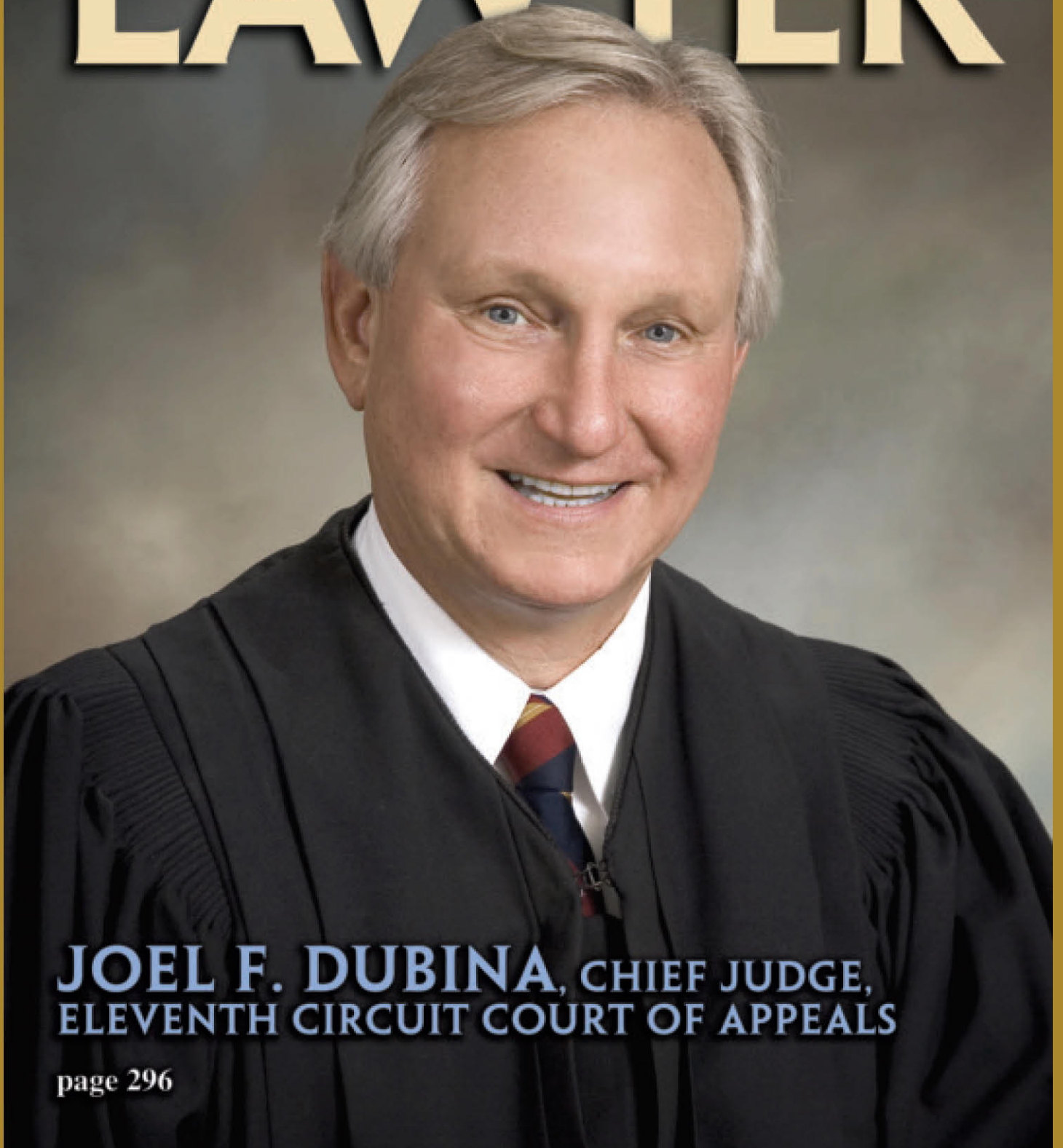


JULY 2009 • VOL. 70, NO. 4

# THE ALABAMA LAWYER



**JOEL F. DUBINA, CHIEF JUDGE,  
ELEVENTH CIRCUIT COURT OF APPEALS**

page 296



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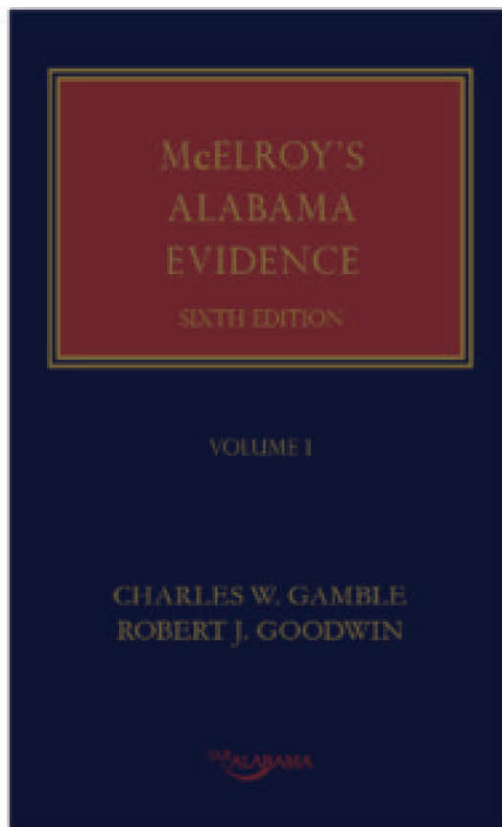
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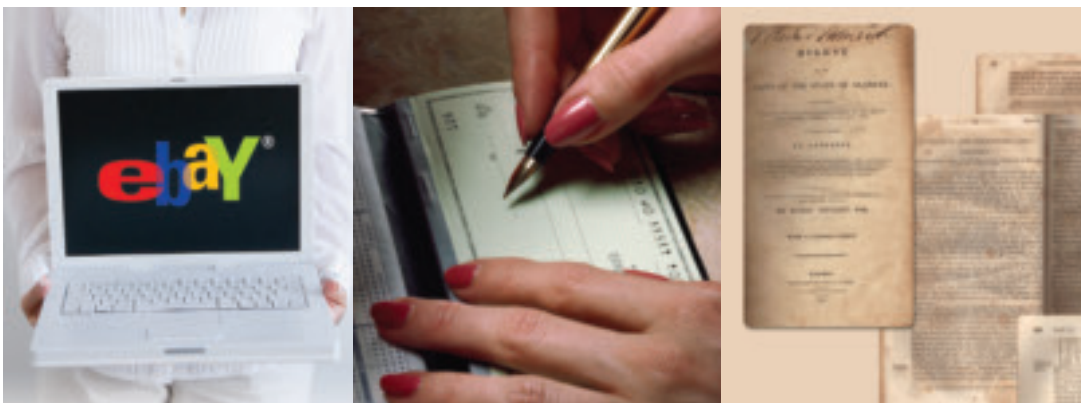
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ON THE COVER

On June 1st, Alabama native Judge Joel F. Dubina became the chief judge of the United States Court of Appeals for the 11th Circuit. In doing so, Judge Dubina became the second Alabamian to hold that position (Judge John Godbold was the first). Articles on pages 273 and 296 of this issue provide highlights of each judge’s career.

—Photo by Robertson Photography, Inc.

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Periodicals postage paid at Montgomery, Alabama, and additional mailing  
offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box  
4156, Montgomery, AL 36103-4156.

