

JULY 2008 • VOL. 69, NO. 4

THE ALABAMA LAWYER



H. THOMAS WELLS, JR.
PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

page 239

Celebrate Our Success!

On July 1, 2008, AIM started its nineteenth year of providing malpractice insurance with stable rates and quality coverage. It is dedicated to serving only Alabama lawyers.



Isn't it time you **JOINED THE MOVEMENT** and insured with AIM?

AIM: For the Difference!



**Attorneys Insurance Mutual
of Alabama, Inc.**

200 Inverness Parkway
Birmingham, Alabama 35242-4813

Telephone (205) 980-0009
Toll Free (800) 526-1246
FAX (205) 980-9009

COASTAL CARNIVAL

JULY 10, 2008

2008 ANNUAL MEETING
All Compliments of

COASTAL CARNIVAL
The carnival is coming to the beach again for
the annual ISI ALABAMA Children's Party.
Featuring games, a space walk jumper,
a rock wall and face painting.



EST. 1959

ISI ALABAMA
a division of
INSURANCE SPECIALISTS, INC.

ULTIMATE INDULGENCE
Enter to win a three night stay for two
at The Red Horse Inn in Landrum,
South Carolina.

*The Ultimate Indulgence in
the Foothills of the Blue Ridge Mountains*



ADIA2008AM-0508

CHARLES GAMBLE

Publications



Available at **ABICLE**

Alabama Bar Institute for Continuing Legal Education

Gamble's Alabama Rules of Evidence and McElroy's Alabama Evidence are intended to be used as companion treatises. Gamble's is a one-volume manual usable for quick reference in formulating and responding to objections in the courtroom under the Alabama Rules of Evidence. It likewise functions as the beginning reference in pre- and post-trial evidentiary analysis. The two-volume McElroy's, because it contains more extensive discussions of subjects only briefly discussed in Gamble's, serves as the research treatise for more in-depth treatment of any evidence principle contained in the Alabama Rules of Evidence, other rule of court, statute, constitutional provision or case law. McElroy's, known widely as the "Bible of Trial Practice", has been cited or quoted in over 2000 Alabama appellate decisions.

Order Form for Gamble Publications Available at ABICLE

- \$170.00** **McElroy's Alabama Rules of Evidence (5th Ed.) Vol 1 & 2**
- \$52.50** **McElroy's Alabama Rules of Evidence, 2007 Supplement**
(for use in 2008) (25%discount!)
- \$96.50** **Gamble's Alabama Rules of Evidence - Trial Manual (2nd Ed.)**
- \$20.00** **Gamble's Alabama Rules of Evidence - 2007 Supplement**
(for use in 2008)
- \$89.95** **Gamble's Character Evidence: A Comprehensive Approach**
 - Please send all future pocketparts and new editions of Gamble's publications to me automatically and bill me for the cost.**

Name: _____

Address: _____

City, State, Zip: _____

To order: fax or mail to ABICLE

Mail: **ABICLE (check payable to University of Alabama)**
 Box 870384
 Tuscaloosa, AL 35487-0384

Phone: Call 1-800-627-6514 or 1-205-348-6230

Fax: Complete form and fax to 205-348-1072 Internet:www.abicle.org



IN THIS ISSUE

- 239** H. Thomas Wells, Jr.
President-Elect, American Bar Association
- 246** ASB Leadership Forum 2009
- 252** Alabama Supreme Court Awards Harper Lee Honorary
Special Membership
- 253** Senator Howell T. Heflin among New Hall of Fame
Members
- 254** Law Day 2008
- 256** Protecting Privileges and Confidentiality
When Dealing with Experts
By C. Anthony Graffeo and Eric J. Artrip
- 264** A Pleading Delayed May Mean Justice Denied
Amended Pleading Practice under
Alabama Rule of Civil Procedure 15(a)
By Christian Hines
- 276** Accessibility and Possible Cost-Shifting of ESI
By Rebecca Jennathan Luck
- 284** Notes on Stays Pending Appeals in
Alabama's Appellate Courts
By Marc James Ayers
- 293** Emergency Voting Changes
By John Tanner



ON THE COVER

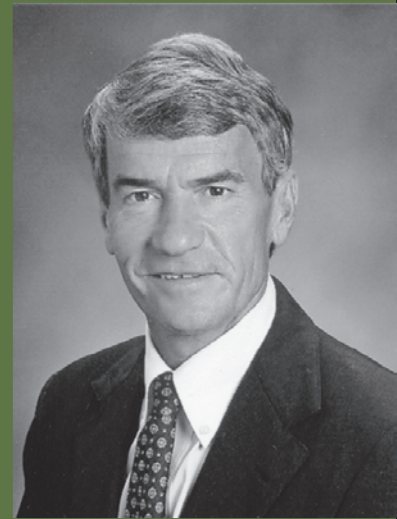
Pictured on the cover, at Shoal Creek Country Club, are Birmingham attorney H. Thomas Wells, Jr. and his family, on the eve of his taking office as president of the American Bar Association.

Back row, left to right, are Tommy and his wife, Jan. Middle row, left to right, are son-in-law Alan Palmer and son H. Thomas Wells, III ("Trey"). Front row, left to right, are daughter Lynlee Wells Palmer, grandson Mac Palmer and daughter-in-law Haas Peake Wells.

Photo by Dee Moore

DEPARTMENTS

- 235** President's Page
Only Wrestlers Can Fake Professionalism
- 241** Executive Director's Report
Fifteen Tons and a Facelift
- 243** Memorials
- 245** Bar Briefs
- 247** Disciplinary Notices
- 250** Opinions of the General Counsel
Retention and Destruction of Client Files
- 289** Young Lawyers' Section
Another Great Year for the YLS
- 291** Legislative Wrap-Up
Elections
- 297** About Members, Among Firms



SAMUEL N. CROSBY

Only Wrestlers Can Fake Professionalism

On February 21, 2008, Alabama's first Professionalism Consortium was held at Cumberland School of Law through the joint work of the Alabama State Bar and the Chief Justice's Commission on Professionalism. The purpose of the consortium was to discuss and evaluate recommendations regarding improving the professionalism and quality of services delivered by lawyers and judges throughout the state.

- Some of the recommendations which came out of the consortium were:
1. Chief Justice Sue Bell Cobb is considering having judges throughout the state re-administer the oath to all attorneys in the state as a reminder of our duties. She also has suggested mandatory continuing judicial education in the area of professionalism.
 2. Justice Hugh Maddox recommended that each lawyer who is not currently a member of an honor of Court consider joining, or founding, a local chapter of the American Honor of Court to further encourage ethics, skills and professionalism.

PRESIDENT'S PAGE Continued from page 235

3. Panelist Tom Methvin encouraged compliance with Rule 6.1 of the *Code of Professional Responsibility* which states, "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means."
 4. Mobile County Bar President Ian Gaston emphasized that professionalism in the court system starts at the top with the judges. Each judge in Alabama should start court on time, treat the parties and attorneys with respect and enforce standards of conduct in a courtroom.
 5. Bar Commissioner Allan Chason encouraged expanding the Alabama State Bar's Pilot Mentoring Program to include more sole practitioners and lawyers in small firms who do not have mentors in their firms.
 6. Judge Randall Cole proposed the adoption of written standards of professional conduct for lawyers which set forth the court's duties to lawyers and litigants. These standards would be similar to the standards for lawyers reflected in the ASB *Code of Professional Courtesy* and the *Lawyer's Creed*. The standards would be submitted to the Supreme Court of Alabama for adoption.
 7. Bar Commissioner Anthony Joseph suggested that every lawyer in the state be required to observe a public reprimand before the Board of Bar Commissioners as a reminder of the lawyer's professional responsibilities.
 8. During the consortium, Professor Carol Andrews reminded those in attendance that in 1887, Thomas Goode Jones, the author of the first *Code of Ethics* for lawyers and a member of the Alabama State Bar, worried about "the young lawyers who did not have the gentleman's background and training, and who needed specialized rules to guide them." According to Professor Andrews, there was a fascinating debate about reports of lawyers who would call the judge "an ass" on one extreme and others who curried favor through "marked hospitality thrust upon judges."
 9. Mobile County Bar President-Elect John Leach encouraged law firms to adopt policies promoting professionalism among their members.
 10. President-Elect Mark White mentioned the success of the Bench & Bar Liaison Committee in Jefferson County in addressing the issue of standard pretrial orders, abuse of discovery and promoting professional conduct among judges in the circuit. He encouraged the establishment of such a committee in each judicial circuit.
 11. Judge Harold Albritton disseminated the standards for professional conduct adopted in the United States District Court for the Middle District of Alabama on January 8, 1999 and urged the adoption of these standards within the state court system.
- Other members of the Chief Justice's Commission on Professionalism serving with me are:
- District Attorney Nick Abbett
Leon Ashford
Judge Sharon Lovelace Blackburn
Dean John Carroll
Judge Charles W. Fleming, Jr.
Sam Franklin
Leon Garrett
J. Douglas McEvoy
J. Anthony McLean
Former Chief Justice Drayton Nabers, Jr.
Dean Charles I. Nelson
Keith B. Norman
George Robert Parker
Dean Kenneth Randall
Erestine Sapp
Judge Greg Shaw
Bryan A. Stevenson
Judge William C. Thompson
- On May 13, 2008, Alabama became the second state in the country to establish an initiative that has been successful in North Carolina in promoting professionalism and bolstering public confidence in the legal profession. This pilot program, the Professionalism Support Initiative, will

address unprofessional conduct by lawyers or judges which does not rise to the level of a grievance or judicial inquiry complaint. The program will be administered by Judge Harold Crow, the new director of the commission. Thanks to Phillip McCallum and Jimbo Terrell for their work on this initiative.

Preserving Our Humor, Wisdom and History

During my first year in practice in Baldwin County, two very drunk men wandered in off the street to see me. One of the two men was slightly more sober than the other and was holding up the other to keep him conscious, despite his inebriated state. The two staggered into my office and sat down, almost missing the chairs. More than a bit puzzled, I asked, "What can I do for you?"

The more sober of the two, who was still holding up his friend so he wouldn't fall face down on our floor, replied, "We wanna' make a will and leave ever'thin' to me."

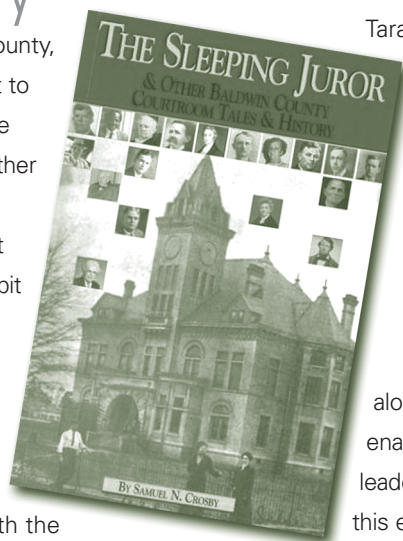
In spite of myself, I laughed loudly, and with the tears of laughter in my eyes, explained why I could not help them and ushered them out the door. After these men left, I realized I should record other similar events I had either heard about or experienced while practicing law.

This occurrence prompted me to collect funny court stories for 23 years. In 2002, these stories were compiled in the book *The Sleeping Juror*, which was published by the Alabama Law Foundation (through the kindness of 11 local law firms). All proceeds of book sales have been donated to Kids' Chance scholarships and civil legal services for the poor. To date, over \$1,000 has been raised by this project.

ASB Past President Bill Hairston of Birmingham read this book and decided to videotape senior members of the Birmingham bar telling funny court stories. Watching parts of this videotape, and speaking with Reggie Hamner, encouraged me to appoint a Humor and History Task Force this year. Members of the task force are:

Mary Margaret Bailey, Mobile
 Charles Carr, Daphne
 Elizabeth A. Citrin, Daphne
 R. Scott Colson, III, Birmingham
 John M. Edgely, Montgomery
 R. Graham Edgely, Jr., Montgomery
 T. Charles Fry, Jr., Birmingham
 Christopher R. Hood, Birmingham
 Marcus A. Huff, Huntsville
 Kathy Johnson, Montgomery (narrator)
 Tara Waller Lockett, Daphne

Thomas J. Methvin, Montgomery
 Richard J. R. Raleigh, Huntsville
 R. Cooper Shattuck, Tuscaloosa
 Patrick Sheehan, Imagination Factory, Birmingham
 Ernest Frank in Woodson, Montgomery



The generosity of Freedom Court Reporting, along with the hard work of the task force, enabled us to conduct interviews with senior leaders of the Alabama State Bar. The product of this effort is a three-part DVD which has been produced by the ASB and funded by the donations of three law firms.

The first chapter, "Justice Tempered with Humor," preserves funny court stories from throughout the state. The second chapter, "Leadership Principles of Alabama Lawyers," preserves the counsel of Alabama lawyers regarding leadership principles. The third chapter, "Advice to New Lawyers," contains counsel for new admittees. Each chapter is six minutes long.

This video is posted on the ASB Web site (www.alabar.org) and is available for viewing at no charge. A copy of it has been sent to each local bar president and bar commissioner to be shown at local bar meetings. Also, each interview will be available in its entirety. We hope these efforts will prompt you to videotape interviews with senior lawyers in your circuit to preserve their humor and wisdom for future generations of lawyers and judges.

PRESIDENT'S PAGE Continued from page 237

Partnering with Our Law Schools

On January 25, the first bar commission meeting to ever be held on a law school campus took place at the University of Alabama School of Law. Law students were invited to attend the meeting, and we hope that they will be encouraged to seek leadership roles within the Alabama State Bar.

Also, students from each of the five law schools in Alabama attended bar commission meetings this year. These students were recommended by their law school deans for their leadership potential. They were the guests of Commissioner Joe Fawal, who did an excellent job coordinating this effort.

Our Legislative Efforts

The mission statement of the Alabama State Bar includes improving the administration of justice in Alabama. Before the commencement of the 2008 regular session of the Alabama legislature we met with our lawyer-legislators to discuss promoting the passage of two bills which we believe will help fulfill our mission.

The first bill establishes minimum experience requirements for state court judges (requiring lawyers to have a law license for three years to serve as a district judge, five years to serve as a circuit judge and ten years to serve as an appellate judge). Currently, any lawyer appointed to defend a death penalty case is required to have five years of criminal law experience. On the other hand, the circuit judge hearing the case might only have had a law license for one day.

The second bill protects the integrity of the mediation process by preventing a mediator from being compelled to testify or produce documents about a mediation. The second bill passed both houses and it has been signed into law after eight years of effort by many people.

Diversity and Client Security Fund Task Forces

The Diversity Task Force, chaired by Aldos Vance, Wyndall Ivey and James Hughey, III, and the Client Security Fund Task Force, chaired by Julia Roth, are both continuing their excellent work in these important areas.

50th Law Day Anniversary

Congratulations to Gregg Everett, Tommy Klinner, Marcia Daniel, Brad Carr, the Law Day Committee, Charles Godwin, Ginger Avery, Bob Prince, and many others for their fine work in making this day special.

Thank You

Thank you for giving me the privilege of serving as president of the Alabama State Bar this year. My hope is that we will continue to encourage each other to do justice, love kindness and walk humbly with our God. ▲▼▲

AUCTION

The BEST way to sell land.


amerisouth
A U C T I O N S

Call today for information

256-353-7525 • www.amerisouthauctions.com

Chuck Crump AL 1539 · Em Barran, CCIM, AAL 2616 · Bryan C. Knox AL 1587



H. Thomas Wells, Jr.

PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

H. Thomas Wells Jr., a partner and founding member at Maynard, Cooper & Gale, PC in Birmingham, was elected as the American Bar Association's president-elect at its August 2007 annual meeting in San Francisco and is to become president in August 2008.

Wells has served on numerous committees and in leadership roles in the Alabama State Bar, the Birmingham Bar Association and the ABA.

Wells has served in the ABA's policy-making House of Delegates since 1991 and was chair of the House of Delegates, the second highest office in the American Bar Association, from 2002 to 2004. He is a former chair of the ABA Section of Litigation, the largest section in the ABA with more than 75,000 members.

In addition, Wells is co-chair of the ABA's Special Committee on Disaster Response, which was commissioned after the devastation of Hurricane Katrina. He also has been a member of the ABA's Commission on the American Jury and the ABA Commission on the Future of the Legal Profession.

Wells earned his B.A. degree with honors from the University of Alabama, where he was president of the Student Government Association and was elected to *Phi Beta Kappa*. He earned his J.D. degree, Order of the Coif, from the University of Alabama. He also was a member of the *Alabama Law Review* and Hugo Black Scholar while in law school.

Wells lives in Birmingham with his wife, Jan. The couple's two children, Lynlee Wells Palmer and H. Thomas "Trey" Wells III, are also lawyers in Birmingham and active ABA members.

Wells is slated to be the ABA's third president from the state of Alabama. Henry Upson Sims, of Birmingham, was ABA president in 1929-30, and N. Lee Cooper, also a founding member of Maynard, Cooper & Gale, PC in Birmingham, was president in 1996-97 (see the July 1996 issue of *The Alabama Lawyer*).

SAMFORD UNIVERSITY
CUMBERLAND
 SCHOOL of LAW

1847

where
 good people
 become
exceptional lawyers

Cumberland School of Law is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our continuing legal education seminars during the 2007–08 academic year. We gratefully acknowledge the contributions of the following individuals:

James A. Abernathy II
 James G. Adams, Jr. '86
 William F. Addison '82
 Orrin K. Ames III '69
 D. Michael Andrews
 David R. Arendall '75
 D. Leon Ashford
 Prof. J. Mark Baggett
 Mary Margaret Bailey '94
 Tammy Lynn Baker
 M. David Barber '72
 Dan E. Batchelor '78
 LaVeeda Morgan Battle
 Prof. T. Brad Bishop '71
 Hon. Sharon Lovelace
 Blackburn '77
 Natalie R. Bolling
 Hon. Karon O.
 Bowdre '81
 Gov. Albert P. Brewer
 Daniel J. Burnick '83
 Hon. Jack Caddell
 Laura A. Calloway
 Dean John L. Carroll '74
 Stephen D. Christie '92
 Charles H. Clark, Jr. '83
 Gina D. Coggin '93
 Michael J. Cohan '93
 Hon. Benjamin G.
 Cohen '76
 Hon. Ralph D. Cook
 Deane K. Corliss '89
 J. Patrick Darby
 Douglas P. Davis
 Thad A. Davis
 George M. Dent III
 Ross M. Diamond III
 Susan D. Doughton
 Joseph H. Driver '93

Hon. Joel F. Dubina '73
 Valrey W. Early III
 Michael D. Ermet
 Gregg B. Everett
 Frederick L. Fohrell
 Sara Anne Ford
 Hon. Mark E. Fuller
 Fournier J. Gale III
 John D. Gleissner
 Jon C. Goldfarb
 C. Lance Gould
 Hon. Callie V.S. Granade
 Mac B. Greaves
 Wilson F. Green
 W. Patton Hahn
 John W. Haley '75
 Hon. Arthur J. Hanes, Jr.
 Bernard Harwood
 Alicia K. Haynes '87
 Victor L. Hayslip '85
 David M. Hunt
 Wyndall A. Ivey
 Gilbert E. Johnston, Jr.
 Gregory R. Jones '81
 Victor Kelley '81
 S. Andrew Kelly
 Aaron Killings, Jr.
 Lawrence T. King '88
 Jessica D. Kirk
 Michael D. Knight
 Conley W. Knott
 Mary Carol Ladd
 Alva M. Lambert
 Robert W. Lee, Jr. '78
 John A. Lentine '87
 Heather N. Leonard
 Hon. David N.
 Lichtenstein '78
 Colin H. Luke

Robert E. Lusk, Jr.
 Robert P. MacKenzie III '84
 John Markus
 David H. Marsh '81
 Alice H. Martin
 Jason S. McCormick
 Prof. Marcia L. McCormick
 Elizabeth G. McGlaughn
 Jeremy W. McIntire
 J. Anthony McLain '77
 Frank McRight
 Tracy Miller '03
 Hon. Tamara O. Mitchell
 Hon. Terry A. Moore
 Paul D. Myrick
 Prof. Leonard J. Nelson III
 Stephen C. Olen '79
 Thomas L. Oliver II '89
 Hon. John E. Ott '82
 Lenora W. Pate '85
 James T. Patterson '01
 Sean C. Pierce
 Linda W. Pope '89
 Scott A. Powell '78
 Thomas M. Powell '92
 Patricia J. Pritchett '90
 Hon. T. Michael Putnam
 Barry A. Ragsdale
 Donald R. Rhea
 Charles H. Rice
 Kerri Johnson Riley
 Hon. James J. Robinson '74
 Hon. William R. Sawyer
 John D. Saxon
 David L. Selby II '91
 Randal H. Sellers
 Roman A. Shaul
 Hon. Greg Shaw '82
 Kirk C. Shaw

W. Scott Simpson '93
 Fern H. Singer
 Deborah Alley Smith
 Thomas J. Spina '78
 Jay D. St. Clair
 Hon. Sarah H. Stewart
 William B. Stewart '90
 Matthew W. Stiles
 Hon. C. Michael Stilson
 Prof. Belle H. Stoddard '78
 J. Ted Stuckenschneider '77
 Janet Teer
 Michael L. Thompson
 Hon. William C.
 Thompson '88
 Thomas S. Thornton III '96
 Wendy N. Thornton '96
 Jeremy N. Trousdale '98
 Temple D. Trueblood
 Earl P. Underwood, Jr.
 Hon. J. Scott Vowell
 Albert L. Vreeland II
 Susan S. Wagner
 Lonnie D. Wainwright, Jr. '88
 Charlie D. Waldrep '76
 Richard S. Walker '99
 Hon. W. Keith Watkins
 J. Mark White '74
 Beverly S. Williamson
 David G. Wirtes, Jr. '85
 Assoc. Justice Thomas A.
 Woodall
 Anne R. Yuengert

*Years following names denote
 Cumberland School of Law
 alumni.*

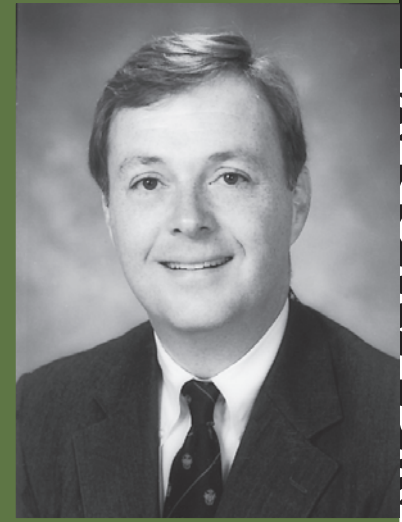


Much of the staff had to play musical chairs while the new build-out was underway.

Fifteen Tons and a Facelift

No, this is not about a new television reality show imitating the *Biggest Loser*. And, it's not a rewrite of the Merle Travis tune, *Sixteen Tons*, popularized by Tennessee Ernie Ford with his chart-topping version in 1955. Instead, I am reporting that we have finished building out the third floor of the ASB building and refurbishing all three floors. In the process of converting our third-floor storage space into office space, we shredded **15 tons** of old files that we no longer needed to keep. This included the hard copies of member files that were no longer required after all of those files were scanned into an electronic document management system.

The third-floor build-out included new space for our information technology (IT) staff and a special room for our network servers. The Communications Department moved from the first floor to the third floor and the Lawyers Assistance Program (LAP) moved from its existing offices on the third floor to a new office area with added space for staff. Moving LAP to the other side of the building allows additional space for the Alabama Law Foundation (ALF) and frees up space for the Volunteer Lawyers Program (VLP) to have, for the first time, an in-take clerk. Two unfilled offices in the new area will be used for the time being as storage space.



