St. Joseph St., Ste. 903, Mobile 36602. Phone (251) 432-8883.

White Arnold Andrews & Dowd PC announces that Laura Gibson Chain has joined the firm as an associate.

Don F. Wiginton and Denise P. Wiginton announce the formation of Wiginton & Wiginton Attorneys At Law at #3 Office Park Circle, Ste. 240, Birmingham 35223-2513. Phone (205) 942-9233. ■



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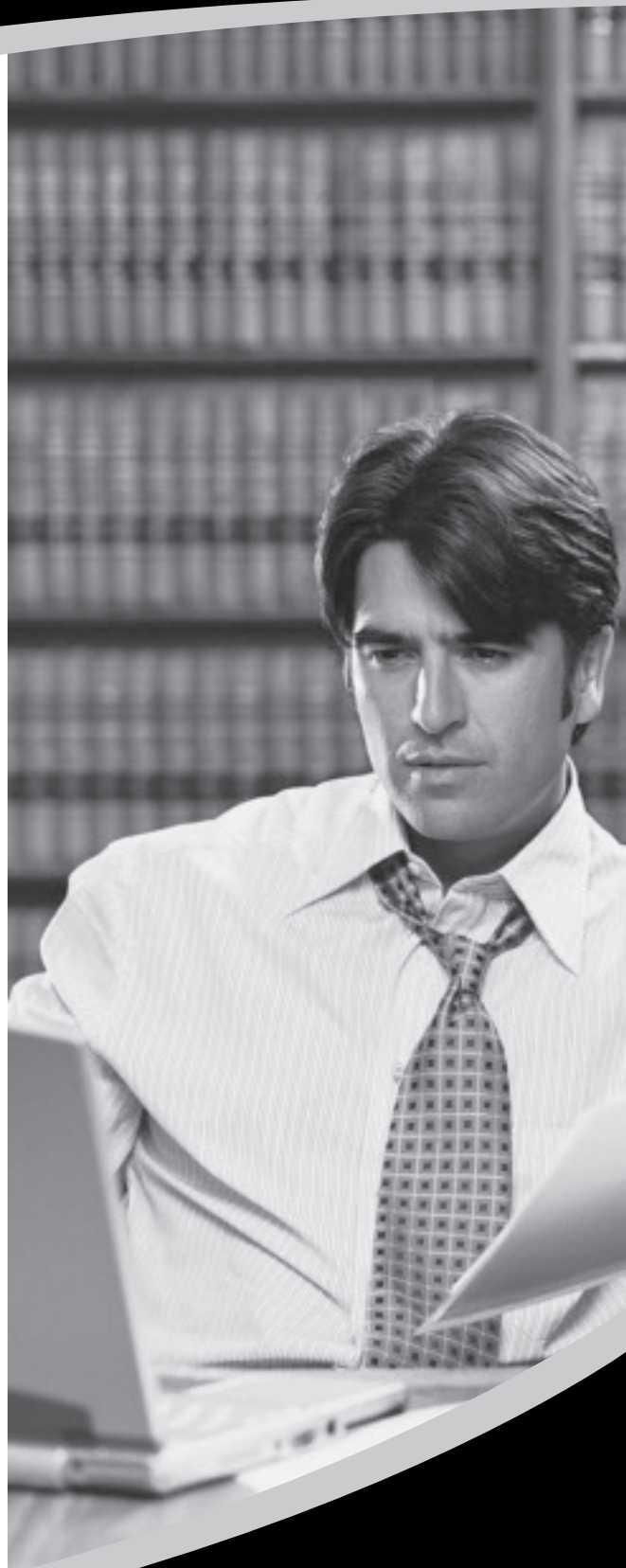
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