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*The president used to get in a little fishing before becoming bar president. Look out fish—he's back!*



MARK WHITE

## "Parting Is Such Sweet Sorrow"

I have come to the end of my term as president of the Alabama State Bar, and it is now my privilege to pass on into that hinterland of the immediate past-president. "Parting is such sweet sorrow," and like Juliet bidding good night to Romeo, I am certain that not only will I see you again, but I will continue to enjoy your company; just not as your president. I've had a grand year serving as state bar president. The support and kindness shown to me during this service have been incredible. To the wonderful ASB staff, thank you for preparing me for my duties and always making me look good. That is a difficult task.

I also sincerely thank my wife, Carol Ann, for allowing me the time this past year to be away representing you. Even my White Arnold & Dowd family managed without my being under foot every day, and that is no surprise.

In driving to Montgomery this week for one of my last visits to the little office I have called my "home away from home," I really had time to reflect on the many opportunities and challenges of my year as your president. As a member of the Alabama State Bar for 35 years, I have served on numerous panels and committees. My service as president has been my greatest professional honor. You expect a great deal from your leadership, as well you should. And, in many ways, I feel that with your help and the wonderful support of the bar staff, we were able to deliver on many of your goals and suggestions.

You asked that we, as a state bar, become more engaged at the legislative table and play an active role in matters that affect our profession. We did. One example of our work is the Panel of Neutrals, a group of Alabama citizens

## PRESIDENT'S PAGE Continued from page 247



*Celebrating the new job as president with (l to r) Maudie Bedford, Wade Baxley, Sen. Roger Bedford, Keith Norman, and Carol Ann Hobby*

with legal, legislative and/or governmental experience who offered to serve as a resource to our legislators in this current session. The panel exceeded our expectations. As we had hoped, they helped build consensus as well as combat miscommunications and misinformation. I look forward to seeing the future successes of this group. No doubt, the Panel of Neutrals will help us as we continue to fight the good fight on issues of justice and merit selection.

You asked that we strengthen the experience level and improve the process of electing judges. Today, I can say that we were successful there, as well. The Judicial Experience Bill passed a few hours ago and is headed to Governor Riley's office where it is expected to be signed. (By press time, the bill had been signed by the governor.) This legislation, at your request, improves the administration of justice for all citizens by setting minimum standards for judges. With the help of lawyer-legislators Rep. Paul Demarco and Sen. Roger Bedford, and the unanimous support of our bar membership, we were successful in a session that offered little hope for progress.

You also pushed us to expand our presence and resources on access to justice for the poor. During the fall, we kicked off a program that directly responds to the needs of those in financial crisis. With Tom Methvin chairing our Task Force Chair on Mortgage Foreclosure Assistance, your state bar is working with the local bar associations across the state to offer relief and counsel for families facing foreclosure. This is another great example of lawyers rendering service.



*President White with "Miss Charlene," his great friend and a receptionist at White Arnold & Dowd (She promised she'd spank him if he didn't do a good job as bar president.)*

Our efforts to expand the bar's message through public relations and communications worked. Not only did we improve our existing tools and communication vehicles, we broadened the reach of our message about what a positive force our state bar is in this state. Just ask Brad Carr, ASB communications director, if I'm on his speed dial!

I served with a terrific Board of Bar Commissioners. They challenged me to seek new heights for our bar. The quality of debate and reason in this group is fantastic. Know that they work hard to ensure that our bar is strong and our state remains a fabulous place to practice law. Their support and advice encouraged and strengthened our partnerships at the state and local level.

In all that I did, you, our 16,000 and growing membership, remained the first priority. Tom Methvin is coming in right behind me to carry on the fine work we have all done together this past year. Stay tuned. I am flashing my red light, but Tom's is green. Thank you all for the great honor and privilege of serving as your president. I know that under the leadership of Tom, we will continue to both share and provide tangible resources to help you serve your clients and communities better.

Despite the wear and tear of miles of travel, the inevitable scheduling difficulties and the attempts at humor by Margaret Murphy, my year as bar president has been fun. Here are my "Top 10 Reasons Why It Was Fun to Be ASB President:"



## Top Ten Reasons Why It Was Fun to Be ASB President

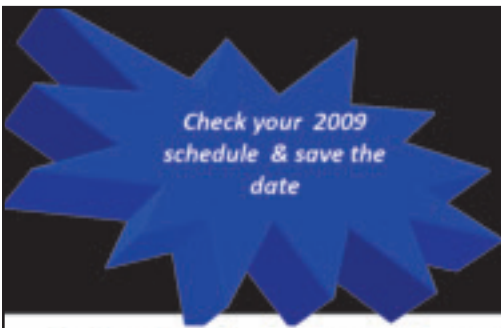
- 10 You get to determine when meetings and speeches end
- 9 Diane Locke and Margaret Murphy—the “Sisters of Tough Love”
- 8 The state bar staff
- 7 Sharing the positive news about our state bar with civic clubs around the state
- 6 Your family is glad to see you most of the time when you return from a road trip
- 5 Judges are nicer to you
- 4 Working with the Alabama legislature
- 3 Sister Lynn McKenzie, Jim Pratt, Billy Bedsole, Sam Crosby, and Bob Dennison—“The Warriors”



*Down memory lane—Pictured above in January 1998 at a luncheon honoring Robert Huffaker’s 15 years of service as editor of The Alabama Lawyer are, left to right, Norborne Stone, 1982-83 ASB president; Mark White, current ASB president; Jen Nowell Kelly, first managing editor of the Lawyer; and Robert Huffaker, honoree and current editor.*

- 2 The great team of folks known as the Board of Bar Commissioners
- 1 You. Thank you to my old friends who were drafted into service and all the countless new friends I’ve made along the way. You made the work enjoyable!

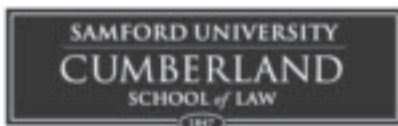
*P.S. See you at Point Clear!*



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| <b>October 29-30</b> | Southeastern Business Law Institute 2009  |
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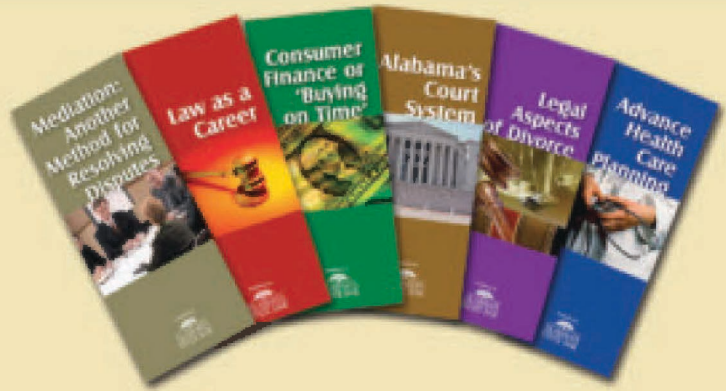
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KEITH B. NORMAN



## Another Modest Proposal

My last “modest proposal” considered changes to our state’s jury system that were based on my observations from serving as a juror. Unfortunately, none of my suggestions created a groundswell for implementing those changes. Consequently, I harbor no illusions that my current proposal will be any better received than the last. Nevertheless, I offer it for your consideration.

This past February, Birmingham lawyer and American Bar Association President Tommy Wells debated Eleventh Circuit Court of Appeals Judge Bill Pryor at a Federalist Society luncheon about changing the method of selection for Alabama’s appellate judges. Tommy argued for the need to remove judges from the expensive partisan judicial contests through an appointive process. His premise for changing our current elective process was that these generally negative, high-cost campaigns are eroding the independence of the state’s appellate courts. Ironically, Judge Pryor, who was nominated by the President and confirmed by the United States Senate, argued that the appointive process would actually be no better.