KEITH B. NORMAN

EXECUTIVE DIRECTOR'S REPORT

Continued from page 241



ASB Foundation Assistant Ann Rittenour was designated "clerk of the works" to oversee this project. These photos offer a glimpse at the different phases of construction from framing the office and storage space to wiring the electrical to finishing the walls.

On the second floor, as on all other floors, the public spaces recently have been repainted. The work space in the Center for Professional Responsibility has been reconfigured to make it more serviceable. New meeting tables have been added in the boardroom and the small kitchen area off the boardroom has been refitted to better accommodate catered functions. The bronze windows on the first floor of the original building have been reworked as have the casements around each window. Additional shelves for filing have been added in the Admissions office and the former file room on the first floor has been converted to general storage. The MCE director and staff, which have been split up, will be moved to the offices formerly occupied by the Communications Department.

The first build-out of the bar building's third floor occurred in 1998. In ten years, our membership has grown 32 percent, from 11,800 to 15,600 attorneys. The VLP, ALAP and Practice Management Program (PMAP), among others, have matured as their services have broadened. In addition, we have created staff positions that did not exist ten years ago: IT, Web site administrator and scanning technician. Fortunately, the Board of Bar Commissioners had the vision in 1989 to construct an addition to the bar building that has accommodated our membership's growth and the increase in services for bar members. Although there is no more interior space available for future expansion, I am confident that the Board of Bar Commissioners will address the state bar's future space needs with the same wisdom and vision that has guided it in the past. ▲▼▲



**PATRICIA YEAGER
FUHRMEISTER**

ALVIN F. HARRIS, SR.

WINDELL CLIFTON OWENS

Patricia Yeager Fuhrmeister

Patricia Yeager Fuhrmeister, a member of the Shelby County Bar Association for more than 27 years, died February 9, 2008. She graduated from Auburn University in 1977 and received her law degree from the University of Alabama School of Law in 1980.

Fuhrmeister practiced law in Shelby County from 1980 until 1994, when she was elected the first female probate judge in that county. She served with honor, dignity and integrity in that capacity from 1994 until 2008.

Fuhrmeister served as president of the Shelby County Bar Association, as chair of the Committee on Continuing Education of the Alabama Probate Judges' Association and as chair of the Alabama Electronic Voting Committee.

She is survived by her husband, James, and her two sons, Chris and Will.

—Lara L. McCauley, president, Shelby County Bar Association

Alvin F. Harris, Sr.

Alvin F. Harris, Sr., a member of the Mobile Bar Association, died January 15, 2008.

Alvin Harris was born September 23, 1945 in Monroe County, but later moved to Mobile County, where he was a resident for more than 30 years. Before entering the practice of law, he was a bank vice president in Shorter and then served as Birmingham's Director of Housing.

Harris went to the University of South Alabama and received a bachelor's degree. After graduation, he attended Jones Law School and began his practice September 10, 1993 in Saraland with Johnny M. Lane. His law practice consisted of criminal law and domestic law. Harris also served as the municipal judge of Mt. Vernon.

He practiced law with Lane & Harris until his death.

Harris was member of three Mardi Gras organizations, the Mobile Botanical Gardens and other organizations. He also enjoyed bird hunting and fishing. He was active in several animal rights groups and gardening clubs, as a result of his love of animals and gardening.

Alvin F. Harris, Sr. is survived by his wife, Rena Harris; his children, Jennifer Nikolov, Al Harris, Jr., Jessica Moree and George Harris; his grandchildren, Harris, Camden, Konnor, Parker, and Mary Lois; his sister, Alyce Snow; and other family members. He had a gentleness of heart and was respected by all who knew him. He was a wonderful husband, an incredible father and a trusted friend to all, who is truly missed.

—Ian Gaston, president, Mobile Bar Association

MEMORIALS Continued from page 243

Windell Clifton Owens



On February 20, 2008, the Alabama State Bar and the legal community lost highly respected, longtime member Windell Clifton Owens of Monroeville.

Windell practiced law in the southern part of the state and maintained his office in Monroeville for 60 years, having just recently retired from practice August 2007, at the age of 85.

Although a successful businessman and local politician, the practice of law was Windell's greatest passion, particularly criminal law. With the reputation as an excellent trial attorney throughout the region, he was best known for his participation in many criminal cases before the bar.

In the early 1940s, Windell attended the University of Alabama and was a Golden Gloves boxer for the university, participating in many well-known bouts of the time. Like many men of the "Greatest Generation," World War II interrupted his education. In 1943 he was commissioned as a 2nd Lieutenant in the United States Air Force, serving as a bombardier aboard a B-17 Liberator.

Following the war, Windell returned to the university and received his bachelor's degree and later his juris doctorate degree from the University of Alabama School of Law, where he was a Farrah Law Society member.

On a local level, Windell served as a city councilman and later as mayor of Monroeville (1968-1972), during one of city's most prosperous periods. He also served as Monroe County attorney and as an assistant attorney general for four state administrations, and on the state Democratic Executive Committee and the Alabama State Bar. He served as commander of the Monroe County National Guard Unit stationed in Monroeville for many years, until

his retirement from the armed services. From a business prospective, Windell was a founding partner of Crown Investment Corporation, one of the largest nursing home entities in the state, the First Citizen's Bank of Monroeville and several other local business ventures. However, it was his love of the law for which he is best known.

Equally at home in and out of the courtroom, Windell served as a mentor to two generations of aspiring young lawyers in the 35th Judicial Circuit, some of whom were associates or partners of his law firm during a period spanning 60 years. Before the new Monroe County Courthouse was built in the 1970s, he tried many of his cases in the old county courthouse, now a museum and where the trial scene in the 1961 movie "To Kill a Mocking Bird" was filmed. Known by many who had made his acquaintance at various local bar functions and around the Monroe and Conecuh County courthouses, he was described as a master storyteller and to possess a uniqueness of character and presence unlike any other. Windell attended law school with the former Alabama Supreme Court Justice and late United States Senator Howell Heflin and when the Senator visited Monroeville, locals noted that he always visited Windell's law office, located just across the street from the courthouse.

Windell was a country gentleman who loved a good cigar, hunting, fishing, golf, an occasional poker game, and the device members of the Monroe-Conecuh County Bar Association affectionately refer to as the "sand box." He was a friend and counselor to many and a champion for his fellow citizens seeking equal access to the law.

He is survived by wife Elaine Owens; two daughters, Lynn Franklin of Dothan and Denise Mounger of Vicksburg; and two sons, George Owens of Monroeville and Windell Richard Owens of Birmingham.

—Windell Richard Owens

Black, Robert Coleman

Montgomery
Admitted: 1961
Died: March 24, 2008

Dickinson, William Louis

Montgomery
Admitted: 1950
Died: April 1, 2008

Graffeo, Nick John, Jr.

Birmingham
Admitted: 1964
Died: March 7, 2008

Gustin, Patrick I.

Jasper
Admitted: 1976
Died: March 19, 2008

McConnell, John William, Jr.

Memphis
Admitted: 1984
Died: January 29, 2008

Mendelsohn, James Alan

Birmingham
Admitted: 1988
Died: February 19, 2008

Pointer, Sam Clyde, Jr., Hon.

Birmingham
Admitted: 1957
Died: March 15, 2008

Robinson, Joel Patrick, Jr.

Jasper
Admitted: 1954
Died: April 16, 2008



BAR BRIEFS

BOYD CAMPBELL

STEPHEN W. STILL

JAMES D. HARRIS, JR.

SCOTT A. POWELL

BRUCE F. ROGERS

EDGAR M. ELLIOTT, III

- The Alabama Center for Foreign Investment Counsel announces that its general counsel, **Boyd Campbell**, has been appointed to serve as vice chair of the Investor (B-5) Committee of the American Immigration Lawyers Association.
- **Stephen W. Still** has been reappointed to the Lawyers Council of the Financial Services Roundtable. Still is the only attorney from Alabama in the private practice of law who is a member of the Lawyers Council. The Roundtable is a trade association in Washington, D.C. and is limited to 100 of the largest integrated financial services companies in the country.
- **James D. Harris, Jr.** has been named to the Executive Council of the Association of Defense Trial Attorneys (ADTA). The ADTA is an association of defense trial attorneys established to advance the principles of courtroom fairness, justice and fellowship.
- Samford University's Cumberland School of Law honored Birmingham attorneys **Scott A. Powell** and **Bruce F. Rogers** during alumni weekend activities. Powell, a 1978 graduate and partner in the Birmingham firm of Hare, Wynn, Newell & Newton P.C., was named Volunteer of the Year. He was cited for his service as chair of the Cumberland Advisory Board and his leadership to create the newly-dedicated Martha F. and Albert P. Brewer Plaza at Samford. Rogers, a partner in the Birmingham firm of Bainbridge, Mims, Rogers & Smith P.C., was named Friend of the Law School. He was cited for his service in Cumberland's interview process and other programs, such as annual visits by the Alabama Supreme Court and Court of Appeals to the Samford campus for oral arguments.
- **Edgar M. Elliott, III**, of counsel with Christian & Small P.C., received the 2008 Nina Miglionico "Paving the Way" Leadership Award in April. The award was established in 2005 by the Women Lawyers' Section of the Birmingham Bar Association to recognize and honor individuals who have achieved professional excellence and actively paved the way to success and advancement for women lawyers. ▲▼▲

ALABAMA STATE BAR

Leadership Forum

2009 • Class 5



These are the graduates of the Leadership Forum Class IV. Throughout the state, lawyers serve on non-profit boards, political organizations and community groups. Lawyers have an obligation to render service to others, and the Leadership Forum's goal is to further the leadership skills lawyers use and need to fulfill their ethical duties and responsibilities. The Leadership Forum makes the state and the profession stronger by encouraging the development of these leaders.

Applications for the 2009 sessions of the ASB Leadership Forum are now available at www.alabar.org/members/leadership-update.cfm or by calling 334-269-1515, ext. 2166. Class 5 will consist of no more than 30 participants. Successful applicants are notified on or before November 15, 2008.

Applicants must have practiced law for not less than five years and for not more than 15 years (based upon first admission to

any state bar). Attendance at all five sessions (January through May) is mandatory.

For more information, contact Kimberly T. Powell (205-226-8769, ktpowell@balch.com) or Sam David Knight (205-874-7961, sdknight@gattorney.com).

"Leadership can be thought of as a capacity to define oneself to others in a way that clarifies and expands a vision of the future." Edwin H. Friedman ▲▼▲

REINSTATEMENTS

DISBARMENTS

SUSPENSIONS

PUBLIC REPRIMANDS

Reinstatements

- On February 6, 2008, Birmingham attorney **Robert Lee Kreitlein** was suspended from the practice of law in Alabama for noncompliance with the 2006 Mandatory Continuing Legal Education requirements of the Alabama State Bar. On March 7, 2008, Kreitlein came into compliance with the MCLE Rules. On April 18, 2008, the Supreme Court of Alabama made entry on the roll of attorneys dismissing the order of suspension against Kreitlein and reinstating him to the practice of law. [CLE No. 07-31]
- The Supreme Court of Alabama entered an order reinstating former Carbon Hill attorney **Dennis Michael Sawyer** to the practice of law in Alabama, effective April 7, 2008, based upon the decision of Panel V of the Disciplinary Board of the Alabama State Bar. Sawyer had been on disability inactive status since February 1994. [Pet. No. 06-06]

Disbarments

- Mississippi attorney **Timothy Reese Balducci**, who was also licensed in Alabama, was disbarred from the practice of law in Alabama effective January 9, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order based upon Balducci's consent to disbarment. Balducci consented to disbarment based upon an ongoing federal felony criminal investigation being conducted in the United States District Court for the Northern District of Mississippi, and he also affirmed that he will not seek reinstatement. [ASB No. 07-235(A)]
- Tuscaloosa attorney **Winfred Clinton Brown, Jr.** was disbarred from the practice of law in Alabama effective February 19, 2008, by order of the Alabama Supreme Court. The supreme court entered its order based upon the February 19, 2008 order of the Disciplinary Board of the Alabama State Bar disbarring Brown from the practice of law. On or about July 24, 2007, Brown filed an answer to formal charges in which he admitted to violations of rules 1.15(a), 1.15(b), 8.1(a), 8.4(a), 8.4(c), and 8.4(g), *Alabama Rules of Professional Conduct*. In July 2006, Brown deposited a \$95,000 settlement check into his trust account. Approximately \$48,000 of the settlement was distributed to the client. Another \$15,000 was to be held by Brown and used to pay medical debts on behalf of the client. Brown failed to use the \$15,000 to pay the medical providers and spent the money on personal expenses instead. Despite repeated opportunities throughout the disciplinary process to repay the money, Brown failed to do so. [ASB No. 06-207(A)]

DISCIPLINARY NOTICES

Continued from page 247

- The Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Board, Panel IV, disbaring attorney **Eugene Paul Spencer** from the practice of law in Alabama, effective April 7, 2008. On February 21, 2008, Spencer signed a consent to disbarment. This consent was based upon Spencer's admitting to having forged the signature of a circuit judge on a case action summary document. R ule 23(a), Pet. No. 08-20; ASB No. 06-120(A)]

Suspensions

- Birmingham attorney **John Edward Clark, Jr.** was suspended from the practice of law in Alabama for a period of 18 months by order of the Supreme Court of Alabama, effective February 20, 2008. The supreme court based its order on Clark's guilty plea to violations of rules 8.4(a), (b), (c), (d), and (g), *Alabama Rules of Professional Conduct*. Clark was retained to handle the estate of an individual and subsequently admitted that he forged letters testamentary. Clark also prepared a deed conveying property from the estate to his client. The deed was notarized by Clark, when, in fact, he was not a notary public. The deed was not recorded until after the death of the grantor. [ASB No. 08-01(A)]
- On April 7, 2008, the Supreme Court of Alabama entered an order adopting the March 3, 2008 order of the Disciplinary Board, Panel IV, accepting the conditional guilty plea for violations of rules 4.1(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.*, entered by Dothan attorney **Virginia Dewella Emfinger**, and thereby suspending her law license for a period of one year, effective April 7, 2008. [ASB No. 07-236(A)]

Public Reprimands

- On April 11, 2008, Bessemer attorney **Calvin David Biggers** received a public reprimand with general publication for a violation of Rule 3.10(a), *Ala. R. Prof. C.* On or about October 13, 2006, Biggers threatened the complainant with criminal

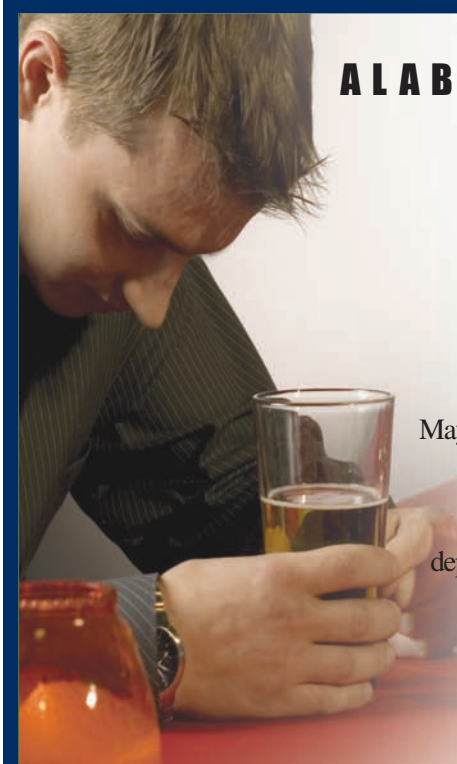
prosecution if she did not pay his client \$400 by October 16, 2006. On October 16, 2006, the complainant paid Biggers's client \$477.47. On December 8, 2006, Biggers sent the complainant a second letter requesting an additional \$700. The complainant did not pay this amount and a *pro se* complaint was filed against her by Biggers's client. In or about March 2007, the complainant retained an attorney who filed an answer and a counter-claim for fraud and other allegations. He also filed a Rule 19 motion to join Biggers as a party defendant in the action. Biggers contacted the complainant's attorney and admitted that he drafted the civil complaint for his client and instructed her to sign it *pro se*. Biggers also threatened the complainant's attorney under the *Litigation Accountability Act*, if he did not withdraw the Rule 19 pleading. Biggers admitted that he discussed the complainant's actions with the district attorney's office but did not seek criminal prosecution. [ASB No. 07-81(A)]

- On April 11, 2008, Birmingham attorney **Rodger Keith Brannum** received a public reprimand without general publication for violations of rules 1.1, 1.3, 1.4(a), 1.16(d), 8.1(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* Brannum was retained and paid \$4,700 by an individual in or about September 2003 to represent the individual's aunt in a post-trial appeal of a murder conviction. Due to Brannum's failure to file the necessary Rule 32 Motion and perform the necessary work the individual had to retain other counsel. Also, because of Brannum's lack of representation, the aunt remained incarcerated, while also suffering from a terminal illness. The aunt also learned that Brannum's license to practice law had been suspended due to his failure to pay his bar license fee. Furthermore, Brannum failed to communicate with the aunt and the individual during his representation and failed to provide a copy of the aunt's file to new counsel. When Brannum was requested to refund the unearned fee, he failed or refused to do so. [ASB No. 05-266(A)]
- Birmingham attorney **Edward Eugene May** was noticed to receive a public reprimand with general publication for

violations of rules 1.15(a) and 8.4(a), *Ala R. Prof. C.* On at least one occasion, May deposited personal funds in the amount of \$5,000 into his client trust account. May admitted that he would occasionally deposit personal funds into the trust account as working capital. Under his own admission, he would use these monies to advance clients settlement funds if they needed money prior to settlement of their case. May also wrote checks out of the trust account for personal and business expenses. However, it does not appear that client funds were misappropriated or used to pay for any personal and/or business expenses. [ASB No. 06-174(A)]

- Mobile attorney **Robert E. McDonald, Jr.** was ordered to receive a public reprimand without general publication on December 26, 2007 for violations of rules 1.7(a) and 8.4(a), *Alabama Rules of Professional Conduct*. McDonald was originally retained to draft a will for a client while she was hospitalized. When McDonald delivered the will, he determined

that she was not competent to execute the will. That same day, the client's daughter had the client sign a settlement and release agreement and a settlement check concerning a prior motor vehicle accident. The client's daughter deposited the check into a joint checking account she shared with the client. The client subsequently died and McDonald was hired by the daughter to open the client's estate. Thereafter, the daughter was appointed as the personal representative in accordance with the client's will. McDonald subsequently filed a motion to determine the interest in the bank account. After filing said motion, a dispute arose between the heirs of the estate and the client's daughter over whether the funds in the joint checking account belonged to the estate or to the daughter individually. Despite acknowledging that McDonald represented the estate, he then argued before the probate court in support of the daughter's individual claims. In doing so, McDonald took a position that was adverse to the interest of his client, the estate. [ASB No. 06-127(A)] ▲▼▲



ALABAMA LAWYER Assistance Program

Are you watching someone you care about self-destructing because of alcohol or drugs?
Are they telling you they have it under control?

They don't.

Are they telling you they can handle it?

They can't.

Maybe they're telling you it's none of your business.

It is.

People entrenched in alcohol or drug dependencies can't see what it is doing to their lives.

You can.

Don't be part of their delusion.

Be part of the solution.

For 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.



J. ANTHONY MCLAIN



Retention and Destruction of Client Files

QUESTION:

I am seeking an ethics opinion from the Alabama State Bar regarding the retention, storage and disposing of closed legal files.

My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

"I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the file remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes and rules of conduct relating to this process and any other ethics opinions.

"Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six-year interval, what is the appropriate method of disposing of a client's file?"

DISCUSSION:

A lawyer does not have a general duty to preserve all his files permanently.

However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed.

ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).

While there are no specific rules in the *Alabama Rules of Professional Conduct* regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary Commission established the following guidelines in Formal Opinion 84-91. The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation.

For that reason, the file should be examined and the contents segregated in the following categories: (1) Documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.; (2) Documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him; (3) Documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and, (4) Documents which fall in none of the above categories.

Documents which fall into category one should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories two and three should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her. Documents which fall into category four could be appropriately destroyed. With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances.

Since the file is the property of the client, theoretically it may be immediately returned to the client when the legal

matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging from a few years to permanent retention. The length of time is more a matter of the lawyer's or the firm's policy rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider that the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition.

First, the client should be informed of the disposal plans and given the opportunity of being provided the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the commission's view that six years is reasonable) and then destroyed, with the exception of those documents classified as category one above.

Second, prior to destroying any client file, the file should be screened to ensure that permanent type (category one) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer's or law firm's office or at some secure off-site location. Any medium that preserves the integrity of the documents in the file, whether microfilm or by electronic scanning, is appropriate. [RO 1993-10] ▲▼▲

IN THE SUPREME COURT OF ALABAMA

April 23, 2008

ORDER

It is ordered that Rule 1(a)(2), *Alabama Rules of Disciplinary Procedure*, be amended to read as follows:

"(2) *Incumbent Judges*. Incumbent judges are subject to the jurisdiction of the Disciplinary Commission and the Disciplinary Board of the Alabama State Bar during their terms of office for misconduct occurring before they became judges."

It is further ordered that this amendment is effective immediately. It is further ordered that the following note from the reporter of decisions be added to follow Rule 1:

"Note from the reporter of decisions: The order amending Rule 1(a)(2), *Alabama Rules of Disciplinary Procedure*, effective April 23, 2008, 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, and Murdock, JJ., concur. Parker, J., dissents.

Alabama Supreme Court Awards Harper Lee Honorary Special Membership

Alabama icon Harper Lee was recently awarded an honorary special membership in the Alabama State Bar at a ceremony conducted by Alabama Supreme Court Chief Justice Sue Bell Cobb at the Heflin-Torbert Judicial Building.

The presentation was made during the induction of four new members of the Alabama Lawyers' Hall of Fame. Lee was recognized as the author of one of the most widely read and internationally honored books of popular fiction ever written, *To Kill a Mockingbird*.

ASB President Sam Crosby said, "The character of Atticus Finch has become the personification of the exemplary lawyer in serving the legal needs of the poor and those no one else would represent. He epitomizes the type of professional, and person, lawyers strive to be every day."

Lee studied law at the University of Alabama from 1945-1949, but was unable to complete her studies and sit for the bar examination. The idea for presenting this one-of-a-kind honor originated with



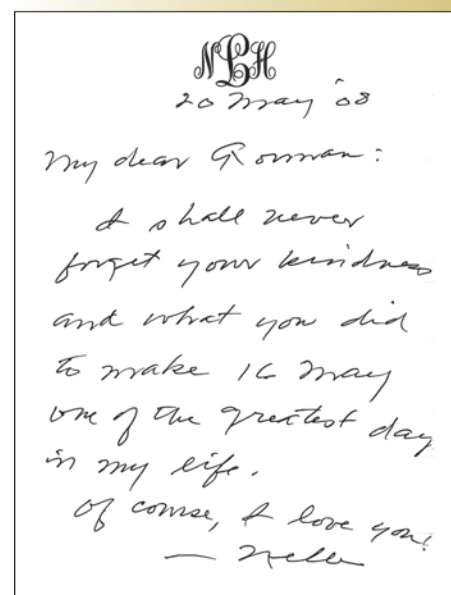
Harper Lee (in wheelchair) is awarded an honorary special membership in the state bar. Supreme Court Chief Justice Sue Bell Cobb, ASB President Sam Crosby and Associate Supreme Court Justice J. Gorman Houston (behind the wheelchair) participated in the joint presentation.