During this just-concluded 2009 regular session of the Alabama legislature, two bills to help address the partisanship and cost issues for judicial races were defeated, mostly along party lines. One of the bills would have required judicial candidates to be elected on a non-partisan ballot, while the other bill would have limited contributions to appellate candidates from individuals, businesses or political action committees to \$500. Without question, the cost of partisan statewide judicial campaigns is staggering. The spending for the supreme court contest in 2008 reached \$5.3 million. In 2006, the race for chief justice was the second costliest judicial race in U.S. history with the candidates spending over \$8.2 million and an estimated \$1 million in special-interest-group spending. When citizens see these tremendous sums spent on partisan judicial races, public confidence in the judiciary’s fairness and impartiality is compromised. These two bills would have brought needed changes to address these problems.

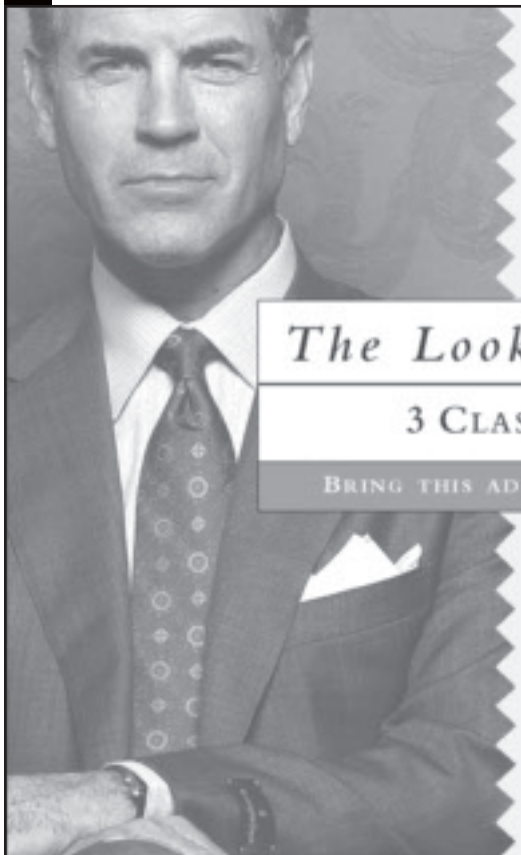
# EXECUTIVE DIRECTOR'S REPORT

Continued from page 251

This past February, *USA Today* and Gallup released a poll showing that 89 percent of those surveyed believed the influence of campaign contributions on judges' rulings is a problem while 59 percent thought this was a "major" problem. More than 90 percent of those surveyed thought that judges should be removed from a case if it involves a contributor. These findings are buttressed by a study in 2002 by the Justice at Stake organization that indicated that 26 percent of the judges it polled believed that campaign contributions have at least some influence on judicial decision-making. The Justice at Stake study further found that 70 percent of voters support selecting judges through a form of merit selection with retention election.<sup>1</sup> In a 2007 survey, Zogby International polled 200 senior executives principally at companies of 500 or more employees about state judicial election fundraising. The findings show that business

leaders are concerned that disproportionately large campaign contributions are influencing judge's decisions and creating an unacceptable appearance of this influence. Survey respondents were virtually unanimous in their opinion that judges should recuse themselves from cases involving contributors.<sup>2</sup>

Throughout the first eight decades of the 20<sup>th</sup> century, Alabama was essentially a one-party state so judicial candidates did not, for the most part, run on the platform of a political party. Of course, this quickly changed when Guy Hunt was elected as the first Republican governor since Reconstruction. The politicization of statewide judicial races or "judicial platforming" increased in 2002 with the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*.<sup>3</sup> Despite these recent changes of the last two decades, efforts to strengthen the independence of Alabama's courts are



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not new. In 1916, Alabama State Bar President Charles S. McDowell recognized the role of judges to be necessarily distinct from elected members of its co-equal branches. He wrote:

“If the unyielding and zealous advocates of the primary system for choosing judges are logical, they must go further than they have gone and declare, virtually, that they do not want men upon the courts because of their legal attainments, but because of their political alignments. All men recognize a difference between a political and judicial office, and we should recognize a corresponding difference between candidates for these offices.... The judge does not make the law, and it is not therefore material what he thinks about current political issues. He is chosen to serve the people, not to represent them; he does not translate their

convictions into statutes, nor shape the policy of the State. His office is simply to hold the scales of justice even as between man and man, and he should never be forced into a contest which must inevitably engender passion and prejudice which are fatal to judicial poise....”

In 1951, Alabama State Bar President John A. Caddell sought to increase judicial independence with the passage of legislation providing for the appointment of judges under a “Missouri Plan.” “Mr. Johnny,” a life-long Democrat, related to me not long before his death that when he proposed a Missouri Plan for Alabama, his few Republican friends (they were few because there were few Republicans in those days) approved and supported the concept. He said that his Democrat friends almost disowned him for supporting the plan. Of course, the legislation proposing a Missouri Plan for Alabama failed.



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# EXECUTIVE DIRECTOR'S REPORT Continued from page 253

In 1973, then-Chief Justice Howell Heflin proposed a new judicial article. Among the features of the constitutional amendment was a provision that allowed for the merit selection and retention election of the state's appellate judges and non-partisan elections of circuit and district court judges. Remarkably, the leadership of the state house and senate, who were Democrats as was a preponderance of both houses, required the removal of the merit selection provision before they would allow passage of the rest of the judicial article. Recent efforts to persuade the legislature to enact legislation supported by the state bar implementing a merit selection plan have generally been acceptable to the Democratic members of the Alabama legislature but, as in the past, have met similar fates but at the hands of house and senate Republicans.

In the early 1990s, the Alabama State Bar Task Force on Judicial Selection, chaired by **Robert Denniston** of Mobile, recommended several voluntary guidelines for candidates seeking judicial office.<sup>4</sup> In the preface of their report of March 14, 1994 the task force observed:

“ . . . The one area of greatest concern to the members of the bar and the public is the unseemly amounts of money contributed by some special interest groups and individuals, and some lawyers and law firms, to candidates for judicial office, and

the acceptance of such large sums by the candidates. While some such large contributors may be doing no more in their minds than supporting a well qualified individual who has a similar legal philosophy as the contributor, and are not seeking any special favor in return, the public and opposing litigants often see the matter in a different light.”

Key among the recommendations was voluntary limits on campaign contributions. Those recommended monetary contribution limits were:

Cash Contributions	Supreme Court	Courts of Appeal	Circuit/District Court
From Individual	\$750	\$500	\$500
From Law Firm/Members	\$4,000	\$2,500	\$2,500
From PAC or organization	\$5,000	\$3,000	\$3,000

Other aspects of the task force's comprehensive voluntary guidelines for judicial campaigns included the creation of a judicial campaign monitoring committee, the forerunner of the current day Judicial Campaign Oversight Committee, and the compilation and publication of judicial campaign contributions for an easier determination of compliance with the monetary guidelines by the public. Although the voluntary guidelines were not formally adopted by the Alabama State Bar



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Board of Bar Commissioners, at least one candidate of whom I am aware, **Associate Justice Hugh Maddox**, chose to abide by the voluntary contribution limits in his successful re-election bid in 1994.

As our experience with merit selection has revealed, the fate of legislation is more often based on who is in power at the time rather than particular merits. With the appellate courts now dominated by lawyers who ran under the Republican banner, Republican officials and legislators have no desire to change the current system. This was also true when lawyers sought judicial office under the Democratic banner and Democrats dominated judicial offices. Likewise, judicial candidates themselves have been reluctant to curb campaign contributions by adopting voluntary contribution limits.

I have a "modest proposal" for those who support partisan elections of all judicial candidates and argue that merit selection takes away the right of voters to elect their judges (which it doesn't). My proposal would preserve partisan elections, but would help restore the dignity that has been stripped from judicial elections because of the obscene amounts of money raised and spent by candidates for statewide office. My proposal is **automatic disqualification** of a judge or justice based on campaign contributions. This is not a new concept. In fact, mandatory recusal legislation<sup>5</sup> was enacted in 1995 in response to a particularly egregious supreme court race the previous year that saw campaign contributions crack the \$1 million mark for the first time. This particular legislation, sponsored and signed into law by a Republican governor, proved to be unworkable, however, because the Alabama Supreme Court determined that it was unable to fashion specific administrative rules as required under the act.

The act essentially provided for a party to seek mandatory recusal of a judge before which the party was appearing if that party's opponent in the case had previously made a campaign contribution that exceeded a threshold amount. The act's legislative intent plainly expresses:

"The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety

because as a candidate the justice or judge received a substantial contribution from a party in the case including attorneys for the party, and all others described (in the act) . . . This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or a judge by parties in a case and others described (in the act)..."

Large sums of money that flow to partisan judicial campaigns call into question the fairness and impartiality of our courts and erode public confidence in the judiciary. This is not a new problem, but it is one that in the minds of most citizens is having a greater impact than ever before. If our state political leaders continue to thwart change, as they historically have done, the judicial branch, as a matter of self-preservation, should consider adopting mandatory recusal/automatic disqualification rules as a part of the *Canons of Judicial Ethics* to help address this serious problem. ▲▼▲

## Endnotes

1. I am grateful to Buck Lewis, president of the Tennessee Bar Association, for his timely article appearing in the April 2009 issue of the *Tennessee Bar Journal* which provided the survey information. This information was taken from the February 17, 2009 issue of *USA Today* in an article entitled, "Supreme Court Case with the Feel of a Best-Seller."
2. See *Zogby International Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007).
3. 536 U.S.765 (2002).
4. Published in *The Alabama Lawyer*, May 1994, pp. 137-141.
5. See Section 12-24-1 *et seq.*, *Code of Alabama* (1975).



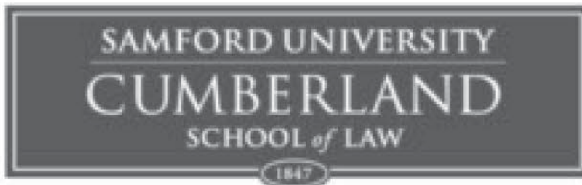
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Cumberland School of Law is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our continuing legal education seminars during the 2008-09 academic year. We gratefully acknowledge the contributions of the following individuals.

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HERBERT J. FAWWAL

STANLEY K. SMITH

JUDGE LEE CLYDE TRAYLOR

## Herbert J. Fawwal

Bessemer attorney Herbert J. (Jadd) Fawwal departed this life for a better one on January 27, 2009, after a brief illness.

Jadd was born in Washington, D. C. March 23, 1951, the third of four children born to Mansur J. and Zahia M. Fawwal of Ramallah, Palestine. While a child, Jadd and his family, including sisters Mary Ann and Margie, as well as younger brother Eddie, moved to Florida, eventually settling in Jacksonville.

As a young boy and through his teenage years, Jadd helped out at his parents' various businesses, often while also working a part-time job. He attended school in Jacksonville and was elected senior class treasurer at his high school alma mater, Englewood.

After graduation from high school, Jadd attended the University of Florida, receiving a bachelor of arts degree in December 1972. He then moved to Birmingham, to attend Cumberland School of Law at Samford University, receiving his doctor of jurisprudence in May 1976.

After that, Jadd practiced law in Jefferson and surrounding counties with offices in Birmingham and then Bessemer, with his focus on trial practice, both civil and criminal. In addition, Jadd served as town counsel for the Town of Brookside for several years, involved in several annexations which greatly increased its size.

Jadd was a past president of the Bessemer Bar Association, as well as a member of the Alabama Criminal Defense Lawyers Association and the Delta Theta Phi Law Fraternity. He was a member of the Alabama State Bar and the Federal Bar of the Northern District of Alabama, as well as the 5<sup>th</sup> and 11<sup>th</sup> Circuit courts of appeal. He was also a member in good standing of Saint George Melkite Greek Catholic Church.

Jadd loved a good trial. He was always willing to give assistance to other attorneys whenever asked. His skills as a trial lawyer were admired by all who either worked with him or opposed him in the courtroom.

However, there was much more to Jadd than just the law. He loved to travel and made many overseas trips, including visiting the birthplace of his parents, Palestine, in 2007. He was an excellent photographer and loved

## MEMORIALS Continued from page 257

to show pictures of his travels. He also loved to collect pipes. He will be sorely missed by all who knew him.

He leaves to cherish his memory many friends and fellow attorneys, as well as his loving sisters Mary Ann (Fuad) Sahouria and Margie (Abe) Kalil and brother Ed (Cindy) Fawwal, as well as a host of nieces, nephews and grand-nieces, too numerous to mention. He loved them all, especially his little "Dory Elle," daughter of Ed and Cindy and the light of his life.

—Neil C. Clay, president, Bessemer Bar Association

### Stanley K. Smith

Stanley K. Smith, age 49, an avid outdoorsman, hunting guide, firearms instructor and attorney, passed away January 22, 2009. Stan is survived by his beloved wife, Kimberly Bunn Smith, and her daughter, Chloe Bunn, of the McAdory Community of Jefferson County; his brothers, Dr. Glen Smith, DMD (wife Cecilia) and Don Mills (wife Brenda); and sister Jill Mills Davis (husband Bruce) of Decatur. Stan was predeceased by his father, John Euin Mills, and his mother, Robbie Jewel Mills, of Decatur.

Stan was born September 2, 1959 in Decatur, Alabama. He graduated from Decatur High School in 1977 after which he attended the University of Alabama in Huntsville, graduating in 1981 with a B.A. degree in English. Following college, Stan obtained his law degree from the University of Alabama School of Law in 1984. He was a member of the Alabama State Bar and the Shelby County Bar Association.

Following graduation from law school, Stan worked as an associate and then partner with the Birmingham firm of Porterfield, Scholl, Bainbridge, Mims & Harper. In July 1994 Stan joined Robert C. Thomas, Jr. and established the firm Smith & Thomas LLC in Alabaster. In 1999 Brent A. Tyra joined the firm and the name was changed to Smith, Tyra & Thomas LLC.



As a hunter and guide, Stan enjoyed his hunting properties in Lowndes County and British Columbia where as a Master Class Bow Hunter he harvested over 500 big game animals.

Along with his friend, Matt Sims of Gadsden, Stan was co-founder of Alabama Defensive Pistol Academy (ADPA). He was an International Defensive Pistol Association (IDPA) Master Class Shooter, Safety Office, Instructor and recipient of numerous competition trophies. He was a National Rifle Association (NRA) Pistol, Rifle and Personal Protection Instructor.

As an author, Stan wrote and published two novels, *Beyond Blue Ice* and *Sufficiency of Evil*.

Stan loved and was loved by his wife, family, friends and church family, who will miss him dearly.

The Shelby County Bar Association celebrates the life of its member, Stanley K. Smith, mourns his death, expresses its gratitude for his distinguished career and contribution to the legal profession and extends its sincere sympathy to Stan's family, friends and colleagues.

—Jim Pino, president, Shelby County Bar Association

### Judge Lee Clyde Traylor

Judge Lee Clyde Traylor, judge of the DeKalb County District Court, died November 16, 2008.