Associate Justice J. Gorman Houston, Jr., who discussed it with Associate Justice Champ Lyons, Jr. Justice Lyons presented a resolution to the entire supreme court which unanimously voted to approve taking the action.

In 2006 Lee received the state bar's Award of Merit, presented for outstanding constructive service to the legal profession in Alabama. ▲▼▲



Noted author Harper Lee autographs a copy of *To Kill a Mockingbird* for Bar Commissioner Kelly Lee (no relation) at the special ceremony conducted during the induction of new members of the Alabama Lawyers Hall of Fame.



Photos by Thomas Ryan, Jr., bar commissioner, Huntsville, and Robert Fouts, Fouts Commercial Photography, Montgomery



Members of the Board of Bar Commissioners pose with noted author Harper Lee at a special ceremony conducted during the induction of new members of the Alabama Lawyers Hall of Fame. She was honored with a one-of-a-kind honorary special membership in the Alabama State Bar which was unanimously approved by the supreme court. After receiving the award, Lee remarked, "I'm opening an office, tomorrow!" In 2006, Lee received the state bar's Award of Merit, presented for outstanding constructive service to the legal profession in Alabama.

Senator Howell T. Heflin among New Hall of Fame Members

The late Senator Howell T. Heflin, a towering figure in the state's political, legal and judicial history, joined a former United States Supreme Court justice, a former governor and a distinguished community leader as the newest members of the Alabama Lawyers Hall of Fame. The most recent induction by the Alabama State Bar was May 16 in a special ceremony held at the Alabama Supreme Court.

Former ASB President Samuel A. Rumore, Jr. explained, "The Hall of Fame was established five years ago to spotlight significant contributions lawyers have made to the state throughout its history. These individuals have demonstrated a lifetime of achievement that exemplifies the bar's motto, 'Lawyers Render Service'."

The 2007 honorees are:

John Archibald Campbell (1811+ 889)

Accomplished Constitutional scholar and advocate, prominent lawyer, legislator (1836+ 837 and 1842+ 843), outstanding public man of his time, and Associate Justice of the U.S. Supreme Court (1853+ 861)

Howell T. Heflin (1921+ 2005)

Decorated soldier, successful lawyer, judicial reformer, active bar leader and president of the Alabama State Bar (1965+ 966), chief justice of the Alabama Supreme Court (1971+ 977), and U.S. Senator (1979+ 997)

Thomas Goode Jones (1844+ 914)

Carried flag of truce at Appomattox (1865), reporter for Alabama Supreme Court (1870-1880), member of Alabama House of Representatives (1884-1888), speaker of the house (1886-1888), governor of Alabama (1890-1894), president of the Alabama State Bar (1900-1901), Federal District Court Judge (1901-1914), and author of the *Alabama Code of Legal Ethics*, first code adopted by a state bar (1887)

Patrick W. Richardson (1925-2004)

Fourth-generation lawyer, highly regarded mentor, president of the Huntsville-Madison County Bar Association (1965+ 966), president of the Alabama State Bar (1969+ 970), distinguished community leader, and principal catalyst of the creation of the University of Alabama at Huntsville



ASB President Sam Crosby and Chief Justice Sue Bell Cobb present a Hall of Fame plaque to the widow and son of the late Senator Howell T. Heflin



Charles I. Nelson, dean, Jones School of Law (right), accepts the Hall of Fame plaque from ASB President Sam Crosby honoring Thomas Goode Jones, for whom the school is named



The family of the late Patrick W. Richardson after his induction into the Lawyers Hall of Fame

Rumore, who also chairs the bar's Hall of Fame selection committee, noted honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national or international level.

Nominees must meet the award criteria which includes having a breadth of achievement in their lifetime, demonstrating a profound respect for professional ethics, being recognized as a leader in their community, and leading, inspiring or mentoring others in the pursuit of justice. Only lawyers who have been deceased for a minimum of two years are considered.



LAW DAY 2008



Winners of the 2008 Law Day Poster & Essay Contest pose on the steps of the Heflin-Torbert Judicial Building: Front row poster contest winners (l-r), John Blanding, WJ Christian School, Birmingham; Mary Jeanette Mellown, Gloryland Christian Academy, Birmingham; Crossan Ryals, Advent Episcopal School, Birmingham; Ellie Vance, Advent Episcopal School, Birmingham; Jordan Reeves, Bear Exploration Center, Montgomery; and Jordan Johnson, Bear Exploration Center, Montgomery. Middle row essay contest winners (l-r), Daniel Broderick, Calvary Christian Academy, Montgomery; Whitney Covington, Booker T. Washington Magnet School, Montgomery; Leah Berkebile, Athens Bible School, Athens; Kaylee Smith, Booker T. Washington Magnet School, Montgomery; and Emily-Prather Stallworth, Monroe Academy, Monroeville. Top row (l-r), ASB President Sam Crosby, Law Day Co-Chairs Thomas B. Klinner and Greg Everett and Court of Civil Appeals Judge Tommy Bryan



Judge Tommy Bryan, Alabama Court of Civil Appeals, bestows the first-place medal to Ellie Vance, a student at Advent Episcopal School in Birmingham. ASB President-elect J. Mark White (right) observes the proceedings. Ellie is the daughter of Jefferson County Circuit Judge Robert Vance, Jr. and granddaughter of the late U. S. Circuit Judge Robert S. Vance, Sr. The theme for this year's Law Day celebration was, "The U.S. Constitution: Foundation of the Rule of Law."

With a total of 440 entries, judges of the Alabama State Bar's Law Day 2008 annual competition came away with a vivid impression of what our legal system means to Alabama's youth.

There were 324 posters and 117 essays entered by Alabama students for this year's Law Day contest. The theme for the 50th anniversary of Law Day was "U.S. Constitution: The Foundation of the Rule of Law."

Montgomery lawyers Thomas Klinner and Gregg Everett served as co-chairs of the state bar's Law Day committee.

Winners were recognized May 1 at a special ceremony at the Heflin-Torbert Judicial Building. Following the presentation of awards, students and their guests were treated to a luncheon at the court hosted by Chief Justice Sue Bell Cobb and Judge Tommy Bryan of the court of civil appeals.

The poster and essay contests were divided into two categories: grades K-6 for posters and grades 7-12 for essays. Winners received United States Savings Bonds.

All winners received engraved gold medals and award certificates. Schools of all winners receive certificates and teachers of the winners receive a \$25 contribution per award for use in their classrooms. ▲▼▲



ASB President Sam Crosby (right) with Judge Tommy Bryan, Alabama Court of Civil Appeals, presenting the first-place certificate and medal to student John Blanding. He attends WJ Christian School in Birmingham.



John Blanding • 6th Grade



Jordan Reeves • 4th Grade



Jordan Johnson • 4th Grade



Ellie Vance • 3rd Grade



Mary Mellown • 1st Grade



Crossan Ryals • 3rd Grade

LAW DAY LIST OF ENTRANTS

POSTERS

K-3

Dakota Coleman
Stuart Jones
Noel Dudeck
Tomeka Frieson
Charles Elmer
Alden Battle
Lilly Thomas
Drew McMahon
Celine Dupre
John Phillip Robertson
Christian Owens
Danielle Stephenson Threatt
Jordan Ciniglio
Blake Sheppard
Olla Jaraysi
Brooke Boyd
Ana McArdle
Mary Abbott Crain
Will Driscoll
Egypt Pettway
Amelia Thrasher
Dylan Higgs
Christopher Jones
John Lawrence
Raleigh Bruce
Ellie Vance
Thomas McMahon
Sarah Goldman
Will Rosenstiel
Caroline McRight
Crossan Ryals
Grace Elmer
Olivia Minor
Sydney Norris
Alexa Jacks
Mary Jeanette Mellown
Elizabeth Scruggs
McKenzie Gordon
Aeryal Bailey
Deangelo Iroh
Jared R. Little
Kobe Brown
Brandon Butler
Jordan Bailey
Taliaia Mathews
Macario Kelley
Hayley Edwards
Josiah Williams
Seneka Rudolph

4-6

Emma Easley
Destiny Hallmark
Noah Farris
Danielle Dodd
JoJo Madison
Brody Meeks
Annalisa Cagle
Waynette Bailey
Austin Heffin
Zac Alexander
Ben Cagle

Hunter Hokett
Michael Boshell
Kayla Jordan
Brooke Harris
Joshua David Spencer
Gabriela Isabel Caviedes
Dixon Simmons
Luke Hartman
Tristan Trechsel
Adriana Robinson
Lydia Lindsey
Ramey Rossman
Madison Beall
Macy Kirkwood
Hannah McRight
Hunter Morgan
Briona Ray
Jody Purnell
Meghan Marks
Sebastian Black
Anna Lee Nabors
Matthew Brooks
Janan Jaraysi
Jordan Johnson
Juanita Mickles
Andrea Reed
Austin Reese
Drew Dauphin
Jacob Miller
Taylor McLemore
Josie Barton
Dave Steele
Jason Burroughs
Kayla McCain
Miles Daltin Smith
Stephanie Hayes
Nathan Blackwell
Dalton Wood
Champagne Cunningham
Tyrell Killingsworth
Ivana Angion
Cody Jones
Kirstyn Griffith
Daniel Jackson
Madison Loehr
Robert Spicer
Frankie McDonald
Anjala Chandrasoma
Tommy Jones
Matt Sailors
Maxine VonKaenel
Victoria Ashby
Rochel Rhodes
Mary Thornton
Raven Lindsey
Elizabeth VonKaenel
Peyton Burt
Christian Steyer
Jordan Reeves
Jerron Spraggins
Molly Strickland
Nadira Thomas
Taylor Robinson
Toni-Anton Taite

Ryan Smith
Taylor Ozee
Jasmine Johnson
Alex Thrash
Katie Moseley
Charles Speaks
Maya Anderson
William V. Royal
LeMia Mindingall
Bria Browning
Joseph Love
Mason Gooch
Savannah Hopkins
Thomas O'Donnell
Johnthan Coleman
Tyler Dye
Emily Ambrose
Litrail Berryhill
McKayla Edwards
Jacob Collier
John-Michael Mathews
Gabriel Humphries
Bridgette Davis
Trea Mounier
Tanner Muncey
LaPorsha Mays
Tiara Howton
Jacy L. Stanford
Kelsey Taylor Newell
Deondra Means
Kimya Loder
Keosha Morris
Alfonso Serna
John Blanding
Miranda Perrigin
Felicia Bennett
Q a'Sondria Perry
Matthew Glover
LeDarius Walker
Megan Green
Briana Dunston
Sean Berry
Ashley Lang
Chris White
Leonarah Applewhite
Jordan Higgs
Ronald Moore
Tyler Lankford
Michael Schiavi
Camryn Suggs
Seth Guley
Jake Erwin
Emma Eads
Taylor Rice
Andrew Stewart
Luke Welton
Jonathan Brown
Chris Lebeau
Kaitlin Knight
Brandon Martin
Wynter Sales
Erica Blodgett
Jalin Langjahr
Sarah Lobes

Grady Lynch
Chelsea Higgins
Peter Mehok
Olivia Gonzalez
Nick Benson
Annmarie Crews
Emily Craig
Andrew Adkins
Victoria Yvette Knight
Shanterries Moore
ShiAnne Reeves
Ashley Blaisdell
Andracia Henson
Evan
Will Brooks
Brian Robinson
Kai Perkins
Erin Roberts
Joshua Collier
Devin Barto
Zachary Erow
Joseph Evan Lawson
Ivy Meagher
Brandon Berendes
Mitchell Keys
Dakota Shamblin
Mary Cook
Chris Lundy
Justin Wynn
Amanda Munoz
William McCoy
Tyler Morris
Alex Knox
Jerry Moseley
Tyler Eberle
Jon Moss
Marthe McKinley
Hang Yu
Meagan Springer
Hailey Usleton
Andrew Gisler
Will Tubbs
Bailey Newman
Yazmine Justiniano
Kyle Anderson
Arya Pokhrel
Riley Barnes
Kevin Lightford
Katrina Strand
Kayleigh Keith
Elizabeth Pettit
Sarah Newcomb
Wendy Stevens
Allison Stephens
Jakaylan James
Alivia Massey
Destinie Rocker
Olivia Jacobson
Emily Snell
Kaitlin Boxley
Dalton Anderson
Vann Keel
TC Clarke
Justin Fletcher

Haley Tomlinson
LaDarius Forney
Katie Silery
Caleb Olsen
Stephanie Turrentine
Ryan C
Darby Siniard
Leah Sneddon
Cameron Rawls
Lenise Vining
Juan Zapata
Chase Ray
Landon Newsom
Cameron Cox
Josh Thomas
Miranda Horn
Annalicia Rosado
Cierra Beasley
Kara Kennedy
Robert Russell
Taylor Bavesmeister
Bethany Canus
Hannah Bede
Caleb Robertson
Drew Joner
Briann Ryce
Matthew Mayes
Katie Cox
Taylor Jordan
Will Bartel
Aly Branhof
Tyler Bradley
Dalton Cain
Shelby Winbon
Emmy Dana
Tristen Williams
Chrystal Whitt
Addie Williams
Bruce Ellis
Matthew Robertson
Cody Harmon
Elliott Taylor
Ryan Branton
Molly Cooke
Bethany Bowen
Carl Johnson
Erica Marable
Noah Verble
Khadidah Stone
Collin Washington
Angela Smith
Luke Verble
Andrew Mitchell
Kevin Boling
Roderick Smith
Grant Woods
Michael McKenzie
Hannah Johnson
Perla Mandujano
Mark Lilly
Monifah Bell
Trey Turner
Cortez Williams
Dustin Elmore

Dylan H.
John Williams
Jay Little
Reave Shewmake
Zoë Donalson
Lauren Bexley
Mallory Claypool
Brock Payne
Amanda Phillips

ESSAYS

7-9

Jake Little
Jessie Wallace
Mary Roberts
Tillman Landers
Nikki Harris
Haven Dean
Christopher Gray
Aaron Baker
Alyssa Baugh
Jesse Denton
Cade Whitaker
Casey Bailey
Kyle Robinson
Cody Keyes
Shaquilla Koger
Amber Lowery
Anna Hester
Makayla Alonzo-Nye
Taylor Bonds
Ashley Remkus
Kristin Hatchett
Joseph Maxwell
Will King
Jordan Brewer
Katharine McGee
Emily Irwin
Christen Posey
Leah Berkebile
Julie McFall
Andrew Pittman
Tara Henson
Stefanie McClure
Luke Smith
Joseph Murray
Aubrey Hageewood
Cecilia Ivey
Carly Hasting
Makayla Melvin
Scotty Lee
Andrew Baldwin
Joshua Fontanez
Sarah Bobo
Caleb Hodges
Cory Elrod
Jacob Neeley
Garrett Horne
Joseph Love
Jordan Jones
Kaylee Smith

10-12

Lacy Triplett

Hillary King
Megan Slezak
Marissa Edmonds
Danielle Gallop
Jada Green
Seth Kelly
Jason Watkins
Sandy Willmon
Rachael Isphording
Laura Ellenburg
Cody Lassiter
Tyler Busby
Michael Keyser
Kyle Mangin
Bo Morgan
Chris Lewis
Gibbs Pearson
Peter Waselkov
James Burch
Malachi Ray
Ian Dingwall
Spencer Baumhower
Victoria Roszkowski
Tyler Baggerly
Megan Minter
Katie Eubanks
Andy Davidson
Kerri Pender
Melissa Waddell
Emily Schrimsher
Issac Muñoz
Katelyn Hudson
Matthew Leopard
Ashton McCaig
Elizabeth Murray
Lindsey McClure
Tyler Claxton
Drew Brunson
Rachel Chastain
Annaliese Christopher
Hannah Owen
Ryan Moring
Joseph Baker
Lauren Clark
Jonathan Pittman
Abbie Melvin
Troy Steelman
Tyler Phillips
Emily Butler
Geoffrey Knudtson
Laurin Lee
Jennifer Underwood
Aundrea Keirug
Hannah Kilpatrick
Wes Owens
Hilary Lossau
Sarah Boyd
Nathan Spargo
Kalie Verble
Daniel Broderick
Lynnette Rice
Emily-Prather Stallworth
Whitney Covington
Breonna McCullough



Protecting Privileges and Confidentiality When Dealing with Experts

By C. Anthony Graffeo and Eric J. Artrip

Lawyers use experts for a variety of reasons: initial case evaluation, advice on drafting discovery requests and, of course, presenting testimony at trial. This article discusses the circumstances under which a party must disclose the name, opinion and correspondence of someone who has provided an expert opinion or consultation in a case and when it is proper to withhold such information.

As a general rule, communications with an expert are not confidential. ALA.R.CIV.P. 26(b)(1) “*In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...”; FED.R.CIV.P. 26(b)(1); *State v. Chicago Bridge & Iron Co.*, 261 So.2d 882, 885 (Ala. 1972) (“There is no privileged communication between an attorney and an employed expert, not a client.”). Therefore, the practitioner should carefully consider what to include in communications with experts. Stick to the facts and keep assessments of the case private. Whatever is disclosed to a testifying expert is likely to be discoverable. *See e.g. Ex parte Head*, 958 So.2d 860, 869 (Ala. 2006) (attorney-client privilege waived in turning over certain documents to a retained expert.) However, under certain circumstances, communications (along with the expert’s identity, opinions and basis for same) may be withheld from discovery under both the work-product and attorney-client privileges. Consider the following definitions:

1. **Testifying Experts** One who provides expert testimony.
 - a. **Retained** A retained expert is one who has agreed to provide expert testimony in exchange for consideration.
 - b. **Unretained** This type of expert has first-hand knowledge about the facts of the case but no party has agreed to pay a fee for her to provide testimony in the case. Examples include treating physicians, investigating police officers and employees of governmental groups (e.g. EPA, OSHA, and the FDA).
2. **Consulting Experts** One who is retained or specially employed to give advice or guidance in anticipation of litigation or trial, but who will not testify in the case. There are two special kinds:
 - a. **Connected with Testifying Expert** Where the consultant’s factual knowledge and opinions serve as the basis for a testifying expert’s testimony
 - b. **With Firsthand Knowledge of Facts** A consultant in the role of a fact witness if he obtained knowledge of facts firsthand, or outside the consulting role in some manner. For instance, if a consultant actually witnessed the accident at issue in the case, or participated in the development or testing of an allegedly-defective product, he will be treated as a fact witness as to his firsthand knowledge.

as a result of the consultation as per FED.R.CIV.P. and ALA.R.CIV.P. 26(b)(5).

a. Connected with Testifying Expert A party is entitled to obtain copies of the notes, reports and other materials generated by the consultant that were used by the testifying expert to formulate or support his opinions. To keep a consultant relationship truly confidential, avoid any contact, whether in person or through written materials, between the consultant and testifying experts.

b. With Firsthand Knowledge of Facts As a practical matter, one cannot avoid disclosing the facts known by such an individual simply by paying him a consulting fee. Be suspicious of any employee or former employee of a party who is being paid a separate consulting fee. In such situations, pursue complete disclosure, and/or a privilege log, concerning the alleged consultant.

There is, however, at least one author who finds the withholding of a consulting expert's name and opinions antithetical to the ultimate search for the truth. See Stephen D. Easton, "Red Rover, Red Rover, Send That Expert Right Over:" *Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses*, 55 SMU L.Rev. 1427 (Fall 2002); Stephen D. Easton, *Can We Talk? Removing Counterproductive Ethical Restraints Upon ex parte Communication Between Attorneys and Adverse Expert Witnesses*, 76 Ind. L.J. 647 (summer 2001).

As with any other work product protection, the protection afforded here is not absolute. If the party seeking discovery concerning the consultant can show exceptional circumstances, such as the inability to obtain the discovery in any other manner, discovery may be allowed. ALA.R.CIV.P. 26(b)(3); FED.R.CIV.P. 26(b)(3). An example of such exceptional circumstances is where the consultant is the only person who viewed an allegedly defective product before it was lost or destroyed. Because the party seeking the discovery is now unable to conduct their own examination, they are likely entitled to limited discovery on this issue from the consultant.

It should also be noted that although FED.R.CIV.P. 26(b)(4)(A), governing depositions of experts, appears to imply that some categories of experts may be exempt from the report requirement, that exemption is apparently addressed to experts who are testifying as fact witnesses, although they may also express some expert opinions (e.g. treating physicians). 4 James W. Moore, *et al. Moore's Federal Practice*, § 26.04[4] at 26-107 (2d ed. 1995), and Advisory Committee Notes at 125; *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993) ("Rule 26 focuses not on the status of the witness but rather on the substance of the testimony"); *Zarecki v. National R.R. Passenger Corp.*, 914 F.Supp. 1566, 1573 (N.D.Ill. 1996) (Rejecting plaintiff's argument that treating physician was exempt from report requirement where physician's testimony concerned professional opinion developed for trial and not simply information acquired through observation and care of patient).

Finally, in certain circumstances, the attorney-client privilege may play a role in the need for disclosures under ALA.R.CIV.P. 23(b)(4). The privilege generally provides that, "A client has a privilege to refuse to disclose and to prevent any other person



**So, why is
Robert Huffaker,
longtime editor of
The Alabama Lawyer,
holding a ticket in his
hand, and more
importantly, why is
he smiling?**

**Keep reading this issue of
the *Lawyer* to find out!**

**ALABAMA STATE BAR**

from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” ALA.R.EVID. 502(b). The party asserting the privilege has the burden of establishing: 1) the attorney-client relationship existed; 2) the particular communications at issue were indeed privileged; and 3) the privilege was not waived. *Ex parte City of Leeds*, 677 So.2d 1171, 1173 (Ala. 1996).

Typically, courts have been reluctant to extend this privilege to outside consultants such as experts. However, in some narrow circumstances, confidential communications between an outside consultant and counsel for a party may be deemed protected by the attorney-client privilege. For instance, in the case of *In re: Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), the appellate court found an outside consultant was so intertwined with the Bieter Company as to be considered a representative of the company for purposes of



“A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.”

applying the attorney-client privilege to confidential communications the consultant had with the company’s counsel. The Bieter Company had hired Dennis S. Klohs, an outside consultant, as an independent contractor to provide advice and guidance regarding certain retail developments the company was pursuing. As part of his duties he communicated with the company’s lawyers on a regular basis. When RICO litigation erupted over some of the real estate dealings the consultant had been involved with, Bieter asserted attorney-client privilege for communications Klohs had previously had with counsel. The court ruled that Klohs was an individual without which the Bieter Company could not exist, and so he was a representative of Bieter for purposes of applying the attorney-client privilege.

As noted earlier, if either the work product or attorney-client privileges are asserted, Rule 26 of both the *Alabama* and *Federal Rules of Civil Procedure*

“Dress for success” isn’t enough.
Looking your best isn’t about the suit. It’s about competence. Confidence. The assurance that your professional decisions are protected and supported by one of the industry’s most respected insurance carriers — a carrier that you can contact **directly**, any time you need us — at

800-299-4331.
GreatAmericanLawyer.com

Direct for Success

GREATAMERICAN.
INSURANCE GROUP

Lawyers Professional Group

require the party asserting same to state the applicable privilege and produce a log of documents and information so covered. The federal rule reads as follows:

(5) Claims of Privilege or Protection of Trial Preparation Materials

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Special Cases

As is typical, there are a number of situations which do not fit neatly into one of the above expert classifications. For example, a party's employees sometimes are called to testify as expert witnesses by their employer. They are not automatically exempt from expert disclosure and reporting requirements. On the contrary, some courts agree that "allowing a blanket exception for all employee expert testimony would create a category of expert trial witness for whom no written disclosure is required and should not be permitted." *Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004) quoting *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996).

This issue was considered to be one of first impression within the Middle District of Alabama several years ago in *K.W. Plastic v. U.S. Can., Co.*, 199 F.R.D. 687 (M.D. Ala. 2000). The defendant in that case argued that its expert-employee was not "retained or specially employed to provide expert testimony" and his duties did not entail "regularly ... giving expert testimony," such that the witness was not obligated to prepare and submit a signed expert report. *Id.* at 689. The Court rejected both premises, citing two prior cases where identical arguments were rejected by other federal courts, *Minnesota Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D.Minn.1998) and *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y.1996). In rejecting the defendant's argument, the Court stated:

Rather than reinvent the wheel, the court quotes from the persuasive opinion in *Day* regarding the interpretation [of Rule 26(a)(2)(b)] advanced by the defendant in that case: The reading proposed by defendant would create a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information. The logic of defendant's position would be to create a category of expert trial witness for whom no written disclosure is required— result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulated policy.'

More recently, the Eleventh Circuit Court of Appeals in *Prieto v. Malgor*, 361 F.3d 1313, 1318 (11th Cir. 2004), also relied heavily upon *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996), in requiring an expert disclosure and report from the defendant's expert-employee. In *Prieto*, an excessive force case under §1983, the appellate court found that the defendant's



Meet **Cynthia Martin**, with Kee & Selby LLP in Birmingham, winner of an iPod touch. How did she qualify to win? She read her e-mail and then chose to complete a short survey (only 16 questions!), asking for her honest feedback on the ASB's bi-monthly journal, *The Alabama Lawyer*. The next thing she knew, UPS was handing her a brand-new iPod touch, which, according to Cynthia, is the first thing she's ever won!

**So, it must be true...
good things do come to
those who wait and,
more importantly,
to those who don't!**



employee, who had no connection to the specific events underlying the case, and who the defendant had proffered as an expert in the use of force and police procedures, was required to submit an expert report and subject to full disclosure under Rule 26. In that case, the appellate court agreed with the logic used in *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996), which flatly rejected the defendant's argument that their employees were exempt from disclosure and report requirements, emphasizing the broad provisions for expert discovery in the *Federal Rules of Civil Procedure*.

Another special circumstance occurs when a party designates an expert but subsequently asserts that the expert will not testify in the case. Under this scenario, the expert has been effectively "de-designated." A de-designated expert should be considered a consulting-only expert for purposes of discovery if, before the de-designation took place, no discovery was taken



A de-designated expert should be considered a consulting-only expert for purposes of discovery if, before the de-designation took place, no discovery was taken of the expert and the expert had not conducted a personal medical examination of a party under Rule 35.

of the expert and the expert had not conducted a personal medical examination of a party under Rule 35. If the expert divulged facts known or opinions held *prior to the de-designation* then the opposing party may be entitled to limited discovery of the expert by deposition or subpoena.

Yet another set of criteria is considered when addressing the issue of a dual-role expert who was retained for purposes of both testifying at trial on certain issues and providing confidential (non-testifying) consulting services on other issues. This kind of expert will be treated as a retained, testifying expert for discovery purposes (full and complete disclosure) *unless a clear distinction can be made* between the expert's testifying role and his consulting services. *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F.Supp. 1013, 1014 (S.D.N.Y. 1983). Any ambiguity about whether or not a document or communication took place during the testifying-versus-consulting role should be resolved in favor of providing

CASEMAKER®

It's Even Better Now!

Casemaker, one of the best member benefits the Alabama State Bar offers, just got better. Here's what's new:

- **MORE STATE CASES.** All 50 state libraries, including appellate case law, state constitutions, rules of court, current statutes, and other selected items.
- **MORE FEDERAL APPELLATE CASES.** Most U.S. Circuit Court opinions are now available from the earlier of 1950 or the inception of the Circuit. The 2nd Circuit library goes back to 1924. U.S. Supreme Court decisions now go back to 1754. Formatting has been improved for easier reading.
- **WEB SITE IMPROVEMENTS.** Searching is more user-friendly, with expanded search capabilities using both Boolean and natural language searches.
- **SIMULTANEOUS SEARCH.** Search multiple state and federal libraries at one time.

Free online legal research at your fingertips –

the most powerful tool a solo or small firm practitioner has. And it's a service for members of the Alabama State Bar.

To find out more, visit www.alabar.org and select *Members* or contact Laura Calloway, director, Practice Management Assistance Program at casemaker@alabar.org.

full disclosure. *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997). The burden of showing that an expert did not consider certain documents in forming her opinion cannot rest on the expert's testimony exclusively. *Id.* This burden is generally met when the documents could not have been relied upon (e.g. same were created after an expert's testimony is taken or report is written.) *Aktiebolag v. Andrx Pharm, Inc.*, 208 F.R.D. 92, n. 12 (S.D.N.Y. 2002).

Finally, we come to one of the most commonly-used experts—the non-retained consultant. Typically this type of expert is informally consulted by one of the parties in anticipation of litigation. In determining whether a consultation is truly “informal” for the purposes of discovery, courts will typically look at: (1) how the consultation was initiated; (2) the type and extent of the information obtained from or provided to the expert; (3) the intensity of the relationship; (4) the terms, such as whether payment was provided; and (5) whether a confidentiality agreement was entered into. *Ngo v. Standard Tools & Equip., Co.* 197 F.R.D. 263, 266 (D.Md. 2000). If a party has established that the consultant is truly non-retained, not even the identity of the expert is subject to discovery. *See Ex parte Cryer*, 814 So.2d 239, 248 (Ala. 2001) (Defendant physician established that consultation with an independent physician immediately after procedure in question was done in anticipation of litigation. Absent a showing of substantial harm by the plaintiff, court upheld trial court's decision to not require disclosure of physician's identity).

Lawyers continue to rely upon experts on a regular basis for consultation, testimony and other purposes. Knowing when and how to protect informal communications and withhold certain opinions from disclosure is a crucial part of this process. We hope this article will prove beneficial. ▲▼▲



C. Anthony Graffeo is a founding member of the Huntsville firm of Watson Graffeo PC.



Eric J. Artrip graduated from the University of Alabama School of Law in 1998 and is a partner with Watson, Jimmerson, Martin, McKinney, Helms & Artrip PC.

INSURANCE CONSULTATION AND EXPERT TESTIMONY

As a former Deputy Commissioner of the Alabama Department of Insurance with 25 years insurance regulatory experience and subsequent experience consulting and providing expert opinions, I am offering my services with regard to consultation and possible expert testimony in cases involving property and casualty insurance issues. My employer, TaylorChandler LLC, is a CPA and Consulting firm specializing in the property and casualty insurance industry.

**Contact Johnny Johnson
by phone at 334-669-0216
or via e-mail at
jjohnson@taylorchandler.com**

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE: :
ADOPTION OF : DOCKET NO.: 2008-0344
JADEN JAMES THOMPSON :

TO: BRITTNEY J. WHITTLE

ADOPTION HEARING TO BE HELD ON AUGUST 7, 2008, AT 10:00AM IN
COURTROOM #6 OF THE LANCASTER COUNTY COURTHOUSE,
50 NORTH DUKE STREET, LANCASTER, PENNSYLVANIA 17602

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgement may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

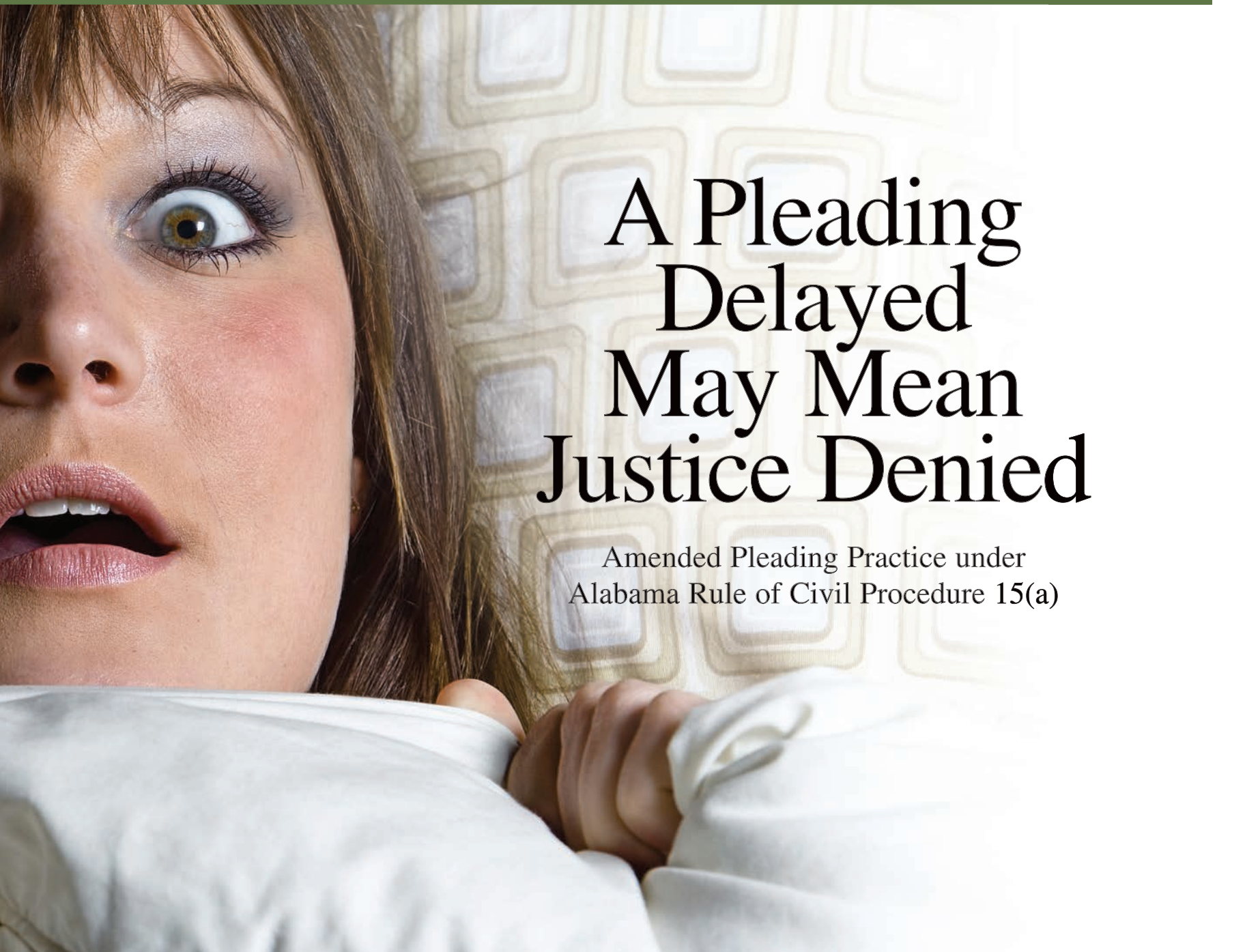
YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LANCASTER BAR ASSOCIATION
LAWYER REFERRAL SERVICE
(717) 393-0737



By Christian Hines



A Pleading Delayed May Mean Justice Denied

Amended Pleading Practice under
Alabama Rule of Civil Procedure 15(a)

Nothing in our profession makes attorneys lose more sleep than the horror of missing a deadline.

The king of deadlines, or perhaps the grim reaper of plaintiff's attorney nightmares, is the statute of limitations. Although not as draconian as the dismissal of an action in its entirety, the inability to pursue a claim or defense can have an equally devastating effect on the outcome of a case. Moreover, the preclusion of a particular theory is a fear shared by both sides of the bar, in that restrictions on amendments shadow both plaintiff and defendant alike.

Alabama Rule of Civil Procedure 15 governs a party's ability to amend pleadings during the course of litigation.

Justice Champ Lyons, Jr. has described the rationale behind Rule 15:

Pleadings are a means, not an end, and the action should be resolved on its merits, not upon technicalities. . . . Without the Rule's permissive approach to the right to amend, the allegiance to substance over form which permeates these rules would not be attainable.

Alabama Practice, p. 308 (1st Ed. 1973), quoted with approval in *McElrath v. Consolidated Piping Supply*, 351 So.2d 560, 564 (Ala. 1977).

Much has been written on Rule 15(c), which deals with the relation back of amendments. Obviously, the ability of an amendment to add a party to avoid the statute of limitations, as referenced above, can have dire consequences for a plaintiff. This article, instead, will focus on the general ability of *either party* to amend pleadings under Rule 15(a), without reference to relation back. As demonstrated below, the availability of an amended pleading can have a significant impact on the success, or failure, of a claim or defense.

The Liberal Construction of Rule 15(a)

The Alabama Supreme Court instructs that “Rule 15(a) calls for a liberality in allowing amendments, and the rules on amendments themselves are liberally construed by the courts, in order to ensure, so far as possible, that cases are decided on their merits.” *McElrath*, 351 So.2d at 564, quoting 1 A. Barron and Holtzoff, *Federal Practice and Procedure*, § 442 comments. Stated another way, “The purpose of this rule is to allow maximum opportunity for the

parties to state each claim and have those claims decided on the merits of the issues.” *Ex parte Reynolds*, 436 So.2d 873, 874 (Ala. 1983). In short, “Rule 15 must be liberally construed by the trial judge s.” *In Re Stead*, 310 So.2d 469, 471; 294 Ala. 3, 6 (Ala. 1975).

The 1992 Amendment

Possibly due to this mandate for a liberal construction of Rule 15, the Alabama Supreme Court has admitted that “the extent of the trial court’s discretion in permitting amendments has not been precisely delineated and has been, at times, unclear.” *Ex parte Liberty National*, 858 So.2d 950, 958 (Ala. 2003). In 1992, the Alabama Rules Committee made an effort at delineation, drafting an amendment to Rule 15(a). This amendment placed limitations on, and a stricter scrutiny of, amendments filed closer to trial. The prior version of Rule 15, on the other hand, had permitted amendments to pleadings without relation to the proximity of trial.

The 1992 amendment, which remains unchanged today, reads as follows:

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court’s own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires. Thereafter, a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause. A party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

The change in the rule was deemed “necessary to accommodate the constraints imposed by time standards for the disposition of litigation.” *Committee*

Quality Paralegal Education



■ Our Mission

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

■ What are typical paralegal responsibilities?

Paralegals work in many areas of law including litigation, real estate, corporate, probate and estate planning, intellectual property, family law, labor law, and bankruptcy. Paralegals perform tasks such as investigating facts, drafting legal documents, legal research, interviewing clients and witnesses, maintaining contact with clients, and the maintenance of legal files.

■ What can I not do as a paralegal?

A paralegal/legal assistant cannot give legal advice, represent a client in court, establish a fee, or accept a case on behalf of an attorney.

■ How do I choose a Legal Studies Program?

One way to ensure you receive a quality education is to choose a program with instruction specific to the skills required for the state. Secondly, it is important to choose a program with academic standards, such as those required by the American Bar Association.

Faulkner University’s Legal Studies Program is approved by the American Bar Association. The Faulkner University Legal Studies program offers an ABA Approved curriculum exclusively at its Montgomery campus, with a strong reputation of academic excellence.

■ How can I get started?

Legal Study courses are offered at convenient times that cater to the needs of students of all ages. Our faculty is comprised of experienced practitioners with outstanding academic credentials. Contact Marci Johns, J.D., Director of Legal Studies today!

Phone: 800.879.9816
Ext. 7140
mjohns@faulkner.edu

5345 Atlanta Highway
Montgomery, AL 36109
www.faulkner.edu



Comments to August 1, 1992 Amendment to Rule 15(a). Additionally, since the Committee was now further restraining the ability to amend pleadings based upon the date of a trial, it was cognizant of Rule 40. Specifically, "Rule 40 requires a sixty- (60-) day notice of a trial setting. Thus, [given the 42-day cut-off in the new rule,] a party has an eighteen- (18-) day period within which to file an amendment after the notice of first setting for trial without the need for obtaining leave of court." *Id.* In sum, the 1992 amendment attempted to strike a balance between the need for liberal amendments and the potential prejudice which could arise from an amended pleading filed on the eve of trial.

The Committee further predicted: "Because an amendment within the forty-two- (42-) day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period." *Committee Comments to August 1, 1992 Amendment to Rule 15(a).* For Alabama trial and appellate courts, consequently, the question became: "What constitutes 'good cause?'"

Amendments Filed within 2 Days of Trial and the "Good Cause" Standard

Despite the committee's anticipation, Alabama courts have repeatedly applied the 1992 Amendment to *allow* amended pleadings within 42 days of trial. Obviously, no rigid test has evolved to

define or gauge "good cause." Instead, with the phrase "good cause" ripe for interpretation, and when coupled with the traditional, liberal application of Rule 15(a), the test has naturally become fact specific. Alabama courts, however, have placed the strongest emphasis on one factor: *when* the information which triggered the amendment became available.

For example, in *Todd v. Kelley*, 783 So.2d 31 (Ala.Civ.App. 2000), a city police officer brought an action against a city, mayor, police chief and supervisor, asserting civil rights and wrongful discharge claims. Only 18 days before the first trial setting, the plaintiff moved to amend his complaint to name three additional defendants. *Id.* at 36. The trial court denied the plaintiff's motion for leave to amend.

The Alabama Court of Civil Appeals reversed. The court noted that "[i]n order to comply with the 42-day requirement under Rule 15(a), [the plaintiff] would have had to amend his complaint to add the three new defendants . . . only eight days after taking the last relevant deposition." *Id.* at 38. In light of these circumstances, the "trial court abused its discretion by determining that [the plaintiff] had not established good cause for leave to amend' the complaint to add the three [the w defendants]" *Id.*

As the spouse or colleague of any lawyer knows, no case is more interesting to an attorney than his or her own. This lawyer is no exception. Nevertheless, even objective observers may agree that the bizarre factual scenario of *Ziade v. Koch*, a case I recently



"Because an amendment within the 42-day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period."



Accounting, Economics & Appraisal Group, LLC

Certified Public Accountants
 Certified Computer Examiner
 Accredited in Business Valuation
 Certified Fraud Examiners



Les Alexander, Managing Principal	205-488-1150
Denise Dauphin, Principal	205-488-1130
Bill Long, Principal	205-488-1138

Accounting & Computer Forensics, Business & Asset Valuation, Economic & Demographic Studies, Enterprise Risk Management & Fraud Investigations

Accounting, Economics & Appraisal Group, LLC, a Certified Public Accountancy Firm
 Two North 20th Street - Suite 1400 - Birmingham, Alabama - 35203
 Telephone (205) 488-1100 - Facsimile (205) 488-1101 - www.aeagroup.com



On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face.

defended with one of my partners, played out more like a law school exam question than an actual case. It is also pertinent to an analysis of “undue delay” under Rule 15.

In *Ziade* (pronounced *Z* e-ah-dee), the plaintiffs claimed that the defendants’ negligence led to the death of a fetus. The death was first confirmed on September 12, 2000, although the fetus was not delivered stillborn until September 14, 2000. The suit was filed on September 11, 2002.

The plaintiffs initially identified two experts, who both opined that the fetus died *at least* 48 hours before the death was first detected on September 12, 2000. These witnesses were deposed on September 6 and 22, 2005, with the trial being scheduled for November 14, 2005. Pursuant to the trial court’s scheduling order, all witnesses were to be identified no less than 60 days before trial. Two days before this deadline expired, the plaintiffs identified a third expert witness. The trial court extended the expert deadline, further ordering that all expert depositions be completed by September 26, 2005. The trial remained set for

November 14, 2005. On September 26, 2005, the deposition of the third plaintiffs’ expert was taken.

The third expert confirmed the testimony of the prior two, meaning that each of the plaintiffs’ experts now opined that the fetus had died *at least* by September 10, 2000. Since the plaintiffs had not filed suit until September 11, 2002, however, the plaintiffs’ experts had, essentially, testified the plaintiff’s case outside the statute of limitations. The defendants filed a motion for summary judgment based upon the statute of limitations in a wrongful death suit. The defendants subsequently submitted a motion for leave to file an amended answer asserting those affirmative defenses, which was filed within 42 days of trial. The trial court granted these motions, and an appeal by the plaintiff ensued.

On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face. It was only after the depositions of the plaintiffs’ experts, who pushed fetal death back to at least September 10, 2000, that the statute of limitations defense became cognizable. As the supreme court summarized, it “only became clear, after the completion of the *Ziade*’s experts, that the entirety of the *Ziade*’s proof . . . was that the death occurred . . . more than two years prior to the filing of the complaint.” *Ziade v. Koch*, 952 So. 2d 1072, 1075 (Ala. 2006). Furthermore, the date for completion of this evidence had been pushed closer to trial by the plaintiffs, rather than the defendants, when a third expert was added. *Id.* Finally, the plaintiffs were only “prejudic ed” by the timing of the amended pleading to the extent that “they were deprived of the theoretical opportunity to procure an expert *who would refute the unequivocal testimony of their three experts as to the date of death.*” *Id.* at 1078.

Ex parte Liberty National, 858 So.2d 950 (Ala. 2003), of all the reported Alabama decisions, particularly demonstrates how alive the liberal spirit of Rule 15(a) remains. In this case, the plaintiff filed suit against Liberty National on February 13, 2001 based upon actions that took place in or before December 1978. The defendant filed an answer that did not include the rule of repose as an affirmative defense. An opinion was released by the Alabama Supreme Court in January 2002

Birmingham School of Law

The Birmingham School of Law offers an affordable legal education for individuals who attend class at night. Many students commute nightly from as far away as Athens, Montgomery, Tuscaloosa and Auburn. Our students graduate in 4 years, depending on the course loads and are eligible to sit for the Alabama bar exam. See our web site.



Night Classes

Affordable

An Evening Law School Since 1915
823 Frank Nelson Bldg. Birmingham, Al 35203
(205) 322-6122 www.bsol.com

which clarified the law as to the rule of repose. The defendant then filed a motion for summary judgment in February 2002, asserting the rule of repose. The plaintiff filed a response, claiming waiver, since the rule of repose had not been pled as an affirmative defense. *Id.* at 952.

At the March 2002 hearing on the motion, the defendant was granted a continuance to address the waiver claims. After the hearing, a motion for leave to file an amended answer was submitted, but the trial court denied the motion. *Id.* at 952. On appeal, the Alabama Supreme Court reversed the trial court's ruling and allowed the amendment. The court noted that at the time Liberty National filed its answer, the state of the law precluded its use of the defense. Two months after the law was clarified, Liberty National filed its motion to amend, which was acceptable to the court. *Id.* at 954.

The Test for Amendments after a Showing of "Good Cause"

After a party has shown "good cause" for an amended pleading filed within 42

days of trial, the analysis is not necessarily finished. A major hurdle, however, has been overcome. That is, the Alabama Supreme Court has determined that,

in light of the overarching liberal policy of allowing amendments under Rule 15, the appropriate way to view the request for leave to amend, if a party demonstrates good cause, is as though the request had been brought more than 42 days before trial, when the court does not have unbridled discretion to deny the leave to amend, but can do so only upon the basis of a valid ground' . . .

Ex parte Liberty National, 858 So.2d 950, 953 (Ala. 2003).


In other words, the amendment is now treated as if it was timely filed, is subject to far less scrutiny, and "the burden is [now] on the trial court to state a valid ground for its denial of a requested amendment." *Id.* (emphasis added).