Judge Traylor was a native of Fort Payne and attended Baylor School in Chattanooga. He obtained his B.A. degree at Emory University, and his law degree from the University of Alabama School of Law. After practicing law for many years in Fort Payne, where he served as municipal judge for 18 years, he was appointed DeKalb County District Judge in 1988. He was later elected to the position and served for 15 years until his retirement in 2003. During retirement, he continued to serve as drug court judge for DeKalb County and took other judicial assignments.



Judge Traylor was an active Shriner, serving as the Grand Potentate of the Cahaba Temple, and was instrumental in getting many children into the Shriners' burn hospitals. He was an avid sportsman and member of Ducks Unlimited.

Judge Traylor was the recipient of the Alabama Judicial Conservationist Award in 1995 and the Howell Heflin Award in 2002, and named Child Support Judge of the Year in 2004. He was named Fort Payne's Public Servant of the Year for 2008, and was honored with a resolution by the DeKalb County Bar recognizing his judicial integrity, fairness and evenhandedness.

Judge Traylor served as president of the Fort Payne

Rotary Club, president of Landmarks of DeKalb County, board member for the Depot Museum and the American Red Cross. He was a member and Sunday School teacher at the First Baptist Church of Fort Payne.

Judge Traylor loved his job as a judge. He took his job seriously, but never allowed it to suppress his sense of humor, a trait greatly appreciated by attorneys and litigants who appeared in his court. His passing leaves a great void in our legal and judicial community.

He is survived by his wife, Dorothy; sons Michael Traylor, Dennis Traylor and Lee Traylor; daughter Karen Traylor; and four grandchildren.

—Judge Randall L. Cole, former law partner

**Azar, Edward James**

Montgomery  
Admitted: 1947  
Died: April 12, 2009

**Boggs, William Pyrlé**

Clanton  
Admitted: 1952  
Died: March 25, 2008

**Bryan, Karen LaMoreaux**

Tuscaloosa  
Admitted: 1977  
Died: March 9, 2009

**Calhoun, Robert Franklin**

Hoover  
Admitted: 1958  
Died: March 9, 2009

**Cody, Gary Philip**

Hoover  
Admitted: 1986  
Died: January 10, 2009

**Fitzpatrick, Henry Tompkins, Jr.**

Montgomery  
Admitted: 1947  
Died: April 3, 2009

**Graham, Bryce Uraldine**

Tuscumbia  
Admitted: 1951  
Died: April 1, 2009

**Humphrey, Scott Johnson**

Hoover  
Admitted: 1982  
Died: April 12, 2009

**Hutchinson, Timothy Clark**

Butler  
Admitted: 1987  
Died: April 12, 2009

**Johnson, Clark Everett, Jr.**

Albertville  
Admitted: 1948  
Died: March 10, 2008

**Palughi, Peter Joseph**

Mobile  
Admitted: 1959  
Died: July 29, 2006

**Putman, Oather Herman, Jr.**

Birmingham  
Admitted: 1959  
Died: February 17, 2009

**Riley, Jack C., Hon.**

Cullman  
Admitted: 1952  
Died: March 5, 2009

**Ripley, Robert Forest**

Auburn  
Admitted: 1999  
Died: December 30, 2008

**Walton, Abbott Brand, Jr.**

Birmingham  
Admitted: 1970  
Died: April 18, 2009

**Weir, Donald Belmont, Jr.**

Huntsville  
Admitted: 1963  
Died: March 15, 2009

**Whitaker, Charles Larimore**

Birmingham  
Admitted: 1968  
Died: April 2, 2009

**Witherspoon, Miriam Denise**

Birmingham  
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## A Team Effort

Thank you for allowing me to serve as president of the Alabama State Bar Young Lawyers' Section this year. I have enjoyed my tenure and am sorry to be departing. However, the YLS is in more than capable hands with **Bob Bailey (president-elect), Clay Lanham (secretary)** and **Navan Ward (treasurer)** leading us into the future. It has been another great year for the YLS, and this is due to the many individuals and firms who supported the section this year and made our programs and events so successful. To the extent possible, I will recognize these individuals and firms in this article.

The YLS held its Sandestin Seminar in May. These members of the Sandestin Committee worked extremely hard to make this event a tremendous success: **Clay Lanham, Katie Hammett, David Cain, Shay Lawson, Brandon Hughey, Larkin Peters, Leslie Ellis, Brad Hicks,** and **Clifton Mosteller.**

We also could not have provided the outstanding entertainment and programming at Sandestin without the financial support of these businesses and law firms:

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JAMES M. TERRELL

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Continued from page 261

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Thanks also to our tremendous panel of speakers who helped make the Sandestin seminar a huge success.

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Thomas J. Spina  
Joe A. Joseph  
Christopher L. Hawkins  
Justice Hugh Maddox  
Honorable John R. Lockett  
Donald P. McKenna  
Shelby L. Stringfellow

On April 15<sup>th</sup> and April 29<sup>th</sup>, the YLS held its award-winning Minority Pre-Law conferences in Montgomery and Birmingham. **J. R. Gaines, Navan Ward, Kitty Brown, Sancha Epiphane,** and **Catherine Long** put a great deal of time, effort and energy into coordinating and planning these events and should be commended for this exceptional program.

Additionally, the following firms and organizations sponsored the YLS Minority Pre-Law conferences:

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In addition, special thanks go to Past YLS President **George Parker**, and to all of the members of the Young Lawyers' Section's Executive Committee. Without your help, there is no way that I could have led the group this year. I also thank Alabama State Bar President **Mark White**, Alabama State Bar President-Elect **Tom Methvin** and the entire staff of the Alabama State Bar who helped make my job easier and who were so supportive of the YLS and our many programs and events. I also express my sincere appreciation to my law partners for their support of me and the YLS during this year. Last, but certainly not least, I thank my wife, Julie, for her patience, understanding, support and wisdom. As always, I encourage you to become more involved in your YLS. 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 for 2008-2009.



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- Montgomery lawyer **Boyd F. Campbell** has been appointed to serve his second term as vice chair of a committee of the American Immigration Lawyers Association (AILA) that studies the foreign investor immigrant visa program. The AILA committee studies and makes recommendations to U.S. Citizenship and Immigration Services for improvements in the EB-5 immigrant investor program.
- The YMBC Civic Forum of Birmingham (formerly known as the Young Men's Business Club) recently passed a resolution honoring the late **Charles Morgan, Jr.** for his efforts challenging racism throughout his long legal career. One of his most significant cases involved the "one-man, one-vote" ruling he won in 1964 in *Reynolds v. Sims*. In addition to opening the Atlanta office of the American Civil Liberties Union and later serving as legislative director of the national office in Washington, Morgan also was employed by the National Association for Advancement of Colored People and the American Association of University Professors. Morgan died January 8, 2009.
- **Eric L. Pruitt**, a shareholder in the Birmingham office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, has been appointed co-chair of the American Bankruptcy Institute (ABI) Taxation Committee. Pruitt will serve a two-year term as co-leader of the committee, which monitors the activities of the congressional committees and IRS on matters concerning bankruptcy tax legislation and regulations.
- **Fred W. Suggs, Jr.** began his term as president of the South Carolina Bar in May. Suggs, an Ogletree Deakins Nash Smoak & Stewart PC shareholder in its Greenville office, graduated from the University of Alabama School of Law and joined the ASB in 1975. ▲▼▲



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*Pictured above are Judge U.W. Clemon, Justice Ralph Cook, Anne-Marie Adams, Jim Pratt, and Angela Hall.*

## The Birmingham Civil Rights Institute Honors Legacy of Justice Oscar Adams

*By James R. Pratt*



*Justice Oscar Adams*

**O**n Friday, May 1, 2009, I had the honor of substituting for Alabama State Bar President Mark White during a reception that the ASB hosted at the Birmingham Civil Rights Institute for the attendees to the Eleventh Circuit Judicial Conference. At the urging of President White, Anne-Marie Adams, the widow of Justice Oscar Adams who was the first African-American to serve on the Alabama Supreme Court, agreed to present Justice Adams's robe on loan to the Institute for display. Unfortunately, President White was unable to preside at the reception due to a medical procedure, but he deserves the credit for the idea and planning of this event. I also give special thanks and recognition to Elizabeth

North for her role in organizing this event.