"Actual prejudice or undue delay" are the "valid grounds" repeatedly cited by

the Alabama Supreme Court as a justification for denying a timely-filed, amended pleading. *Ex Parte Thomas*, 628 So.2d 483, 486 (Ala. 1993). As to the latter, the Alabama Supreme Court has interpreted "undue delay" to mean "flagrant abuse, bad faith, truly inordinate and unexplained delay." *McElrath*, at 560, 564 (Ala. 1977). "A long delay is not good cause, by itself, to deny an amendment." *Ex parte Neely Truck Line*, 588 So.2d 484, 485 (Ala.Civ.App. 1991). The Alabama Supreme Court does consider, however, whether "the amendment, if allowed, will cause any undue delay in the resolution of the case." *Ex parte Liberty National*, 858 So.2d at 955.


Undue Delay

"Undue delay can have two different meanings" under Rule 15(a). *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180, 1189 (Ala. 2006). Primarily, delay deals with when the party learned of the information in relation to the amendment. See *Rector v. Better Houses, Inc.*, 388 So. 2d 75, 78 (Ala. 2001) (affirming the striking of amended complaint, when plaintiff gave no evidence to rebut trial court's



GROW YOUR 401(k) WISELY

Six things you won't hear from other 401(k) providers...




1. We were created as a not-for-profit entity, and we exist to provide a benefit
2. We leverage the buying power of the ABA to eliminate firm expenses and minimize participant expenses
3. Our fiduciary tools help you manage your liabilities and save valuable time
4. Our investment menu has three tiers to provide options for any type of investor, and our average expense is well below the industry average for mutual funds
5. We eliminated commissions, which erode your savings, by eliminating brokers
6. We have benefit relationships with 29 state bar and 2 national legal associations.* No other provider has more than one.

Please visit the ABA Retirement Funds Booth at the **Alabama State Bar Annual Meeting for a free cost comparison and plan evaluation. July 9-12, 2008 - Hilton Sandestin Beach Golf Resort & Spa - Sandestin, FL**

LEARN HOW YOU CAN GROW YOUR 401(k) WISELY

Call an ABA Retirement Funds Consultant at 1-877-945-2272
www.abaretirement.com

* Alabama State Bar	Kansas Bar Association	Ohio State Bar Association
State Bar of Arizona	Louisiana State Bar Association	Oklahoma Bar Association
Arkansas Bar Association	Maine State Bar Association	Rhode Island Bar Association
Colorado Bar Association	Minnesota State Bar Association	State Bar of Texas
Connecticut Bar Association	The Mississippi Bar	Vermont Bar Association
The District of Columbia Bar	State Bar of Nevada	Washington State Bar Association
State Bar of Georgia	New Hampshire Bar Association	State Bar of Wisconsin
Hawaii State Bar Association	State Bar of New Mexico	American Immigration Lawyers Association (AILA)
Illinois State Bar Association	New York State Bar Association	Association of Legal Administrators (ALA)
Indiana State Bar Association	North Carolina Bar Association	
Iowa State Bar Association	State Bar Association of North Dakota	



For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call 1-877-945-2272, or visit www.abaretirement.com or write ABA Retirement Funds P.O. Box 5142 • Boston, MA 02206-5142 • abaretirement@listserveonline.com. Be sure to read the Prospectus carefully before you invest or send money. The Program is available through the Alabama State Bar as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program. 11/2007

finding that facts which were the basis of the amendment were known from the start of the suit); *Burkett v. American Gen. Fin., Inc.*, 607 So. 2d 138 (Ala. 1992) (affirming the striking of an amended complaint where the plaintiff learned of the fact six months prior to the amendment). Alternatively, a trial court may deny an amendment when it would cause a delay of the trial. *Blackmon*, 953 So. 2d at 1190; *Horton v. Shelby Med. Ctr.*, 562 So. 2d 127 (Ala. 1989).

A peculiar scenario of potential “undue delay” arises when the filing of a motion for summary judgment is followed by a subsequent attempt to amend an answer. That is, the motion for summary judgment *precedes* the filing of the very affirmative defense upon which the motion is based. The Alabama Supreme Court “has held that a defendant’s failure to plead an affirmative defense in its answer does not prevent it from raising the defense in a motion for a summary judgment, when

the defendant amends its answer to include the affirmative defense *before the trial court rules on the summary judgment motion.*” *Avery v. Beverly Health and Rehabilitation Services, Inc.*, 902 So.2d 704, 707 (Ala.Civ.App. 2004) (emphasis added).

In *Piersol v. ITT Phillips Drill Division, Inc.*, for example, the court affirmed a trial court’s decision to consider a motion for summary judgment based on the statute of limitations, even though the defendant did not attempt to amend its answer until *four months* after filing the motion. 445 So.2d 559, 560 (Ala. 1984). This was because the amended pleading had been filed prior to the hearing on the statute of limitations. *Id.*

Likewise, in *Alexander, Corder, Plunk, Baker and Shelly, PC v. Jackson*, 811 So.2d 506 (Ala. 2001), the court again affirmed a trial court’s decision to allow an amended answer which asserted, for the first time, the statute of frauds. The answer was filed *after* the motion for summary judgment. Because the defendant amended its answer before the trial court ruled on his summary judgment motion, the Alabama Supreme Court affirmed. *Id.* at 508.

Actual Prejudice

What constitutes “actual prejudice” has caused some confusion, with some finding the phrase to be a legal misnomer. Alabama courts have made clear that the test is *not*, as has been argued, whether the amended claim or defense harms or “prejudices” the opponent’s case. Instead, the non-movant must demonstrate actual prejudice to its ability to develop facts or evidence which it could have used had the amendment been timely. *Ex parte GRE Ins. Group*, 822 So.2d 388, 390 (Ala. 2001).

The true force of this concept was demonstrated in *Ex parte GRE Ins. Group*, where a defendant amended its answer in such a fashion that would completely extinguish the plaintiff’s claims. *Id.* at 390. The trial court granted the plaintiff’s motion to strike the amended complaint, and the defendant appealed. *Id.*

In supporting the trial court’s refusal to allow the amended defense, the plaintiff asked the Alabama Supreme Court what was likely intended to be a purely *rhetorical* question on the true meaning of “prejudice:”



The most difficult problems require the most innovative responses. When the shadows of title problems

loom, a unique approach makes all the difference. Mississippi Valley Title responds. With in-depth knowledge

to serve your local needs instantly. Strength to offer national resources and reserves immediately.

Flexibility to change with your business readily. Call us today.



1-800-843-1688 www.mvt.com

“Because actual prejudice to the opponent of the amendment is a criterion to be considered when allowing or disallowing an amendment to the pleading. . . . it bears mentioning the obvious: allowing the amendment effectively extinguishes Glenda Galvin’s claim against [the defendant] in all probability. How much more prejudice could exist?”

Id. at 390-91 (emphasis in original).

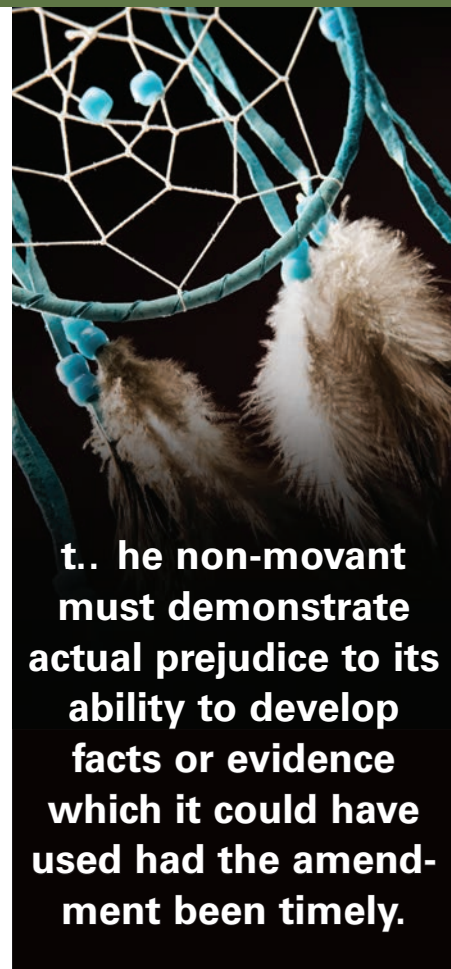
The court, however, chose to answer this question. In reversing the trial court’s denial of the asserted defense, based upon an abuse of discretion, the court answered:

“The plaintiff. . .] misunderstands the meaning of prejudice in the context of the test for allowing amendments. [I]t is obvious that an amendment, designed to strengthen the movant’s legal position, will in some way harm the opponent.’ In the context of a Rule 15(a) amendment, prejudice

means that the nonmoving party “must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.” And by prejudice to the rights of the other party is meant, without loss to him other than such as may result from establishing the claim or defense of the party applying.’ In other words, the defense asserted in the amended answer is not prejudicial, merely because it might constitute a meritorious defense to the plaintiff’s claim.”

Id. at 391 (first alteration and last emphasis added).

The court has also instructed that when an amended pleading “merely changes the legal theory of a case or adds an additional theory, but the new or additional theory is based upon the same set of facts and those facts have been brought to the attention of the other party by a previous pleading, no prejudice is worked upon the other party.” *Bracy v.*



the non-movant must demonstrate actual prejudice to its ability to develop facts or evidence which it could have used had the amendment been timely.

Looking for Something or Someone?

Find what you're looking for at www.alabar.org, "Bar Directory"

The screenshot shows the Alabama State Bar website with a search form for members. The form includes fields for Last Name, First Name, City, Firm, Law School, and State. Below the form, there are links for 'The Judicial System', 'The Courts and Administrative Offices', and 'Information Updates'. At the bottom of the screenshot, there is a footer with the address: 415 Center Avenue • Montgomery, Alabama 36104 • (205) 289-1010 • (205) 281-6030 Fax. Copyright © 2017, Alabama State Bar. Quality (TM).



ASB Lawyer Referral Service

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

The Lawyer Referral Service is not a pro bono legal service. Attorneys agree to charge no more than \$50 for an initial consultation, not to exceed 30 minutes. If, after the consultation, the attorney decides to accept the case, he or she may then charge his or her normal fees.

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

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

Sippial Elec. Co., 379 So.2d 582, 584 (Ala. 1980). In *Ex parte Reynolds*, for example, the court reversed the striking of an amended complaint which added a count of fraud. 436 So.2d 873, 874 (Ala. 1983). In supporting its decision, the court noted that the amendment was filed more than a month before the date set for the defendant's motion for summary judgment and added no new parties. Most critically, it "was based on a combination of facts previously alleged by [plaintiff] in support of his original complaint and facts set forth by the defendants in the affidavit in support of their motion for summary judgment." *Id.*

In contrast, an amended complaint filed within 30 days of trial was deemed appropriately struck by the trial court, when the "new allegations of fraud and suppression [were] based upon information that was known or should have been known . . . at the time she filed the original complaint." *Rector v. Better Homes, Inc.*, 820 So.2d 75, 77 (Ala. 2001) (alteration in original). Likewise, the court affirmed a trial court's decision to strike a plaintiff's second amended complaint, where it was filed six weeks before trial, two years after the original complaint, after the court's deadline to amend pleadings, and after the defendants had filed motions for summary judgment. *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 228 (Ala. 2004); *see also, Government Street Lumber Co. v. AmSouth Bank, N.A.* 553 So.2d 68 (Ala. 1989).

Rule 5's "Liberal Application" Has Its Limits

Despite the overall theme of this article, and the majority of Rule 15 case law, parties should certainly not confuse the intentionally liberal application of Rule 15 with a "carte blanche authority to amend . . . at any time." *Burkett v. American Gen. Fin. Inc.* 607 So. 2d 388, 390 (Ala. 2001), quoting *Stallings v. Angelica Uniform Co.*, 388 So. 2d 942, 947 (Ala. 1980). Rule 15 specifically vests a trial court with the discretion to deny *any amended pleading*, even if filed outside 42 days. In short, a trial court has the discretion to deny *any* amendment for good cause.

No case better emphasizes this discretion than *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180 (Ala. 2006). In fact, *Blackmon* demonstrates how a trial court can exercise its discretionary muscle in multiple ways. The internal flexibility of Rule 15 can be used by trial judges to void the very time limits of the rule itself. For example, the trial court in *Blackmon* entered a scheduling order that changed the deadline for amended pleadings. The Alabama Supreme Court held that this scheduling order overrode the "default" time provision of Rule 15(a). *Id.* at 1189.

The plaintiff incorrectly assumed, however, that as long as his amended complaint was filed prior to the trial court's scheduled

(Continued on page 274)

More Bang.

When it comes to getting noticed, yours will.


Through AlabamaLegals.com, your public notices are more accessible than ever before. In addition to running in print, newspapers across the state are uploading your legal notices every day to the most comprehensive legal Web site in the state.

More bang, same buck.



Free public notice searches

AlabamaLegals.com



**In just 5 minutes,
you may save up to 15% on your
professional liability policy.**

Get a quote today and see how much you can save. GilsbarPRO is the exclusive administrator for the CNA Lawyers Professional Liability Program in the State of Alabama.

prontoquote

- ✓ Get a premium estimate during your first phone call.
- ✓ Get a customized quote usually within 6 hours.
- ✓ Get your CNA policy at your desk usually within 1 business day.

Call the Pros. **1-800-906-9654**

www.gilsbarpro.com/prontoquote

CNA

GILSBARPRO
Professional Liability Insurance for Attorneys

One or more of the CNA insurance companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes and is not intended to substitute for the guidance of retained legal or other professional advisors, nor to constitute a contract. Please remember that only the relevant insurance policy can provide the actual terms, coverage, amounts, conditions and exclusions. All products and services may not be available in all states. CNA is a service mark registered with the United States Patent and Trademark Office. Copyright (c) 2009 CNA. All rights reserved.

(Continued from page 272)

deadline, he was entitled to this amendment. The trial court disagreed, striking three new counts filed prior to its own deadline. It did so, because: (1) the plaintiff's amendment was based upon his own deposition testimony, so that there was undue delay in waiting until the eve of trial to amend the complaint; and (2) the amendment would cause more discovery and, consequently, a delay in the trial.

On appeal, the plaintiff argued there was no prejudice, because the defendants had been aware of the information upon which the amendment was based for at least eight months. This was the time period between the plaintiff's deposition and the amendment. The Alabama Supreme Court, however, noted that the trial court had relied on undue delay, rather than prejudice. Thus, the plaintiff's "no prejudice" argument effectively proved his own delay, since the plaintiff

would have likewise been aware of his own testimony long before it was amended into legal claims by the amendment.

Conclusion

As shown generally above, the Rules Committee's hope to mark a fine, if not absolute, line for amending pleadings has not been completely achieved. Through the "good cause" crack in the dam of Rule 15(a), a steady trickle of decisions defining

that phrase continues to this day. Indeed, the unanticipated factual scenarios which the real world creates, and these cases exhibit, are the very reason the committee could not, and should not, create an absolute rule of preclusion like the statute of limitations. Thus, because the application of Rule 15(a) remains so fact-specific, the ability to add claims, or foreclose them, will remain fodder for new case law, and the likely stuff of attorney nightmares, for years to come. ▲▼▲



Christian Hines is a partner in the Mobile office of Starnes & Atchison LLP. He received degrees from Wake Forest University in 1994 and the University of Alabama School of Law in 1997.

We're Going "Green" To Save You Time And Energy!

Beginning with the October 2008 issue, your *Addendum* newsletter will become available in an electronic format only.

All ASB members will have the bi-monthly newsletter delivered to the e-mail address they provided to the Membership Department. (Hint: You might want to double-check to see if the information we have for you is correct!) This is all in an effort to better serve our members and make sure that the information we send you is as correct and up-to-date as possible. The newsletter will still bring you news on cutting-edge technology, nuts-and-bolts practice suggestions, upcoming rule changes or other court announcements, and profiles of other ASB members rendering service in their communities. And, the day we send it is the day you'll get it! So, relax and feel good about the new format –

You'll be keeping your desk and the environment a little cleaner.

Alabama, we love where we live.



For more than 125 years, LandAmerica has been working to serve the communities that make up our country. Today in Alabama, with resources and tools from title services to home warranty, our knowledgeable representatives will respond with foresight and innovation to your changing needs. Whether you're a homebuyer, lender, broker or attorney, you can count on LandAmerica to help you with any real estate transaction need anywhere in the state of Alabama.

We're glad to be in the neighborhood.

LandAmerica Financial Group, Inc.
Commonwealth Land Title Insurance Company
Lawyers Title Insurance Corporation
Transnation Title Insurance Company
2200 Woodcrest Place, Suite 330
Birmingham, AL 35209
Phone: 800-831-6807
Fax: 205-868-1011
www.landam.com

© 2006. LandAmerica, Commonwealth, Lawyers Title and Transnation are registered trademarks of LandAmerica Financial Group, Inc.





Accessibility and Possible Cost-Shifting of ESI

By Rebecca Jennathan Luck

How much electronically stored information (ESI) must I produce? When should the cost of search and restoration be shifted to the requesting party? Will I have to produce data if my client is not presently actively using the material? How will the court decide these difficult questions?

The specter of the unknown and the unknowable, high stakes, expensive technical expertise, chance disclosures, highly trained investigators, and human failings, keeps some of us interested in the unfolding lines of case law on electronic discovery issues. Though we learn something with each new case, the underlying electronic facts remain a mystery to most of us. Where is electronic information stored, after all? Every day seems to disclose yet another place that it has been hidden, intentionally or inadvertently. What must we do to properly disclose and respond to discovery requests for electronic information? Are there any parameters that will provide a safe haven for the attorney acting in good faith?

One concept noted in the *Federal Rules of Civil Procedure* and discussed in certain federal court decisions that have been relied on by the Alabama Supreme

Court is that a party may identify data as inaccessible and exclude it preliminarily from required disclosures on that basis. Inaccessibility is discussed herein, with the hope that this discussion will assist in determining your discovery obligations.

The Alabama Supreme Court's recent review of the limits of discovery of electronic information in *Ex Parte Cooper Tire & Rubber Company*, So.2d 2007 WL 3121813 (Ala.2007) considering a petition for writ of mandamus to force limitation of discovery orders pursuant to the defendant's requested protective order, recognized that the *Alabama Rules of Civil Procedure* have not, yet, been amended to include direction for production of electronic discovery. The *Cooper Tire* court adopted the test set out in *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568 (N.D. Ill. 2004) to determine whether to shift the costs of searching and producing inaccessible data to the requesting party in order to protect the producing party from unduly burdensome e-discovery requests. *Id.*, at 572.

The plaintiff in the *Cooper Tire* wrongful death action alleged a tire defect caused the deaths of three family members and caused serious injury to a surviving member.

The requested protective order would have provided relief from an order compelling production of extensive tire-defective design information regarding all models of the defendants' tires over a period of almost nine years in some instances, backup tapes of electronically stored information, and previously produced confidential litigation discovery.

The *Cooper Tire* court carefully reviewed and largely approved of the Marion County Circuit Court's analysis of recent federal case law regarding whether a party should be required to produce large quantities of electronic data. The *Cooper Tire* trial court applied *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C.2001); *Rowe Entertainment, Inc., v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002); *Byers v. Illinois State Police*, not reported in F.Supp.2d, 2002 WL 1264004 (N.D.Ill2002) [not reviewed herein, as it added little to the discussion]; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003); and the *Federal Rules of Civil Procedure*, Rule 26(b)(2)(iii). The *Cooper Tire* trial court discussed the "marginal utility" test, the "proportionality test" and the presumption that a party responding to a discovery request normally pays for its own discovery production.

On review of the *Cooper Tire* trial court's order, the Alabama Supreme Court determined that a more recent federal court case, *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004), stated the proper test to be applied in determining whether the defendant should be required to comply with plaintiff's extensive discovery requests. The Alabama Supreme Court adopted the *Wiginton* test for use in Alabama to test the breadth of appropriate discovery and whether the costs associated with production of the requested information should be shared by the requesting party. On April 25, 2008, the Alabama Supreme Court affirmed its reliance on *Wiginton* and on the *Federal Rules of Civil Procedure* in *Ex Parte Vulcan Materials Company*, 2008 WL 1838309 (Ala.). The *Wiginton* test follows:

- 1) the likelihood of discovering critical information;
- 2) the availability of such information from other sources;
- 3) the amount in controversy as compared to the total cost of production;

- 4) the parties' resources as compared to the total cost of production;
- 5) the relative ability of each party to control costs and its incentive to do so;
- 6) the importance of the issues at stake in the litigation;
- 7) the importance of the requested discovery in resolving the issues at stake in the litigation; and
- 8) the relative benefits to the parties of obtaining the information.

Upon completion of its analysis, the Alabama Supreme Court *Cooper Tire* court first applied a broad discovery based relevancy analysis to eliminate any request for documents not relevant, nor likely to reveal relevant evidence. The court then instructed the trial court to apply the "recent federal guidelines" to determine whether ordering production of the requested e-mails would constitute undue burden.

Though the wording is somewhat different, the tests established in *Cooper Tire* and *Wiginton* do not vary greatly from the *Federal Rules of Civil Procedure*, Rule 26, as amended effective December 1, 2006, and Comments following. (The rules underwent subsequent amending, however, this portion of the rule does not appear to have changed.)

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.



Serving the Demands of the Legal Profession

We help solve your temporary staffing needs for projects like:

- * Document production
- * Brief writing
- * Legal research
- * Commercial transactions
- * Management of complex litigation
- * Human Resources matters
- * Family Medical Leave

We can help with permanent placement, too. Call us now.

205.383.4619 (ph) - www.legaldemands.com - info@legaldemands.com

Does your life have room for both work and play? Judge for yourself.