The reception was very well attended by both judges and lawyers, many of whom had never seen the Institute. All in attendance were treated to a very special ceremony. Presentation participants included Frank Adams, brother of Justice Adams; Angela Hall, the Institute's vice president of publications and special events; U. W. Clemon, former chief judge of the United States District Court for the Northern District; and Ralph Cook, former Alabama Supreme Court Justice.

After welcoming the attendees, I explained that, since the opening of the Civil Rights Institute in 1992, only one robe has been displayed at the Institute.





*Holding her bouquet of red roses is Anne-Marie Adams with Frank Adams, brother of the late Justice Oscar Adams.*

It is a white robe with a hood, which represents very dark and troubling times for the Civil Rights movement, Birmingham and the region. By displaying Justice Adams's judicial robe, we honor the legacy of a great man and a great jurist. This robe stands as a symbol of progress within the Civil Rights movement, hope for the future and the proposition that the

rule of law is our best opportunity to obtain equality and justice for all.

Following these opening remarks, the Honorable U. W. Clemon, who now describes himself as retired and not reversible, gave the attendees his own personal view of the essence of Oscar Adams. Judge Clemon, currently a shareholder at White Arnold & Dowd PC, was Oscar Adams's law partner in the firm of Adams, Baker & Clemon, so he was able to add insight concerning Justice Adams's accomplishments as a man, a lawyer and a supreme court justice. It is particularly noteworthy that not only did Justice Adams go on to become the first African-American justice of the Alabama Supreme Court, but both of his law partners made significant contributions as well. Judge Clemon became the first African-American federal district judge in Alabama and Jim Baker became Birmingham's first African-American city attorney. This historic law firm made great contributions not only to the Civil Rights movement, but also to the legal community in Birmingham and the state.

After Judge Clemon's remarks, Anne-Marie Adams and Frank Adams presented Justice Adams's robe to the Institute and Justice Ralph Cook presented Anne-Marie with a dozen roses in appreciation for her magnificent gesture.

I believe all who were in attendance and witnessed this meaningful event in the history of the Institute were moved by its significance and reminded of the importance of the judiciary and the history of this state. ▲▲▲



*James R. Pratt is a senior partner in Hare Wynn Newell & Newton and is currently a bar commissioner from the 10th Judicial Circuit. He is a member of the American Law Institute, a fellow of the Alabama Law Foundation and a past president of the Alabama Civil Justice Foundation.*



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# Purchasing from Merchants on **ebay**<sup>®</sup> and the **Implied Warranty of Merchantability**: An Overview

*By Gary E. Sullivan*

**M**ost people have heard of eBay, one of many online auction sites where users can go to sell those items that have been cluttering up their attics or garages for too long. Since its inception, eBay has morphed from an outlet for selling unused or unwanted items to a massive platform for conducting e-commerce transactions between and among individuals, retailers and other businesses. As recently as October 2008, the number of “active users” on eBay numbered more than 85 million.<sup>1</sup> Unlike “old-fashioned” transactions involving face-to-face interactions, however, the buyer on eBay is purchasing an item he has never seen from someone he has never met.

Most experienced merchant sellers on eBay—many with online stores and long online sale histories—have warranty disclaimers. Some merchant sellers may replace those disclaimed warranties with express warranties. Many merchant sellers provide neither express warranties nor warranty disclaimers. Transactions involving these sellers may, however, still be covered<sup>2</sup> under the implied warranty of merchantability (IWM). The purpose of this article is to point out ways in which Alabama buyers can use eBay’s present services to protect themselves when dealing on eBay by determining whether a particular transaction is likely to be covered by the IWM.

# The UCC, “Merchants” and the IWM

The effect and purpose of the IWM is best understood in the context of the historical emergence of the Uniform Commercial Code (“U.C.C.”) as the authoritative source of law covering sales transactions. While the U.C.C. was being drafted during the 1940s, it was heavily affected by the legal scholarship of the drafting committee’s chief reporter, Karl Llewellyn. Llewellyn’s intention for Article 2 (covering sales of goods) was to make a functional and predictable business law for business people—regardless of whether that followed contemporary business practice or legal norms. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules*, 73Geo. L.J. 1141, 1151 (1985). One aspect of this was that he wanted to make it such that the courts did

not twist the businessman’s law to accommodate justice for the non-businessman. *Id.* at 1147-48. By separating out merchants from non-merchants, the courts could apply business law to business people without having to muddy the waters with concessions for non-businesspeople. *Id.* Originally, Article 2 explicitly provided for the application of “merchant provisions” to non-merchants so long as the “circumstances and underlying reasons justify extending its application.” *Id.* at 1174 (citing U.C.C. § 1-102(3) of the 1949 draft). The provision was removed before adoption so it appears today that there are two distinct classes of provisions, *Id.* at 1176, even though there are some remnants of the original plan in section 1-102(1) and Comment 1 of section 2-104. *See Id.* at 1181.

The U.C.C. as it was finally adopted, however, did not explicitly state Llewellyn’s intention. The comments to section 2-104, the provision defining “merchant,” lend themselves to the understanding that there are two types of merchants: practices merchants and goods merchants. A practices

merchant is one “who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction.” U.C.C. § 2-104 cmt. 2 (2003). This language, the comment states, would apply to nearly all businesspeople because the provisions to which this applies—dealing with the statute of frauds, firm offers, etc.—are common practices to all businesspeople. *Id.*


The U.C.C.’s IWM clause, however, only applies “if the seller is a merchant with respect to goods of that kind.” U.C.C. § 2-314 (2003). Goods merchants are those that have a “professional status as to particular kinds of goods.” U.C.C. § 2-104 cmt. 2 (2003). Presumably, this would encompass the remainder of the merchant definition under section 2-104, i.e., one who “deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the . . . goods involved in the transaction.” U.C.C. § 2-104 (2003). Although a goods merchant is likely to also be a practices merchant, it is not necessarily so.

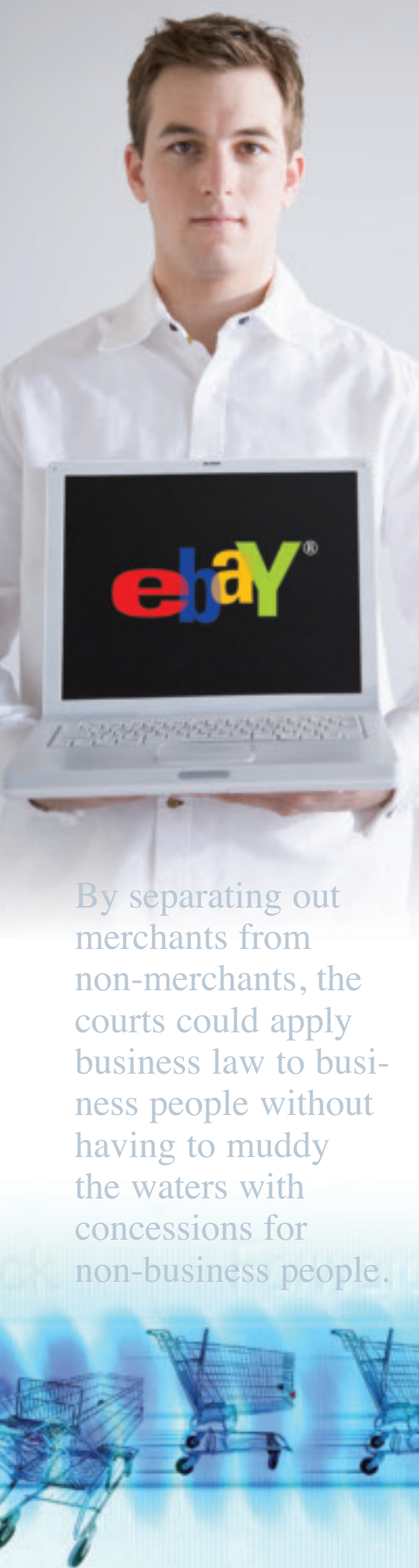
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By separating out merchants from non-merchants, the courts could apply business law to business people without having to muddy the waters with concessions for non-business people.

Despite its division implied by the comments, the definition of “merchant” under section 2-104 was written as a single piece: “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” *Id.* This, unfortunately, led to problems of interpretation since the comments do not make it explicitly clear that section 2-104 is to be divvied up between the various merchant provisions.

Courts have not always come to the same conclusions as to what a merchant with respect to goods of the kind is. Dealers in a particular good are generally held as merchants with respect to goods of that kind.<sup>3</sup> When dealer status is questionable, the courts tend to use the “sales over time” test.<sup>4</sup> With those who are obviously not dealers, however, sales over time are irrelevant, but, depending on the jurisdiction, specialized knowledge may or may not make them a “merchant with respect to goods of the kind” anyway.<sup>5</sup> Those who are obviously not dealers and have no special knowledge as to the goods are not merchants,<sup>6</sup> and those carrying out isolated transactions are generally not merchants, regardless, under 2-314, comment 3.<sup>7</sup>

Despite what was lost in its application, Llewelyn’s merchant/non-merchant dichotomy was a reasonable response to the problem of courts equitably meddling with business law because, at the time of the U.C.C.’s framing, it was easily applicable to the three main types of sales transactions: merchant, face-to-face sales to a buyer; non-merchant, face-to-face sales to a buyer; and merchant, long-distance sales to a buyer. In any face-to-face sale, the buyer had the opportunity to see with whom he was dealing. If he was dealing with a merchant, he was likely to be familiar with the merchant’s “professional” reputation and rely on that knowledge and the implied warranty that what the merchant sold was in fact merchantable. If he was shopping at a yard sale or flea market, the buyer was likely to understand that he was dealing with someone who was simply trying to make some extra cash and probably did not know significantly more about the item than the buyer himself.

The long-distance sale that existed at the time (e.g., buying from a catalogue) was almost exclusively between merchants, or

at least from a merchant to a consumer. In either case, the seller was a merchant, whose “professional” reputation again likely preceded him. This provided the buyer with some indication of what to expect from the transaction despite being unable to see and handle the product before purchasing it. The U.C.C. furthermore provided the buyer with the assurance that a contract for sale with a merchant included a warranty that what he bought would fit the description provided and function as it was intended. *See* U.C.C. § 2-314 (2003). The invention of the Internet, however, has thrown a radically different type of distance-sale transaction into the mix—one which the U.C.C. strains to incorporate.

## Recent Developments

As use of the Internet has become more widespread, more and more companies have begun using it as a medium for sales transactions. With the advent of online auction sites, everyone could get in on the action. Over the long Labor Day weekend of 1995, a software developer named Pierre Omidyar sat down to write the code for the online auction site that would become eBay. ADAM COHEN, *THE PERFECT STORE 21* (Little, Brown and Company 2002). Originally known as AuctionWeb, it quickly took over the entire eBay.com Internet domain, which Omidyar had been using to host the site for his consulting company, Echo Bay. *Id.* From its first sale (of a broken laser pointer), *Id.* at 4, through its public offering in 1998 (making it worth \$2 billion), *Id.* at 148, to its current status as the world’s largest online marketplace, *About eBay*, <http://news.ebay.com/about.cfm> (last visited Feb. 20, 2009), eBay has drastically altered the landscape of the distance-sale transaction by giving every person with a box of baseball cards and a dream the ability to sell to anyone anywhere in the world.

The Internet long-distance transaction has created a drastically different situation from any of those that existed at the time of the framing of the U.C.C. Mixing elements of previous long-distance transactions with the façade of the face-to-face transaction (by creating “stores” and

“about me” pages), Internet transactions can be particularly confusing. In this new form of transaction, the buyer never sees the seller or the item. More often than not, he is not familiar with the seller because, even if the seller is a merchant, it is not likely a widely known one.

The buyer has lost many of the protections in which he has come to trust: he cannot see the actual item before purchasing it; he cannot meet the seller before dealing with him; the buyer’s displeasure with the transaction, despite the feedback system, will likely have little impact on the overall reputation and business of the seller; and the buyer has a veil cast between himself and the seller making it difficult to determine whether the person with whom he is dealing is subject to implied warranties that will protect the buyer in case eBay’s protective measures break down.

## eBay Sellers and the IWM

To determine how well protected a buyer will be in any given sales transaction with a seller on eBay, one must find out as much about the sale and the seller as possible. In a face-to-face transaction, the buyer will generally learn whether

the seller is a professional. In an internet transaction through eBay, the buyer must put a little more work into discovering whether the seller is a dealer in those goods, whether the seller is knowledgeable in those types of goods, whether it is a company or an individual and to what degree the transaction in question is protected by warranties.

When the buyer has found an item on which he wants to bid, he should first look to see whether the seller has provided an express warranty on the product. These are usually found, if present at all, toward the bottom of the product description page after the description of the item. Express warranties are often given by professional sellers because, despite the potential liability they create, the indication of quality they provide helps distinguish the product from the myriad of other similar ones. Express warranties are binding on all sellers, U.C.C. § 2-313 (2003), and should be carefully scrutinized.

Next, the buyer should look for a disclaimer of warranties. This is extremely important because all warranty protections can be disclaimed by language, such as “with all faults” or “as is,” that call the buyer’s attention to exclusion of warranties. U.C.C. § 2-316(3)(a) (2003). Otherwise, the implied warranty of merchantability can only be excluded through an explicit reference to merchantability

and, with written exclusions as would be necessary in the case of an eBay transaction, the writing must be conspicuous. U.C.C. § 2-316(2) (2003). If there is such an exclusion, the buyer must beware; however, even in the presence of such exclusions, additional information will assist in the buyer in his decision of whether to deal with that seller.

eBay currently provides several ways for the buyer to get to know the seller. The “My World” page and the optional “Me” page both provide excellent sources of information about the seller. Both of these pages provide a lot of the same information, but the buyer should still look at both pages to make sure to get the fullest picture of with whom he is dealing.

Every seller will have a “My World” page, which can be found by clicking the hyperlinked name of the seller. The “My World” page will provide a summary of the seller’s feedback information at the top of the page, including the feedback score and percentage of positive feedback, eBay’s new Detailed Seller Rating and a scrolling list of recent feedback. This page can also include a section describing the seller, a description of the seller’s store and a list of the seller’s listed items. Most important here is the seller description, particularly the “All About Me” section. This will include a section in which the seller describes himself, as well as sections detailing what

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types of items the seller likes to buy, sell and collect. A second section may have interests or, in the case of a business, information about the business, such as its history and background, payment policy, shipping information, return policy, and contact information.