Exhibit A

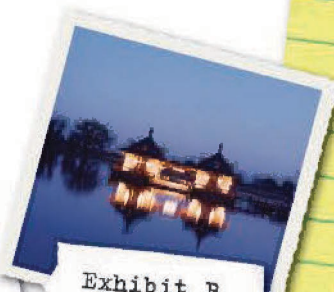


Exhibit B



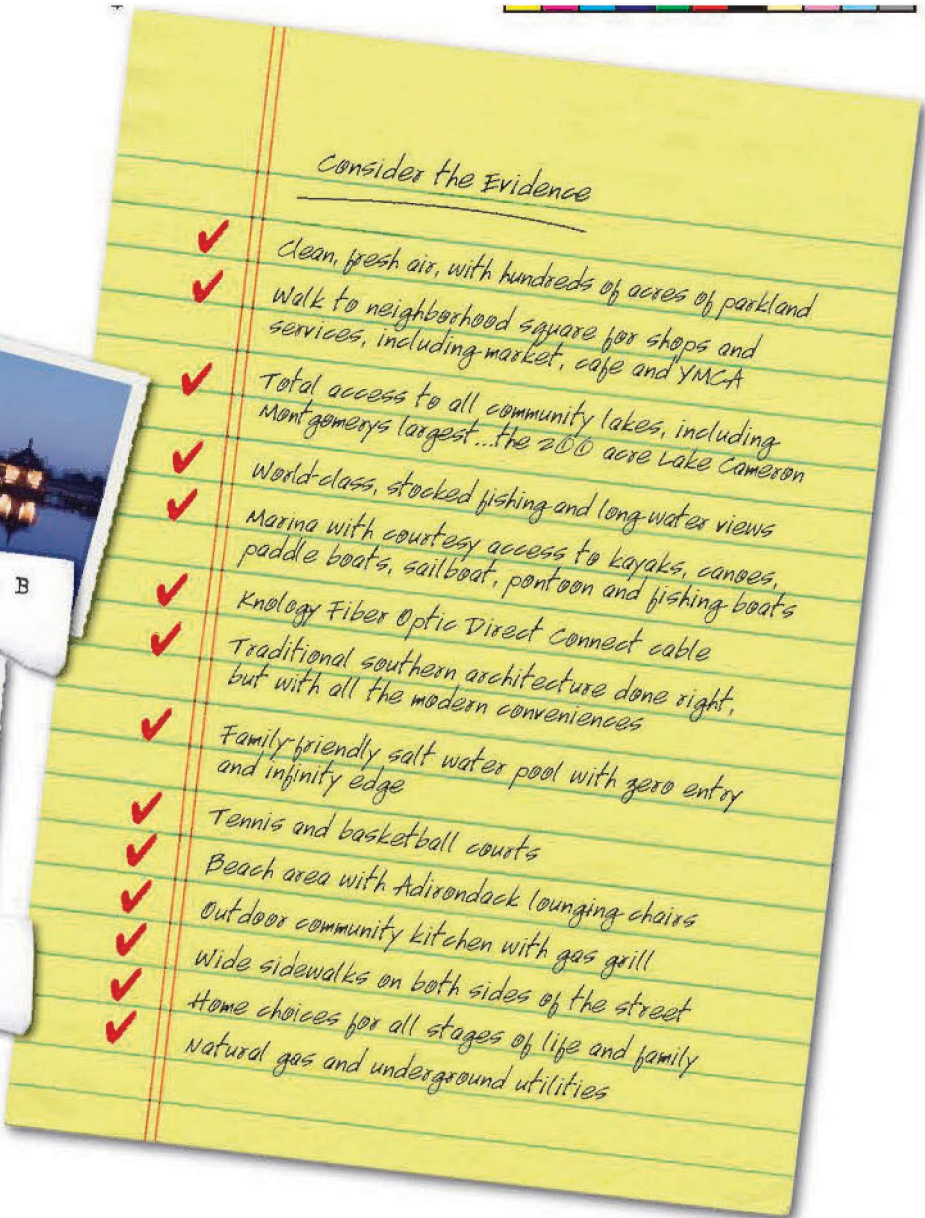
Exhibit C



Exhibit D



Exhibit E

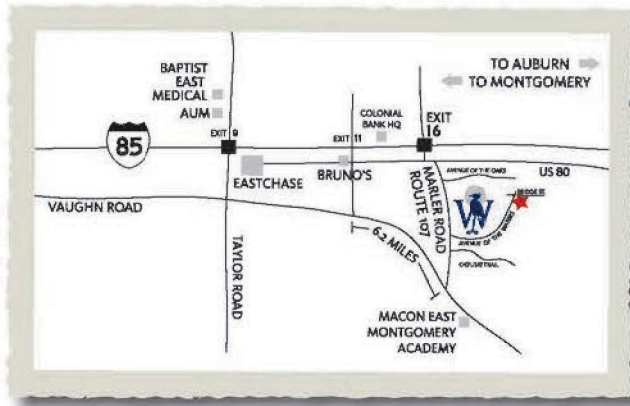


Discover a place that doesn't just respect your taste. It respects your time.

Feel like you've got it all, except the time to enjoy it? Then you need to examine The Waters. Conveniently located just off I-85 on the east side of Montgomery County, it's the ideal lake property for anyone battling an overfilled calendar.

Not only convenient to access, but also convenient upon arrival thanks to an abundance of amenities steps from your front door. Review the evidence above and you'll agree. There is no place like it in Alabama.

The Waters is just off I-85 on the east side of Montgomery County, just down the road from major medical and shopping facilities.



334.272.3200

www.thewatersal.com

NEW HOMES FROM THE \$200s TO OVER \$1 MILLION.

All information is assumed correct but is not warranted.



(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Federal Rules of Civil Procedure, Rule 26(b)(2)(B and C), after April 30, 2007 Amendment

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include:

- 1) the specificity of the discovery request;
- 2) the quantity of information available from other and more easily accessed sources;
- 3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
- 4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;

5) predictions as to the importance and usefulness of the further information;

6) the importance of the issues at stake in the litigation; and

7) the parties resources.

Federal Rules of Civil Procedure, Rule 26, *Comments*, December 1, 2006 Amendment (paragraph structure adjusted to highlight list)

We are watching the unfolding of a new application of the litigation process. Like electronic information itself, cases enforcing disclosure requirements and discovery requests appear to be searching for the consensus position. The amended *Federal Rules of Civil Procedure* do not significantly change existing fairness criteria developed over the years.

A computer performs its functions outside the understanding of most of us. Even if we manage to take off the tough casing, we cannot see the computer work its magic. Perhaps the search for a common legal language and an understanding of the nature of electronic information storage capabilities will begin to demystify electronic information discovery.

The courts and amended rules provide us with guidelines and precedents for compliance with current legal standards. Let's look at some cases referenced by the courts cited in Alabama in *Cooper Tire* to ground our search for direction. We will review the issues of both quantity and assignment of cost of production of electronic information. III address them in the sequential order they were issued.

There are two *McPeck* decisions from our nation's capital, demonstrating the court's use of what is now often called sampling. The *McPeck* court addressed a request for review and acknowledged the high expense of restoration of e-mails from numerous back-up tapes. *McPeck I* described the concepts that later courts used to limit discovery production based on undue burden, accessibility of electronic information and cost-shifting of electronic information production. The *McPeck* plaintiff wanted the Department of Justice to search backup systems for evidence of deleted information. The *McPeck* court analyzed difficulties associated with the plaintiff's request:

“. . . the backup tapes have to be “restored” or rendered readable by returning the files to a source . . . from which they can be read by the application which originally created them. Then, someone would have to review the restored file . . . and determine whether it falls within one of plaintiff's document requests . . . merely restoring the e-mail from a single backup tape would take eight hours . . .

“. . . Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter.

“Unlike a labeled file cabinet or paper files organized under an index, the collection of data by the backup tapes . . . was random. It must be remembered that the . . . use of a backup . . . system was not for the purpose of creating a

Counselforhire.com

Donna J. Beaulieu, Attorney

Services provided:

Appellate and Trial Court Briefs, Motions, Memoranda of Law, Pleadings and Discovery (Civil cases only); Researching general and specific legal issues.

(205)668-4411

Email: counselforhire@gmail.com

perfect mirror image of each user's hard drive. Instead, the system was designed to prevent disaster, i.e., the destruction of all the data being produced on a given day if the network system crashed.

"Once the day ended and the system had not crashed, the system administrator could breathe a sigh of relief. She may then have maintained that day's backup tapes for some period of time, but then eventually taped over them. . .

. . .

"It is . . . impossible to know in advance what is on these backup tapes. There is a theoretical possibility that there may be something on the tapes that is relevant to a claim or defense, for example, a subsequently deleted e-mail that might be evidence . . .

. . .

". . . I have decided to take small steps and perform, as it were, a test run"

McPeek v. Ashcroft (McPeek I), 202 F.R.D. 31, 32-34 (D.C.D.C. 2001) (selected phrases and sentences only).

Once the partial review of backup tapes had been completed, *McPeek II* ordered further argument, applying the principles articulated in the opinion and addressing why other backup tapes should be searched. *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C.2003).

I believe the *McPeek* cases stand for the principle that a sampling may reveal the relative benefits of further ESI or document review

and the nature of information which may be found and allow a proper cost-benefit analysis by the court. (Compare and contrast quick-peek agreements, concerning privilege, See, *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280,290 (S.D.N.Y.2003)).

We know that later both *Wiginton* and the *F.R.C.P., Rule 26* cited above, encourage such an analysis. *F.R.C.P., Rule 34(a)* specifically acknowledges that sampling is a reasonable procedure in connection with a production of documents, or ESI, as follows:

"(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or **sample** the following items in the responding party's possession, custody, or control:

(a) any designated documents or electronically stored information— including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations— stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or . . ."

Federal Rules of Civil Procedure, Rule 34(a) (selected portion only, bolding added).



- **Need to find an associate for your firm?**
- **Need to get rid of some office equipment?**
- **Need to get the word out that you're available as an expert witness?**

Then check out the online
"Classifieds" at the ASB Web site,
www.alabar.org.

Cost-shifting is fully analyzed in the *Rowe* case series. *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) provided an analysis of cost shifting provided for in *F.R.C.P., Rule 26(c)*. Plaintiff demanded production of electronic and other information, some of which resided on backup tapes. The *Rowe* court enumerated eight factors to be considered when determining whether discovery costs should be shifted. Those eight factors became the basis of the *Zubulake* and, then, the *Wiginton* analyses. The *Rowe* court noted general relevancy of the request and ordered cost-shifting for only costs of production, but reserved the expense of review regarding privileged or confidential materials to the producer. The decision was reviewed and approved by the assigned trial court judge, *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, not reported in F.Supp.2d, 2002 WL 975713 (S.D.N.Y. 2002), with more extensive analysis.

There are at least seven reported decisions in *Zubulake*. The *Zubulake* opinion cited in *Cooper Tire* is generally regarded as *Zubulake I* and reviews the reported *Rowe* decision regarding standards to use in determining the parameters of court-ordered discovery of electronic information and an analysis of the appropriate use of cost-shifting, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, (S.D.N.Y. May 13, 2003). Significantly, *Zubulake I* describes the difference between accessible and inaccessible data; though *Rowe* did not use this terminology, the concepts are the same.

“Information deemed ‘**accessible**’ is stored in a readily usable format. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. ‘**Inaccessible**’ data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.”

Zubulake I, supra at 320 (bolding added).

What I will call *Zubulake III* painstakingly applied the concepts in *Zubulake I* for a completely transparent cost-shifting analysis. The decision reiterated the court’s statements that the costs of production do not shift, only the costs of restoration and search. *Zubulake III* emphasized the rule that costs of production are normally assigned to the producing party. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 290, (S.D.N.Y. July 24, 2003).

The *Federal Rules of Civil Procedure*, as amended effective December 1, 2006, address electronically stored information, but are less descriptive of the meaning of accessibility.

“A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is **not reasonably accessible** because of undue burden or cost . . .”

portions of *F.R.C.P., Rule 26(b)(2)(B)*(bolding added).

However, 2006 Amendment, Advisory Committee Notes provide help in determining whether data should be considered accessible:

“. . . some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably **accessible**.

“It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources . . .”

Advisory Committee Notes to F.R.C.P., Rule 26, 2006 Amendment, Subdivision(b)(2)(bolding added).

On October 10, 2007, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the proposed *Uniform Rules Relating to the Discovery of Electronically-Stored Information*. Judge John L. Carroll, dean and professor of law at Cumberland School of Law, served as the reporter for this commission’s draft of uniform rules for discovery of ESI. The commission drafts and promotes enactment of uniform state laws where they deem it appropriate to strengthen the federal system, interstate commerce and international commerce, while considering varying state concerns.

The proposed uniform rules of electronic discovery (found at www.law.upenn.edu/bll/archives/ucl/udoera/2007_final.htm) were discussed by George M. Dent, III in his article published in the March 2008 *Alabama Lawyer*, at page 107. Mr. Dent, who is the chair of the Alabama Supreme Court Standing Committee on the *Alabama Rules of Civil Procedure*, requested comments on the proposed rules or other issues of importance. My review of the proposed uniform rules relating to the discovery of ESI convinced me that they are fully compatible with the federal rules excepting only in a difference in the required time limits for required actions. The proposed uniform rules also gather all ESI discovery issues in one more manageable place than the dispersed requirements in the *F.R.C.P.*

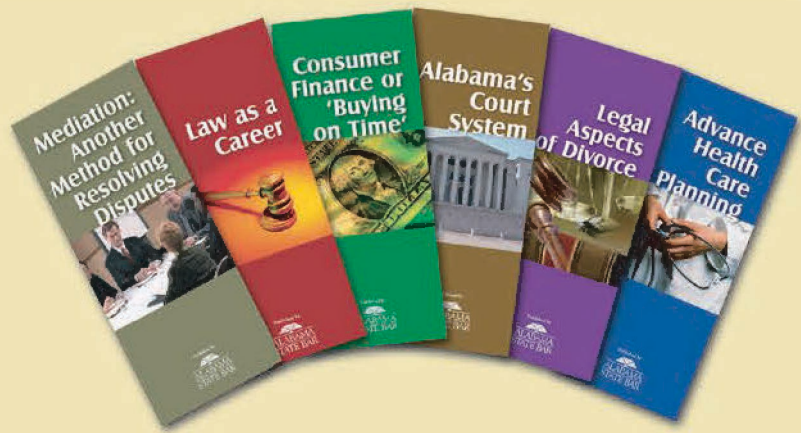
Generally, I am persuaded that improved document management systems will be used in the future to make our discovery searches and productions more manageable. Until then, identify, preserve, confer, reach agreement, disclose, object, or produce! ▲▼▲



Rebecca Jennathan Luck has been an assistant attorney general for the Alabama Department of Mental Health and Mental Retardation since 1996. Luck also practiced in Tennessee and California.

Alabama State Bar Publications Order Form

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



PAMPHLETS

Law As A Career Information on the opportunities and challenges of a law career today.	\$10.00 per 100	Qty _____	\$ _____
Lawyers and Legal Fees A summary of basic legal procedures and common legal questions of the general public.	\$10.00 per 100	Qty _____	\$ _____
Abogados Y Honorarios Legales Un resumen de procedimientos legales básicos y preguntas legales comunes del gran público.	\$10.00 per 100	Qty _____	\$ _____
Last Will & Testament Aspects of estate planning and the importance of having a will.	\$10.00 per 100	Qty _____	\$ _____
Legal Aspects of Divorce Offers options and choices involved in divorce.	\$10.00 per 100	Qty _____	\$ _____
Consumer Finance/"Buying On Time" Outlines important considerations and provides advice on financial matters.	\$10.00 per 100	Qty _____	\$ _____
Mediation/Resolving Disputes An overview of the mediation process in question-and-answer form.	\$10.00 per 100	Qty _____	\$ _____
Arbitration Agreements Answers questions about arbitration from the consumer's perspective.	\$10.00 per 100	Qty _____	\$ _____
Advance Health Care Directives Complete, easy to understand information about health directives in Alabama.	\$10.00 per 100	Qty _____	\$ _____
Alabama's Court System An overview of Alabama's Unified Judicial System.	\$10.00 per 100	Qty _____	\$ _____
Notary Public & Lawyers/Notarios Y Abogados Clarifies the difference between notary publics and lawyers in the USA. Clarifica la diferencia entre Notario público y abogados en los Estados Unidos.	\$10.00 per 100	Qty _____	\$ _____
Acrylic Stand Individual stand imprinted with attorney, firm or bar association name for use at distribution points.	\$ 5.00 each	Qty _____	\$ _____

Shipping & Handling \$ 5.00

TOTAL \$ _____

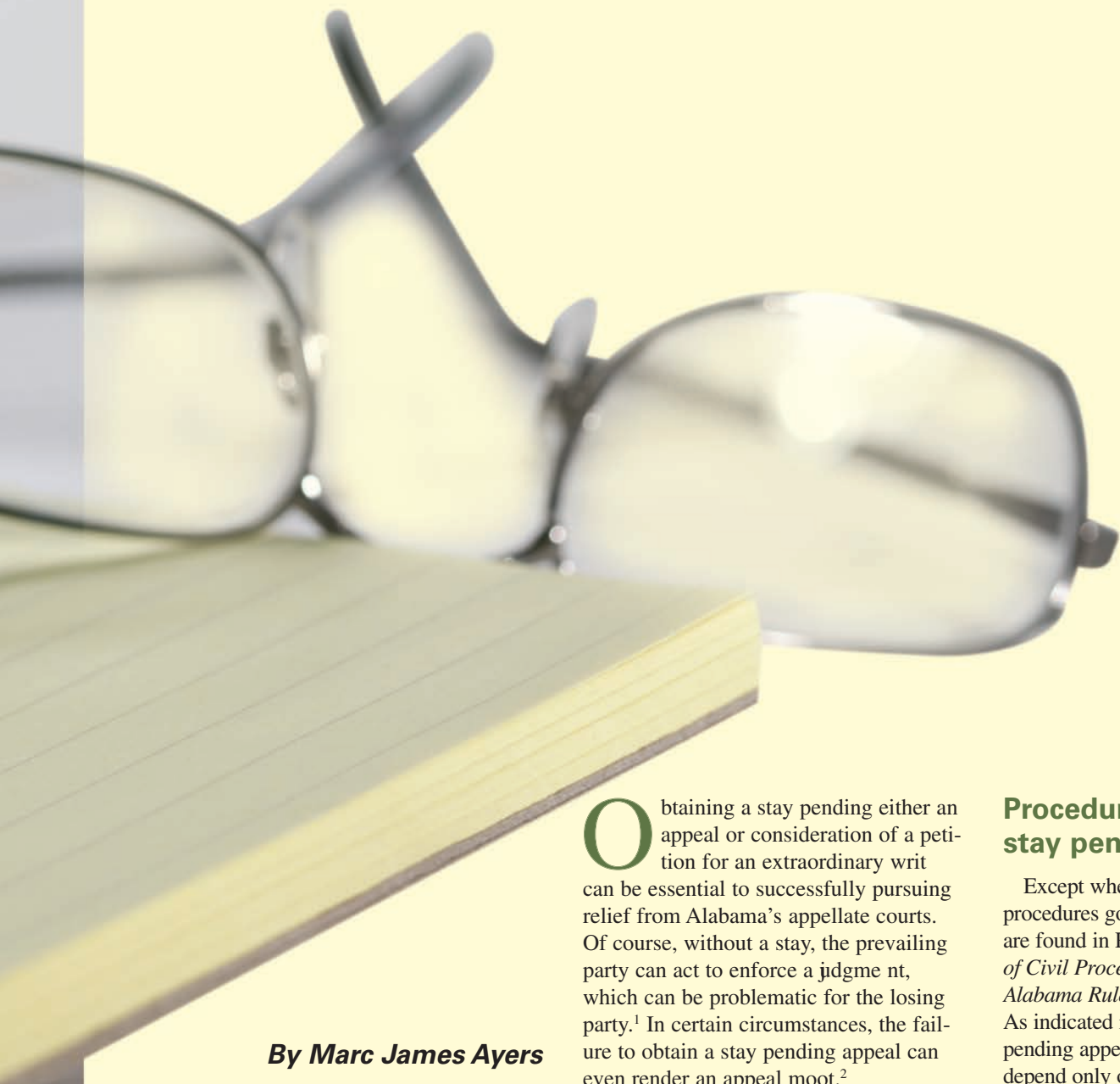
Name to imprint on stand: _____

Physical Mailing Address (not P.O. Box): _____

Please remit CHECK OR MONEY ORDER MADE PAYABLE TO: THE ALABAMA STATE BAR
for the amount listed on the TOTAL line and forward it with this order form to:
Marcia Daniel, Communications, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101

A close-up photograph of a desk. In the foreground, a black and silver ballpoint pen lies diagonally across a yellow notepad. To the right, a pair of glasses is partially visible. The background is a blurred document with the word "APPOI" visible. The overall scene suggests a professional or academic setting.

Notes on Stays Pending Appeals in Alabama's Appellate Courts



By Marc James Ayers

Obtaining a stay pending either an appeal or consideration of a petition for an extraordinary writ can be essential to successfully pursuing relief from Alabama’s appellate courts. Of course, without a stay, the prevailing party can act to enforce a judgment, which can be problematic for the losing party.¹ In certain circumstances, the failure to obtain a stay pending appeal can even render an appeal moot.²

While the general procedures for obtaining a stay pending appeal are fairly clear, the applicable standards for when a stay is proper are not necessarily so. The intent of this article is to briefly outline the procedures and applicable standards that are and should be followed in seeking a stay pending an appeal, and to address a unique case that has caused some disagreement in the federal courts: when a stay is proper pending an appeal from a denial of a motion to compel arbitration.

Procedures for obtaining a stay pending appeal

Except where provided by statute³ the procedures governing stays pending appeal are found in Rule 62 of the *Alabama Rules of Civil Procedure* and Rule 8 of the *Alabama Rules of Appellate Procedure*.⁴ As indicated in those rules, many stays pending appeal are not discretionary; they depend only on whether a party has properly submitted a *supersedeas* bond “approved by the clerk of the trial court, payable to the appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render.”⁵ “The purpose of the *supersedeas* bond is to maintain the status quo between the parties pending an appeal. It ensures that the party who has obtained a judgment will not be prejudiced by a stay of execution of the judgment pending the

final determination of an appeal.”⁶ Posting a *supersedeas* bond does not waive an argument on appeal that the trial court lacked jurisdiction.⁷

As set forth in Rule 8, *Ala. R. App. P.*, a party is entitled to a stay pending appeal of a *money* judgment if the party executes a proper *supersedeas* bond in an amount “equal to 150 percent of the amount of the judgment if the judgment does not exceed \$10,000, or 125 percent if the judgment exceeds \$10,000.”⁸

If the judgment appealed from is “for the payment of money and also for the performance of some other act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay pending appeal when he executes and submits a bond in the amount of what would be required for the money judgment itself, plus an additional amount “as the trial court may in writing prescribe.”⁹

If the judgment appealed from is “only for the performance of some act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay upon the execution and submission of a bond in an amount “as the trial court may in writing prescribe.”¹⁰

Although the trial court has discretion in determining the proper bond amount with respect to non-money judgments, under Rule 8 the trial court generally has no discretion as to setting bonds on money judgments.¹¹ However, the Alabama Supreme Court has recognized one narrow exception to this principle, now known as the “*Ware* exception.” As explained by the court, the *Ware* exception allows a trial court to avoid the strictures of Rule 8 if an appellant makes a satisfactory showing that he does not have the funds to satisfy the Rule 8 bond requirements:

In *Ware v. Timmons*, case no. 1030488, in response to a motion to suspend the requirement of Rule 8(a)(1), this Court issued an order in which it recognized a narrow exception to Rule 8. In that case, this Court directed the trial court to accept “the maximum bond obtainable, based on the appellants’ entire net worth and available insurance coverage. . . .” The *Ware* exception is now recorded in the Committee Comments to Rule 8(a) and (b), Adopted January 12, 2005. The Comments note that the modification to the *supersedeas* bond requirement in *Ware* was derived from this court’s authority under Rule 2(b), *Ala. R. App. P.*, to suspend a rule of procedure for “good cause shown.”¹²

An appellant seeking a stay should first apply to the trial court if “practicable,”¹³ and then to the appellate court if necessary. When a stay is sought from an appellate court, the party should explain that a stay could not be obtained from the trial court, explain why a stay is appropriate and include the pertinent parts of the record:

The motion [for a stay] shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be

filed such photocopied parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court.¹⁴

The appellate court may condition a stay upon the giving of a bond or other security.¹⁵

Applicable standards for obtaining a discretionary stay on appeal—and why there are no Alabama appellate decisions regarding such stays

Many often wonder why there are no Alabama appellate decisions setting forth a standard for acquiring a stay pending appeal in those cases not specifically delineated in Rule 8, such as stays sought along with a petition for a writ of mandamus.¹⁶ These stays do not depend solely on the posting of a bond, but are discretionary in the nature of an injunction. The reason for the lack of published precedent is because the Alabama appellate courts resolve stay motions and certain other matters on a separate docket *before* the appeal is resolved (in the Alabama Supreme Court, this is referred to as the “miscellaneous docket”).¹⁷ Therefore, these stays are granted or denied by order of the appellate court and not by published opinion.

The common practice in crafting an argument as to why a stay is appropriate in these circumstances is to follow those standards set forth in federal decisions.¹⁸ In the federal courts, whether a stay pending appeal is appropriate usually depends upon a balancing of some or all of the following factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”¹⁹ The test is not intended “to be reduced to a set of rigid rules,”²⁰ and, accordingly, “the nature of the showing required to justify a stay pending appeal may vary with the circumstances presented.”²¹ For example, the Eleventh Circuit has held that a stay pending appellate review can be warranted where there exists only “a substantial case on the merits when a serious legal question is involved” and “the balance of equities weighs heavily in favor of granting the stay.”²²

Stays pending the appeal of a denial of a motion to compel arbitration

A unique situation arises when an appeal is taken from a trial court’s denial of a motion to compel arbitration. Orders granting or denying motions to compel arbitration are appealable as a matter of right.²³ However, no Alabama appellate decision addresses whether a trial court must stay further proceedings during the appeal of a denial of such a motion.

In Alabama, “the general rule is that a trial court is divested of its jurisdiction during a pending appeal.”²⁴ Accordingly, “while an appeal is pending, the trial court can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.”²⁵ During an appeal of its judgment or order, “a trial court may proceed in matters that are entirely collateral to the appeal.”²⁶ A denial of a motion to compel arbitration is a ruling that it is

for the court, rather than an arbitrator, to hear and rule on the claims at issue. Therefore, it would seem that proceeding to trial would not be collateral to the denial, but would be purely dependent on its correctness. Moreover, allowing a trial court to proceed to trial during the appeal of its denial of a motion to send the claims to arbitration would undermine the point of arbitration in the first place, which is to provide a fast and efficient method of resolving disputes.²⁷ It would appear, then, that under Alabama law a stay of further proceedings would be required upon the appeal of a trial court's denial of a motion to compel arbitration.

This is precisely the conclusion reached by the majority of federal circuit courts of appeal that have addressed the issue—including the Eleventh Circuit. In addition to the Eleventh Circuit, the Third, Seventh, Tenth, and D.C. (and perhaps the Federal) circuits hold that stays pending appeal are mandatory following the denial of a motion to compel arbitration unless it can be shown that the appeal is frivolous.²⁸ Underlying this holding is the jurisdictional principle noted above that “the only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court. The issue of continued litigation in the district court is not collateral to the question presented by an appeal. . . .”²⁹ As the Seventh Circuit put it, “Whether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal. . . .; it is the mirror image of the question presented on appeal.”³⁰

Furthermore, these courts have recognized that if litigation is allowed to continue even though a party has appealed an order denying arbitration, then the purposes of arbitration will be completely frustrated:

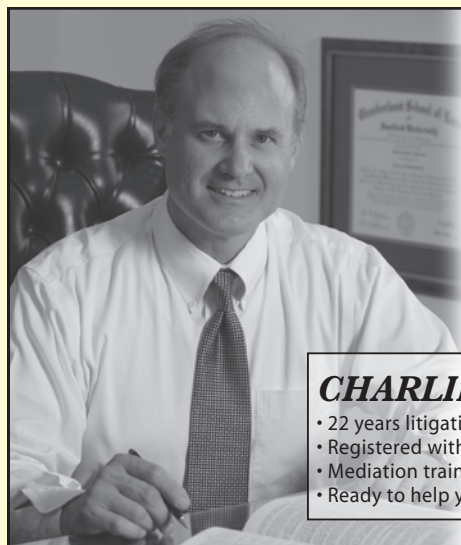
By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been

wasted and the parties must begin again in arbitration. . . . Thus, the underlying reasons for allowing immediate appeal of a denial of a motion to compel arbitration are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.³¹

Two federal circuit courts of appeal—the Second and the Ninth—have endorsed the contrary view that stays pending appeal of a denial of a motion to compel arbitration are not required.³² However, the majority rule, which one noted commentary has approved as “the sounder approach,”³³ appears to accord more fully with Alabama law concerning the transfer of jurisdiction between the trial and appellate courts and the purposes of arbitration. ▲▼▲

Endnotes

1. Rule 62(a), *Ala. R. Civ. P.* provides for a 30-day automatic stay on execution on and enforcement of a judgment except “an interlocutory or final judgment in an action for an injunction or in a receivership action.” Rule 62(a), *Ala. R. Civ. P.* And Rule 62(b), *Ala. R. Civ. P.*, allows the trial court to further stay execution of a judgment during consideration of a post-judgment motion “[i]n its discretion and on such conditions for the security of the adverse party as are proper.” But if the losing party wishes to prevent execution on or enforcement of a judgment pending appeal, that party must seek a stay pending appeal as discussed in this article.
2. See *Masonry Arts, Inc. v. Mobile County Comm’n*, 628 So. 2d 334 (Ala. 1993) (dismissing appeal of trial court’s denial of injunction to prevent the award of a public contract because bidder failed to request a stay pending appeal and contract was awarded and executed pending appeal); *Skelton v. J & G, LLC*, 973 So. 2d 1066 (Ala. Civ. App. 2006) (holding that the plaintiffs’ appeal was rendered moot by their failure to acquire a stay of judgment concerning their right to redeem an apartment building; the time period for redemption set by the court elapsed without having been stayed); see also *Reeb v. Murphy*, 481 So. 2d 372 (Ala. 1985) (appeal dismissed because appellant failed to stay issuance of redemption deed and therefore ratified action of trial court).
3. For example, see, e.g., *Ala. Code* § 9-16-10(b) (1975) (appeals from decisions concerning violations of statutes governing mining operations).
4. This article concerns stays in civil proceedings. Stays pending appeal in criminal matters are governed by *Ala. R. Crim. P.* 7.2(c) and *Ala. R. App. P.* 8(d). See generally *Ex parte Watson*, 757 So. 2d 1107 (Ala. 2000).
5. *Ala. R. App. P.* 8(a); see *Ala. R. Civ. P.* 62(d) (“When an appeal is taken the appellant by giving a *supersedeas* bond may obtain a stay subject to the exceptions contained



Client problems? . . .

Give me a call!

Often times, difficult clients can make even the most straightforward case seem impossible to manage. Personalities come into play creating obstacles to resolution and a case that should be settled ends up on the trial docket. The right mediator can help you with your client and help you move on to a better use of your time than trying cases that should be settled.

CHARLIE ANDERSON, Mediator

- 22 years litigation experience in 38 Alabama counties
- Registered with the State Court Mediation Roster since 1994
- Mediation training completed at the Harvard Law School
- Ready to help you find resolution and to bring peace to adverse parties

Charles L. Anderson

7515 Halcyon Point Dr.
Montgomery, AL 36117
(334) 272-9880

www.andersonmediationservice.com

in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the *supersedeas* bond is approved by the court.”); *see also St. Regis Paper Co. v. Kerlin*, 476 So. 2d 64, 66 (Ala. 1985) (“The common law rule, that an appeal automatically superseded the judgment, in and of itself, has been changed to the extent that an appeal does not ordinarily supersede the judgment in the absence of a *supersedeas* bond. Under Rule 62, *A.R.Civ.P.*, and [Rule 8], *A.R.A.P.*, a *supersedeas* bond must be posted in order to stay the execution of a judgment.”) (citation omitted).

6. *Ex parte Lumbermen’s Underwriting Alliance*, 662 So. 2d 1133, 1137 (Ala. 1995) (quoting *Employers Ins. Co. of Ala. v. American Liberty Ins. Co.*, 495 So. 2d 1039, 1041 (Ala. 1986)).
7. *Baker v. Bennett*, 660 So. 2d 980, 983 (Ala. 1995).
8. *Ala. R. App. P.* 8(a)(1).
9. *Ala. R. App. P.* 8(a)(2).
10. *Ala. R. App. P.* 8(a)(3).
11. *See Ex parte Spriggs Enters., Inc.*, 376 So. 2d 1088, 1089 (Ala. 1979) (“The plain meaning of Rule 8(a)(1) is that one who appeals a judgment against him for money damages only must execute a *supersedeas* bond in an amount equal to 125 percent of the amount of the judgment when the judgment exceeds \$10,000. The language utilized in the rule is mandatory; the trial judge is given no discretion in setting the amount of the *supersedeas* bond.”); *Scrushy v. Tucker*, 955 So. 2d 988, 1000-01 (Ala. 2006) (citing *Ex parte Spriggs Enters.*).
12. *Scrushy*, 955 So. 2d at 1000-01 (footnote omitted); *see also Id.* (holding that there was no sufficient evidence that Appellant *Scrushy* could not post a bond as required under Rule 8).
13. *Ala. R. App. P.* 8(b).
14. *Id.*
15. *Id.*
16. *But see Ex parte Licensure Comm’n of Ala., (Morrison v. Gurley)*, [Ms. 2070245, March 21, 2008] ___ So. 2d ___, 2008 WL 748100, at *11 (*Ala. Civ. App.*) (opining that at least a part of a trial court’s analysis in considering a stay on appeal is to “balance the equities between the parties” as the trial court would in considering an injunction). *Ala.Civ.App.*, 2008.
17. In addition to stay motions, the Alabama appellate courts also address other preliminary matters (such as initial rulings on petitions for extraordinary writs) on a separate docket. *See* Marc James Ayers, *The Use and Review of the Extraordinary Writs of Mandamus and Prohibition in Alabama’s Appellate Courts*, 68 *Ala. Law.* 396, 398 (2007).
18. Rule 62, *Ala. R. Civ. P.*, and Rule 8, *Ala. R. App. P.* are substantially similar to, and in some instances identical to, their federal counterparts. Accordingly, the federal courts’ interpretations of the federal counterparts will be persuasive. *See, e.g., Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557, 561 n.3 (Ala. 2005) (“Cases interpreting the Federal Rules of Civil Procedure can be persuasive authority in construing the Alabama Rules of Civil Procedure because of the similarities between the Alabama rules and the federal rules.”).
19. *Hilton v. Braunkill*, 481 U.S. 770, 776 (1987).
20. *Hilton*, 481 U.S. at 777.
21. 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3954 (3d ed. 1999).
22. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981); *see United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992) (following *Ruiz*); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (same). *See also Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (discussing the “continuum” on which stays are evaluated, and stating: “At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. [T]he relative hardship to the parties is the critical element in deciding at which point along the continuum a stay is justified.”) (citations and internal quotations omitted); 16A Wright, Miller & Cooper, *Federal Practice and Procedure*, at § 3954 (“If the balance of hardships tips decidedly in favor of the party seeking a stay, it may be sufficient

showing on the merits to show the existence of serious legal questions.”) (citing cases).

23. *See Ala. R. App. P.* 4(d).
24. *Reynolds v. Colonial Bank*, 874 So. 2d 497, 503 (Ala. 2003).
25. *Reynolds*, 874 So. 2d at 503 (internal quotations omitted).
26. *Id.*
27. *See, e.g., Ocwen Loan Servicing, LLC v. Washington*, 939 So. 2d 6, 13 (Ala. 2006) (noting that “a key purpose” of arbitration is “to permit speedy resolution of disputes”) (quoting *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 12-14 (1st Cir. 2005)).
28. *See Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (“Upon motion, proceedings in the district court ... should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration.”); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 507 (7th Cir. 1997) (holding that a district court must stay litigation during the pendency of appeal upon the filing of a non-frivolous notice of appeal of a denial of a motion to compel arbitration); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162-63 (10th Cir. 2005) (same); *Ehleiter v. Grapetree Shores Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (agreeing with majority rule); *Bombardier Corp. v. National R.R. Passenger Corp.*, 2002 WL 31818924 (D.C. Cir. 2002) (unpublished); *see also Ecolab, Inc. v. Gardner Mfg. Co.*, 56 Fed. Appx. 484, 485 (Fed. Cir. 2003) (citing *Bradford-Scott* for the principle that an appeal from a denial of a motion to compel arbitration “divests the district court of jurisdiction to conduct the trial”) (unpublished). *Cf. In re White Mountain Mining Co.*, 403 F.3d 164, 170-71 (4th Cir. 2005) (stating that “[o]ur court has not decided whether a stay of the entire action is required pending appeal of an order denying a motion to compel arbitration or whether the filing of an interlocutory appeal divests the trial court of jurisdiction”; and holding that the issue was moot).
29. *Blinco*, 366 F.3d at 1251; *see also Bradford-Scott*, 128 F.3d at 505 (“[I]t is fundamental to a hierarchical judiciary that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”) (internal quotations omitted).
30. *Bradford-Scott*, 128 F.3d at 505.
31. *Blinco*, 366 F.3d at 1251-52.
32. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1411-12 (9th Cir. 1990).
33. 19 *Moore’s Federal Practice* § 203.12[3][a] (3d ed. 2007) (discussing the circuit split, and concluding that “[t]he sounder approach appears to be that adopted by the Eleventh Circuit, which holds that the district court should grant a motion to stay the litigation pending an appeal from the denial of a motion to compel arbitration, so long as the appeal is not frivolous”).



Marc James Ayers practices with Bradley Arant Rose & White LLP. He is a 1998 graduate of the Cumberland School of Law of Samford University and served as clerk and staff attorney to Alabama Supreme Court Justice J. Gorman Houston, Jr.



Another Great Year for the YLS

This year has been another great year for the YLS, and I've thoroughly enjoyed serving as president. Because there is no way to do this job alone I take this opportunity to thank all (to the extent possible) the persons and firms who have made this year such a success.

The YLS held its Sandestin Seminar in May. Thanks to these businesses and law firms for sponsoring it:

Platinum Sponsors

Carr, Allison, Pugh, Howard, Oliver & Sisson PC
Bradley Arant Rose & White PC
Hare Wynn Newell & Newton PC
Burr & Forman PC
Beasley Allen Crow Methvin Portis & Miles PC
Henderson Court Reporting
Vize PC
ProLegal Copies
Freedom Court Reporting Inc.
Bain & Associates Court Reporting Service Inc.
Imaging & Video Resources PC

Gold Sponsors

Lightfoot Frankin & White PC
McCallum Hoaglund Cook & Tuby PC
Marsh Rickard & Bryan PC

Silver Sponsors

White Arnold & Dowd PC
Daniell Upton Perry & Morris PC
McCallum Methvin & Terrell PC
Vickers Riis Murray & Curran PC
Luther Dendenburg & Rainey PC
Tyler Eton Morgan Nichols & Pritchett Inc.
Jenkins Crow & Dickson PC
Gaines Wolter & Kinney PC
Huie Fernambucq & Stewart PC
Sasser Sefton Connally Upton & Davis PC
Hand Arendall PC
Armbrecht Jackson PC
Banier Ford Shaver & Payne PC
Christian & Small PC
Donnie Ellis, MetLife Financial Services

(Continued on page 290)



GEORGE R. PARKER

*Bradley Arant Rose & White LLP,
Montgomery*

YOUNG LAWYERS' SECTION

Continued from page 289

I also send thanks to our other exhibitor sponsors and speakers not mentioned above who helped make the seminar a success.

Sponsors

Bain & Associates, hc.
PE , hc.
Alabama Appleseed Center for Law & Justice, Inc.
Henderson & Associates
Insurance Specialists, hc.

Speakers

Mike Emert
Carol Rice Andrews
Jim Stewart
Gregory B. Breedlove
Robert F. Prince
Hon. J. Gorman Houston, Jr.
Joseph P. Borg
Jeanne Marie Leslie

Additionally, the following firms sponsored the YLS Minority Pre-Law Conference held in Birmingham April 2 and in Montgomery April 17:

Carr Allison Pugh Howard Oliver & Sisson PC
Witte Arnold & Dowd PC
Bradley Arant Rose & Witte P
McCallum Methvin & Terrell PC
Jenkins Crow & Dickson PC
Ball Ball Mathews & Novak PA
Melton Epply & Williams PC
Hand Arendall C
Burr & Forman P
Birmingham Bar Association Young Lawyers' Section
Beasley Allen Crow Methvin Portis & Miles PC

Also, thank you's go to the following for their sponsorship of the 2008 Bar Admission Ceremony held in May and to be held in October:

Boggs Reporting & Video C
West
The Locker Room
Freedom Court Reporting
U.S. District Courts Northern, Middle and Southern Districts of Alabama

In addition to those above, thanks go to members of the Young Lawyers' Section Executive Committee. Without your help, there is no way that I could have led the group this year. Special thanks also go to Jimbo Terrell (president-elect), who will do an outstanding job next year; Clay

Lanham (treasurer); Leslie Ellis (YLS board member), who could not have been any more helpful to me and the Executive Committee; Navan Ward (YLS board member) for heading up the Minority Pre-law Conference; and the entire Sandestin committee for all of their help putting on a great CLE. I also thank Alabama State Bar President Sam Crosby, Alabama State Bar President-Elect Mark White and the Alabama State Bar staff who helped make my job easier and who were so supportive of the YLS events. Finally, "thank you's" go to my law firm, Bradley Arant Rose & White, for all of its support of me and the YLS during this year and, last but certainly not least, to my wife, Jessi, for her patience and understanding during the past year.

As always, I encourage you to become more involved in the YLS if it is of interest to you. If you have any questions, please give me a call or send me an e-mail. Once again, thank you for allowing me to serve as your YLS president this year. ▲▼▲

A COMPREHENSIVE GUIDE TO DUI AND TRAFFIC LAW IN ALABAMA

Only \$75 plus shipping & handling

ALABAMA DUI, TRAFFIC, and DRIVER LICENSE LAW HANDBOOK

NOW AVAILABLE!
SECOND EDITION



William M. Bowen
and
Patrick Mahaney

Second Edition

A MUST FOR EVERY ALABAMA LAWYER.

ORDER NOW! Send Name, Shipping Address and Phone # to:

Total Price \$83.50

Alabama DUI Handbook
P.O. Box 242324
Montgomery, AL 36124

(334) 264-5054



Elections

The Alabama primary election was June 3, 2008, with a run-off election scheduled for July 15, 2008. The party nominees then will face off in the general election on November 4, 2008.

In addition to the election of the President of the United States, all members of Congress must be elected and one of Alabama's senators (Senator Jeff Sessions) is running as well.

The following statewide offices are on the ballots: president of the Public Service Commission; one seat on the Alabama Supreme Court being vacated by Justice Harold See; and members of the Court of Criminal Appeals and Court of Civil Appeals.

Also, members of the State Board of Education are running for office (they run in geographical districts).

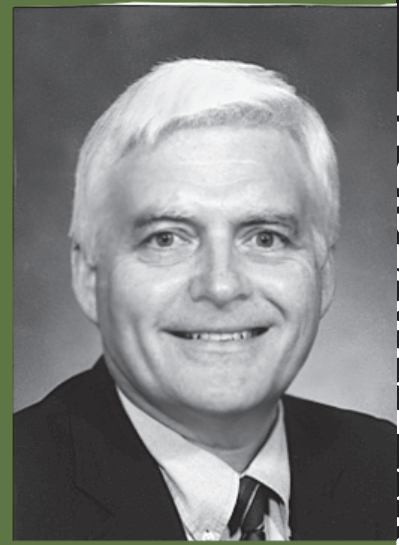
In the courthouse, the following elected offices are on the ballot: county commissioners, revenue commissioners, tax collectors, tax assessors, county treasurers, county constables, county school boards, and county school superintendents.

In addition to state and county elections, there will also be many municipal elections.

The last day to qualify to run for municipal office is July 15, 2008. August 26, 2008 is the regular municipal election day, with October 7, 2008 as the run-off election day for municipal elections. Approximately a dozen of the larger cities hold elections in other years but the vast majority of municipal elections will be held this year.

Election Law Changes

As a result of work done by an Institute committee chaired by former legislator and Speaker Pro Tem Jim Campbell and 24 other members who were legislators, lawyers, judges, sheriffs, clerks, and the Secretary of State, the entire Election Code-Title 17 was reviewed. The committee cleared up inconsistencies,



ROBERT L. MCCURLEY, JR.

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

LEGISLATIVE WRAP-UP

Continued from page 291

duplications and obsolete laws. The election laws then were reorganized to make them more accessible and usable without making substantive changes to the current practice.

Alabama's election law evolved from paper ballots, to machine voting, to electronic voting. All three processes had separate voting procedures that remained in the law, thereby making a cumbersome and outdated law which was made more complicated by the passage of the federal "Help America Vote Act," the Secretary of State's Administrative Rules and voting officials obtaining Attorney General's Opinions to interpret the various statutes.

The new revision of the law simplified the existing law by conforming all the laws, rules and opinions to electronic voting machines to make sure the statutory law coincides with the voting procedure practice.

The legislature passed the new revision, and it was signed into law by the governor on April 25, 2006 with an effective date of January 1, 2007. Before the law could be effective, it had to be pre-cleared by the Justice Department. It wasn't until over a year later, in July 2007, that the Attorney General of Alabama submitted the act to the Justice Department which approved the revision in November 2007.

The 2008 election is the first opportunity for the new election code to be in effect. It did make certain changes in duties and responsibilities of elected officials. For clarification of these changes one may wish to consult Title 17 or the *Alabama Election Handbook, 13th Edition*.

Some of the more meaningful changes were the realignment of certain responsibilities of the probate judge as chief election official of the county and the sheriff. Further, the appointing of election officials by the appointing board (probate judge, sheriff and circuit clerk) has been clarified. The revision delineates the responsibilities of the canvassing board to receive the ballots. For general elections, the canvassing board is the probate judge, sheriff and circuit clerk, while in primary elections, the canvassing board is the party election officials.

Some of the most confusing areas in the law were purging the voter list, identifying the responsibilities of poll workers and the voter identification law as it is applied to absentee ballots and provisional ballots. Again, these were clarified and made more understandable.

When the Help America Vote Act provided for "provisional ballots," the election code had to be revised to replace our existing challenged ballots.

Municipal law changes were also made to coincide with the most recent changes in the general law. These changes can be found in the Elections chapter of the Municipal Code, which is Chapter 46 of Title 11. Also available is a *Municipal Election Code Handbook* that can be obtained from the League of Municipalities' Web site at www.alalm.org.

Voting Rights Act

Because Alabama falls within Section 5 of the Voting Rights Act of 1965, 79STAT.439, 42USC§1973(C), any changes or qualifications in voting with respect to voting procedures different from those in effect November 1, 1964 must be submitted to the United States District Court or District of Columbia or a declaratory judgment must be obtained as to the validity of the change or the change submitted to the U.S. Attorney for approval. John Tanner, formerly chief of the Voting Rights Section, Civil Rights Division, U.S. Justice Department, Washington, D.C., is currently serving a sabbatical with the Alabama Law Institute as a visiting Fellow. His article in this *Alabama Lawyer*, entitled "Emergency Voting Changes," is a reference to the pre-clearance procedure for lawyers to follow in the event of changes that occur close to election day.

The next *Alabama Lawyer* will review all of the legislation passed by the 2008 Regular Session of the legislature. At the time this article went to press, the legislature was continuing to filibuster and no meaningful statewide legislation had been able to pass.

Annual Meeting

The Institute's Annual Meeting will be held during the annual meeting of the Alabama State Bar. This year's meeting, in Sandestin, will be Friday, July 11, 2008 at 10:15 a.m.

Institute President Demetrius Newton will preside over a program that will include:

2008 Legislation of Interest to Lawyers Panel:

Senator Roger Bedford

Senator Bob LITTLE

Representative Marcel Black

Representative Cam Ward

Business & Non-Profit Entities Code

Professor Howard Walthall

Pre-clearance Election Issues under The Voting Rights Act

John Tanner, Institute Fellow (see above) ▲▼▲



EMERGENCY

Voting Changes

By John Tanner

Things go wrong with elections, as recent experience across the United States has abundantly proved. The most careful planning cannot address every contingency, and situations arise where full compliance with the law is virtually or actually impossible. The best-laid plans of state and local officials can be disrupted by everything from a hurricane to a truculent owner of a building used as a polling place.

In addition to finding a new polling place and advertising its location, or solving whatever the actual problem may be in a manner consistent with state law, the practitioner struggling with an emergency has to face a federal law, Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Section 5 protects the voting rights of minority citizens, and requires federal review of your proposed remedial plan. That review must take place before your new procedure can be implemented, and the statute gives the U.S. Department of Justice months in which to complete its review. A misstep can mean redoing the whole election.

Success depends on awareness of the nature of and need of federal review, prompt action to comply and, most importantly, close consultation with the affected minority community on developing and implementing the new voting procedure.

Background: Section 5 of the Voting Rights Act

Under Section 5, any new voting practice or procedure—every change in an election date, voter registration or candidate qualifying deadline, polling place location, district boundary, or alteration of an election system—must undergo federal review to assure that it is not racially discriminatory as to either its purpose or effect. The review can be by either the United States District Court for the District of Columbia in a declaratory judgment action or administratively by the United States Attorney General, at the local government's choice. In an emergency, of course, the District Court process is out of the question. It is used relatively rarely even in more leisurely circumstances, and the vast majority of changes are reviewed administratively by the Department of Justice through the Voting Section of the Department's Civil Rights Division.

That review can take time. The statute allows the Department 60 days from its receipt of a submission of a new polling place or other voting change in which to interpose an objection to that change. The Department can, at any time within those 60 days, request additional information, and the 60-day period begins anew after receipt by the Department of the complete

information. Until that 60-day period has expired with no objection interposed, the change is legally unenforceable: the polling place cannot be moved.

Governments ignore Section 5 at their peril. In the absence of Section 5 "pre-clearance" of a change, not only the Justice Department but any affected voter can seek an injunction from a three-judge panel to enjoin the change or obtain other relief. *Allen v. State Board of Elections*, 393 U.S. 545, 554-557 (1969). Many readers will recall that a federal court allowed the 1982 Alabama state legislative elections to go forward under a redistricting plan that had not been pre-cleared as to all areas of the state, but limited the legislators to one-year terms. Legislators had to face the voters again in a 1983 special election held under a new, pre-cleared plan. *Burton v. Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983). Even now, 25 years later, a former legislator grumbled to me about the 1983 do-over election.

Step 4 Working with the Minority Community

The most important step in avoiding problems under the statute is to satisfy its purpose, and avoid any action that may discriminate against minority voters. The best way to avoid enacting changes that

are racially discriminatory is immediate, frank consultation with the potential victims of any discrimination, the affected minority community.

Looking back to its origins in 1965, one of the most important facets of Section 5 is that it has given local minority communities a seat at the table at which decisions are made. That facet should be remembered and honored. It is important to engage leaders of this community, or these communities, in a genuinely collaborative process. If you need to select a new polling place, run through the options with them. Ask if they know of additional options. Listen to their ideas and concerns. Their views will be helpful in identifying a solution to the emergency problem.

A wise attorney will not succumb to the temptation to avoid consulting those community members who are most likely to raise complaints. If someone has a complaint, it is best by far to know about it early. As a part of its review, the Voting Section contacts local minority elected officials and other community leaders who will not be hesitant to articulate any concerns they have. Identifying those concerns at the outset allows the attorney to address them, consider alternatives and either achieve consensus or, at least, proceed knowing what the complaints will be. The attorney can, at minimum, arm herself to rebut any claims and be in a position to establish the absence of discrimination.

There may be more than one minority community. Alabama, like other states, has growing Hispanic and Asian populations in some areas, as well as African American and Native American populations. The interests and access to voting of each of these groups should be considered fully where they are present and eligible to vote.

It is one thing to identify a new procedure to meet an emergency situation. It is another thing to let the voters know what you have done. The Justice Department will look to whether the new polling place or new procedure has been publicized in a way that voters, including minority voters, actually will learn of it. The minority community itself will be the best guide to effective publicity among its members, and the most effective communication may vary from group to group. Court decisions, including the recent string of decisions in *Common Cause v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), have weighed notice to voters heavily, and it can be a factor in Section 5 review.

The publicity issue may be especially significant for Hispanic or Asian communities, where some citizens have limited English-speaking and reading proficiency, and may rely on separate communication channels. Members of those communities will know what those communication channels are, as will retailers who sell products to those communities, religious leaders who serve their spiritual needs and other service providers.

The Price of Failure to Comply

The price of a failure to comply with Section 5 can be very high. Where a voting change is determined to be discriminatory, the jurisdiction faces the prospect of having a new election, just as the Alabama legislature did in *Burton v. Hobbie*. In a recent example, the North Harris Montgomery Community College District adopted a change reducing the number of polling places for its May 13, 2006 election from 84 sites co-located with sites of its constituent school districts, which were having elections on the same day, to 12 entirely separate locations. As set forth in a May 5, 2006 letter interposing an objection to the change,

“Under the proposed change, District elections will be held separately from [school district] elections, so that voters will have to travel to two separate polling places in order to cast their ballots. Moreover, instead of 84 polling places, there will be 12 polling places. These 12 polling places will serve a geographic area of well over 1,000 square miles with over 540,000 registered voters. The assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2 percent black and Hispanic) will serve over 67,000 voters.”

Letter of May 5, 2006 from Assistant Attorney General Wan J. Kim to Renee Smith Byas.

Under these circumstances, the District failed to meet its burden of establishing the absence of discrimination. The District determined to hold no May election at all. The Department of Justice subsequently filed suit under Section 5 and

obtained relief requiring the District to hold its election in conjunction with the November 2006 general election, using all polling places within its boundaries of the two constituent counties for that election. *United States v. North Harris Montgomery Community College District* Civil Action No. H 06-2499 (S.D. Tex. July 27, 2006).

Step IV Working with the Justice Department

Contact the Voting Section promptly, even before you have finalized your plans for new procedures. The thought of navigating a federal bureaucracy can be daunting, but you can expect to engage in a productive conversation with knowledgeable people. They will not give legal advice as such, and will avoid answering some questions prior to their investigation and consultation, but they will identify issues, including sources of potential discrimination that may not have occurred to local officials. They can be helpful, and can help you to a much different outcome than that of the North Harris Montgomery Community College District.

The most notable recent case of an election emergency flowed from the devastation to New Orleans by Hurricane Katrina on August 26, 2005 and its aftermath, when the scope of the devastation gradually became known. On September 7, 2005, the Department wrote the Louisiana Secretary of State,

“I can only imagine the host of burdens facing you and other Louisiana officials. I write to express my sympathy and also to ease your burden in at least one respect. Specifically, I am aware that the State of Louisiana has an open primary election scheduled for October 15, 2005. No doubt the devastation and disruption caused by Hurricane Katrina will necessitate the postponement and rescheduling of that election. Please be assured that the Civil Rights Division stands ready to expedite the review of any and all submissions of voting changes (especially scheduling and polling place changes) resulting from Hurricane Katrina which the state and/or its subdivisions submit to our Voting Section for review under Section 5 of the Voting Rights Act.”

September 7, 2005 letter from Acting Assistant Attorney General Bradley J. Schlozman to Secretary of State Al Ater

Similar letters were sent to other states affected by Katrina and Rita.

The Louisiana letter offered broader assistance “in any way we can,” and the state took advantage of the offer. The October and November 2005 elections were postponed, as was the regular New Orleans mayoral election scheduled for the following February. Even with that delay, extraordinary changes in voting procedures were necessary and had to be adopted in a short period under daunting circumstances. The Department of Justice worked closely with state election officials, legislative leaders and others to facilitate a process for early inclusion of informed minority leaders in the formulation of each of the complex steps, from satellite poll locations across Louisiana to special absentee voting procedures to new and consolidated polling places, necessary to conduct an election. Accordingly, when these procedures were finalized and received by the Department, review was

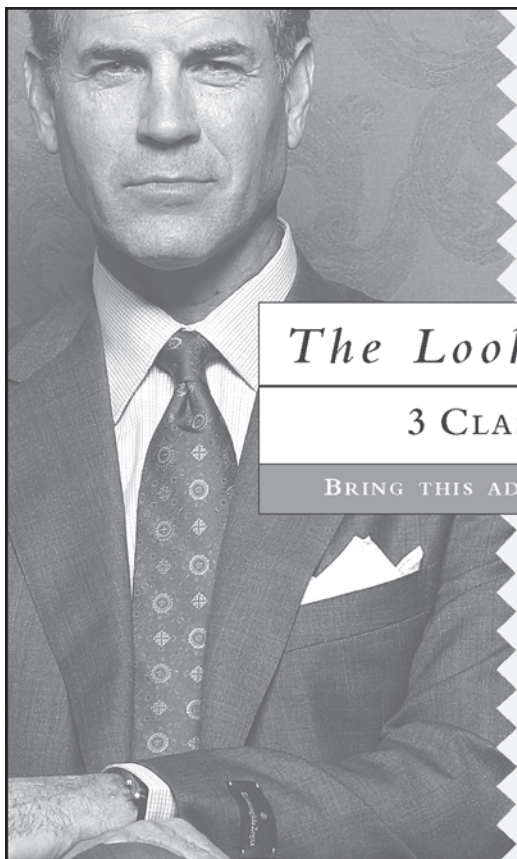
completed in short order. *March 16, 2006 letter from Voting Section Chief John K. Tanner to Assistant Attorney General William P. Bryant III, and Section 5 files 2006-0399, -0436, -0733, -1207, -1208, and -1209.* (Submission of four state acts, the Secretary of State’s Emergency Election Plan and an Executive Order completed March 10, 2006; pre-cleared on March 16, 2006.)

Without comparing them to hurricanes, decisions of the courts also can disrupt the routines of election administration and create Section 5 exigencies. The Texas Supreme Court entered orders in several candidate qualification cases on January 27, 2006 which delayed the ballot certification of both the Republican and Democratic parties for their March 7, 2006 primary elections. The delay was such that at least two vendors of voting equipment and ballots could not deliver printed ballots to Texas counties on time; they would be over a week late. That delay wrecked the schedule for compliance with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973, (UOCAVA) which requires 30 days for transmittal of ballots to and from military

personnel and persons overseas. Thus, the state found itself in a bind between the command of the state supreme court and federal law. The state used existing discretionary authority to make up for the week’s delay in sending out ballots by extending the deadline for receiving ballots by nearly two weeks, from March 7 to March 20. The state submitted that change for Section 5 review by letter of February 23, 2006. *February 23, 2006 letter from to Texas Director of Elections Ann McGeehan to Voting Section Chief John K. Tanner.* The change was pre-cleared the same day. *February 23, 2006 letter from Voting Section Chief John K. Tanner, to Texas Director of Elections Ann McGeehan*

Actual impossibility

The Department of Justice thus is at pains to accommodate the needs of local authorities, and can act with remarkable speed. Circumstances can overcome even the best of efforts, however. In the fall of 2004, local elections were scheduled for many Gulf Coast communities just as Hurricane Ivan was bearing down on the area. On September 13, 2004, the City of Spanish Fort sensibly voted to postpone



Our famous suit package includes three classic Graham & Gunn year round 100% tropical weight wool suits—or substitute a blazer and trouser for one suit—for only \$1,295, a *15% savings*. And ask about our *no interest* financing option. Call Tom, Josh, Hunter or George.

The Look of Success for Less

3 CLASSIC SUITS FOR \$1,295

BRING THIS AD IN FOR \$50 Off YOUR SUIT PACKAGE.

Whether you are a senior partner or associate, we offer the finest men’s clothing in Alabama. From our classic suit packages to exceptional quality from names like Canali, Hickey Freeman, Zanella, Robert Talbott and Samuelsohn. With personal service that is second to none.



THE LOCKER ROOM

1717 CARTER HILL ROAD MONTGOMERY 334.262.1788 TUES-SAT 9AM-6PM WWW.TLRCLOTHIERS.COM

AMERICAN LEGAL SEARCH

Where Lawyers Look for Lawyers®

Attorney Search

- Permanent Placement
(Associate & Partner Level)
- Temporary Placement
- Firm Mergers & Acquisitions

Richard G. Brock, Esq. richard@americanlegalsearch.com

Brannon Ford, Esq. brannon@americanlegalsearch.com

Birmingham (205) 397-9500

Nationwide (800) 930-9128

www.AmericanLegalSearch.com

Atlanta Birmingham Houston Los Angeles
Nashville New York South Florida



"Nationwide Legal Support"

Support Search

- Paralegals
- Legal Secretaries
- Legal Assistants

Katherine Marsh, Esq.

katherine@apexlegalsupport.com

Birmingham (205) 397-9555

Nationwide (800) 930-9128

www.ApexLegalSupport.com

Atlanta Birmingham Houston Los Angeles
Nashville New York South Florida

their September 14 municipal election. They submitted that postponement for Section 5 review on the same day and, no doubt, headed inland with Section 5 the last thing on their minds.

The federal courts and the Justice Department long have taken a sensible approach to such situations, and have allowed *nunc pro tunc* compliance with Section 5 review requirements—"post-clearance," as it were. In 1968, Georgia enacted a change in the method of electing the County Commissioners of Peach County. The change was never submitted for Section 5 review and private citizens filed suit on the eve of the 1976 commissioner election. In *Berry v. Doles*, 438 U.S. 190 (1978), the Supreme Court adopted the suggestion of the Department of Justice that the county be required to make a submission within 30 days, and noted that the courts could revisit the issue of relief if an objection were to be interposed. 438 U.S. 192-193. "If approval is obtained, the matter will be at an end." *Id.* The Department took that same approach in the Spanish Fort change in election date, which subsequently was "post-cleared." *October 26, 2004 letter from Voting Section Chief Joseph D. Rich to City Clerk Mary Lynn Williams.* Approval having been obtained, the matter was at an end.

Conclusion

The attorney whose client has an election emergency faces a difficult but manageable legal task. The statutory time period for federal review may make the federal legal requirements seem impossible to meet. They are not. *Berry v. Doles* identifies the two elements to obtaining "post-clearance": prompt efforts to comply and, most importantly, avoiding changes that are, in fact, racially discriminatory. The attorney who fails to follow these steps takes his client on a stroll through a mine field. The attorney who moves quickly and who meets the goals of the federal law through prompt inclusion of minority community in planning and publicity can find the Department of Justice to be a source of assistance and cooperation, rather than an obstacle. ▲▼▲



John Tanner, formerly chief of the Voting Rights Section, Civil Rights Division, U.S. Justice Department, is serving a sabbatical with the Alabama Law Institute as a visiting Fellow.



About Members

Dan Cushing announces the opening of his office at 2653-B Old Shell Rd., Mobile 36607. Phone (251) 471-9885.

Stephen Greene announces the opening **Stephen K. Greene, LLC** at 200 Union Hill, Ste. 100, Birmingham 35209. Phone (205) 868-1414.

James Mac Patton announces the opening of the **Jim Patton Law Firm, LLC** at 2956 Rhodes Circle, Birmingham 35205. Phone (205) 933-8383.

Among Firms

Balch & Bingham LLP announces that **Carey Bennett McRae** has joined the firm's Birmingham office as partner.

Evelyn V. Mauldin, general counsel of **Bank Independent**, Sheffield, announces that **Melissa N. Ridgeway** has joined the legal department as associate attorney.

Chip Cleveland announces that **Robert E. Riddle** is now associated with the firm.

Conrad & Barlar announces that **Krissy McCulloch** has become associated with the firm.

Constangy, Brooks & Smith LLC announces that **James N. Nolan** and **Herbert B. Sparks, Jr.** have joined the Birmingham firm.

Christian & Small announces that **Chirayu "Charlie" M. Shah** has become a partner, **Richard F. Ogle** has joined as a partner and **Richard T. Littrell, Oscar M. Price, IV, Jeremy L. Carlson, Robert H. Harris, and J. Paul Zimmerman** have joined as associates.

Estes, Sanders & Williams LLC announces that **Devona L. Johnson, W. Walker Moss** and **Jonathan G. Wells** have become associates.

Haskell Slaughter Young & Rediker LLC announces that **Robert L. Williams** and **Thomas J. Buchanan** have joined the firm *as counsel*.

Jackson, Foster & Graham announces that **Mathew Bernard**



PLEASE E-MAIL
ANNOUNCEMENTS TO
MARCIA DANIEL
marcia.daniel@alabar.org

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS, AMONG FIRMS

Continued from page 297

Richardson has become a member of the firm and the firm name is now **Jackson, Foster & Richardson.**

Kaufman Gilpin McKenzie Thomas Weiss PC announces that **John Allen Howard, Jr.** and **Davis H. Smith** have become shareholders.

Maynard, Cooper & Gale PC announces that **Brian Richardson** has joined the firm's Huntsville office as an associate.

Mills Paskert Divers announces that **P. Keith Lichtman** has moved to Atlanta to open the firm's new office.

Najjar Denaburg PC announces **Steven D. Altmann** is a shareholder in the firm.

J. Lenn Ryals, John S. Plummer, M. Andrew Donaldson, Algert S. Angricola, Jr., and Jeffrey W. Smith announce the formation of **Ryals, Plummer, Donaldson, Agricola & Smith PC** with offices at 60 Commerce St., Ste. 1400, Montgomery 36104. Phone (334) 834-5290.

Siniard, Timberlake & League PC announces that **Mary Scott Hunter** has joined the firm as an associate.

Watson Law Firm PC announces that **Aaron Ryan** has become associated with the firm.

Wilmer & Lee PA announces that **Lisa Davis Young, Angela Slate Rawls, Katie L. Granlund, Ellen C. Wingenter,** and **Jeffrey D. Maynor** have joined the firm as associates. ▲▼▲

ARE YOU PAYING TOO MUCH FOR LIFE INSURANCE?

Through Drane Insurance you can purchase affordable life insurance from highly rated insurance companies. To avoid overpaying, call or visit our web site for a free quote on policies ranging from \$100,000 up to \$25,000,000 to compare with your current life or business insurance policy. Look at the sample rates below.

\$250,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Monthly Premium							
AGE:	30	35	40	45	50	55	60
10	\$9	\$9	\$11	\$18	\$25	\$42	\$67
15	\$11	\$11	\$13	\$24	\$37	\$53	\$86
20	\$13	\$13	\$18	\$30	\$47	\$70	\$118
30	\$22	\$24	\$33	\$48	\$72	\$140	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Monthly Premium							
AGE:	30	35	40	45	50	55	60
10	\$15	\$15	\$19	\$31	\$45	\$80	\$130
15	\$18	\$18	\$23	\$44	\$70	\$103	\$168
20	\$23	\$23	\$31	\$56	\$90	\$137	\$231
30	\$39	\$44	\$62	\$91	\$139	\$276	

Drane Insurance
Carter H. Drane
(800) 203-0365

Life Insurance • Employee Benefits • Estate Planning • Annuities

LET US FAX OR EMAIL YOU A QUOTE

www.draneinsurance.com

FORENSIC FINANCIAL SERVICES GROUP, LLC

Investigative accounting to assist you in preventing and detecting fraud

Forensic accounting services, litigation support, internal controls review and implementation, training

Ned Egbert, CPA, CFE
Mac McCawley, CPA, CFE
Linda Steele, CGFO, CFE

Certified Fraud Examiners

251-928-0339

negbert@mobis.com

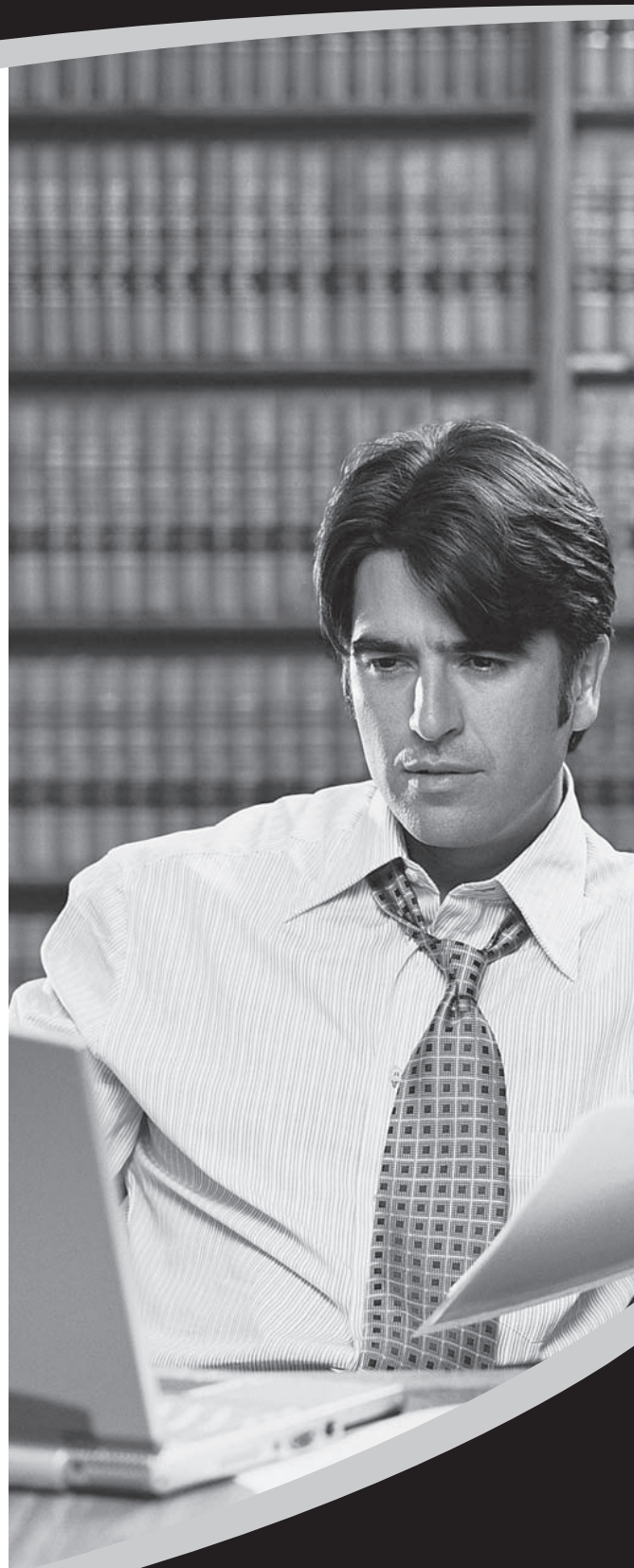
Mobile/Baldwin

Build your Case on a Solid Business Valuation

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

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

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



© 2005 Dixon Hughes PLLC



DIXON HUGHES PLLC

Certified Public Accountants and Advisors

www.dixon-hughes.com



Productivity breakthrough: Westlaw Legal Calendaring

Westlaw® Legal Calendaring automatically calculates your litigation deadlines based on the applicable federal, state and local court rules – then adds the information directly to your Microsoft® Outlook® calendar. As dates change, you can recalculate accordingly – and repopulate your calendar with the updates. Know with confidence you'll

never miss key dates again – no matter how often they change. Even link directly to the relevant court rule governing any of the events on your calendar. Westlaw Legal Calendaring: a powerful tool for managing your cases, your time and your priorities. For more information, call our Reference Attorneys at **1-800-733-2889 (REF-ATTY)**.

©2008 West, a Thomson business L-337828/2-08

Better results faster.



Periodicals Postage
Paid
Montgomery, AL