The “Me” page, on the other hand, is optional but can also be quite useful where it is present. It can be found by clicking on the “me” image next to the seller’s name. In a lot of cases, it is unhelpfully similar to the “My World” page because it generally provides again a list of the seller’s available items along with a static list of the seller’s feedback. The useful difference between the pages is the “Me” page’s less formulaic structure. The top part of the page is usually a description of the seller’s online and/or brick-and-mortar business in whatever form the seller chooses, often including pictures, custom layouts and more detail than that included on the “My World” page.

A third option is to search any links included on the “My World” and “Me” pages. Occasionally, sellers will include links to other Web sites, such as MySpace or a business Web site. These pages can also be useful in gaining information about a seller, but buyers should understand that these sites will have different standards regarding the offensiveness of what is posted on them. They can be useful tools, but should be used with care.

## Alabama’s Construction of “Merchant” and eBay Transactions

Alabama’s implied warranty of merchantability statute is found at *Alabama Code* section 7-2-314, and is essentially the same as section 2-314 of the U.C.C. See ALA. CODE § 7-2-314 (1975). The relevant part provides: “[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” *Id.* The question to be asked regarding eBay sellers is: what is a “merchant with respect to goods of that kind”? To answer this question, we must look to section 2-104, which in Alabama is identical to U.C.C. section 2-104 discussed above.

Most of the Alabama decisions to address this point have interpreted section 2-104’s merchant definition in a way consistent with the above analysis. Some cases have simply found under the first clause of section 2-104 that, because the seller was a dealer in the goods of the kind, they were a merchant. See *Agri-*

*Business Supply Co., Inc. v. Hodge*, 447 So. 2d 769 (Ala. Civ. App. 1984) (“The evidence is undisputed that plaintiff is and has been for a number of years in the business of selling equipment to people who raise chickens.”). This is perhaps the easiest method of determining that a seller is a merchant because it is usually obvious that the seller has a “professional status” as a merchant. The following two cases take a slightly more in-depth look at the analysis.

In *Donald v. City National Bank of Dothan*, 329 So. 2d 92 (Ala. 1976), the Alabama Supreme Court determined that a bank was not a merchant because it was neither a dealer nor did any of its employees have knowledge relating to the goods in question. *Id.* at 95. An official of the City National Bank of Dothan had contacted the plaintiff to see if he would be interested in buying a repossessed boat. The plaintiff had then paid to have the boat inspected twice before agreeing to buy it. After the plaintiff sued for a breach of warranty, the court concluded that, although a bank could be a merchant, “[n]o evidence was offered that the City National Bank of Dothan deals in the kind of goods involved in this transaction—boats—or that it holds itself out as having knowledge or skill peculiar to such goods.” *Id.* It further noted that the sale of the boat was an “isolated transaction.” *Id.*

In *Bradford v. Northwest Alabama Livestock Association*, 379 So. 2d 609 (Ala. Civ. App. 1980), the court held that

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an auctioneer was a merchant and that, through his agency and the operation of section 2-314(1), the farmers for whom he worked were as well. *Id.* at 611. The Bradfords filed a suit against the auction company because of the loss of a sale due to the death of 49 of their cattle in the company's pens. In the end, the case turned on whether the farmers were merchants. *Id.* Although farmers are usually not merchants under the U.C.C. in Alabama, the court held that they could be if they "employed an agent who by his occupation holds himself out as having knowledge or skill concerning the goods involved in the sale." *Id.* The court then found the defendant, their agent, to be a merchant because it "was in the business of selling cattle ... and had been so engaged for a number of years and held itself out as having the knowledge and skill to conduct such sales." *Id.*

These two cases illustrate the general method of analysis under section 7-2-314, asking whether the seller was a dealer or held itself out, by its occupation, as having knowledge or skill as to the goods in question. One case, however, seems to have set the bar particularly low. In *Ex parte General Motors Corp.*, 769 So. 2d 903 (Ala. 1999), the Alabama Supreme Court stated: "It appears undisputed that Bishop is a 'seller' of automobiles, as that term is defined in § 7-2-103, Ala. Code 1975 [subsection (d) of which defines 'Seller' to be a person who sells or contracts to sell goods]. Thus, § 7-2-314's requirement that the seller be a 'merchant with respect to goods of that kind' is met . . . ." *Id.* at 912. The plain words of the court would appear to undermine the comments to 2-104 that require a "professional status," but the seller in the case would still qualify as a "professional" merchant despite the court's lax choice of wording.

One final case of potential importance is *Loeb & Co., Inc. v. Schreiner*, 321 So. 2d 199 (Ala. 1975). *Schreiner* is the seminal case in Alabama on whether a farmer is a merchant. In the case, the Alabama Supreme Court held that farmers were not intended by the framers of the U.C.C. to be merchants. *Id.* at 201. The relevant part to the present discussion, however, is the court's discussion of its reasoning, and the possible analogies

that could be gleaned from the court's focus on the official comment's dichotomy of "causal seller" v. "professionals." *Id.* at 202. The court followed essentially the same analysis as stated above, comparing the facts of the case with the three clauses under section 2-104(1). *See id.* at 201-02. After discarding clause 3 as inapplicable to the facts and finding that a farmer did not "by his occupation so hold himself out" as having knowledge or skill peculiar to the practices or goods involved under clause 2, the court held that even having considerable knowledge and selling one's own product did not make a farmer a merchant. *Id.* at 202. Although so far this analysis has been confined to farmers, the potential applicability to some eBay sellers makes it something of which the buyer should be aware.

In applying these cases to the eBay buyer's predicament, there are three factors of which the buyer should take note in determining whether he will be protected by implied warranty of merchantability: a seller's eBay store and any other items that the seller has listed, indications of "professionalism" on the "My World" and "Me" pages and Power Seller status. Although eBay stores are not required to sell items within a single category, odds are that the store will have a central theme. If the item the buyer is purchasing is from that store or within that store's theme, it provides a strong implication that the seller is a "dealer in goods of that kind." Looking at items listed on the seller's "My World" page, "Me" page or "Items for Sale" page (which can be reached through the link of the same name on the left of the "My World" page) can provide the buyer with further support for the seller's status as a "dealer in goods of that kind." Items sold within the last 90 days can also be viewed on the "Feedback Profile" page, which can be found by clicking on the hyperlinked number in parentheses next to the user name.

The "My World" and "Me" pages can also be a useful place to find indications of the seller's "professional" status as a dealer or one knowledgeable as to those goods. The parts of these pages in which the seller describes himself or his business are often used to highlight the knowledge



“[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”



For those sellers who are not obviously dealers in goods of the kind, the buyer must be more careful.



that the seller or his employees have regarding the product or the length of time that the seller has been dealing in that type of good. Both are excellent indicators of a seller who would fall within the “merchant” category.

Lastly, the eBay-created status of a Power Seller can be a useful, but also misleading designation. The qualifications for a seller to become a Power Seller are that they maintain minimum sales requirements over long periods of time, including both minimum income and items sold requirements; attain a high feedback rating with a near perfect positive feedback record; maintain a high Detailed Seller Rating; and comply with eBay’s rules. Although this collection of qualifications would seem to indicate a merchant status, the eBay designation includes all items sold by the seller and does not necessarily indicate a “merchant with respect to goods of that kind.” The other indicators previously mentioned should be used to make sure that the seller falls under that description as well.

For those sellers who are not obviously dealers in goods of the kind, the buyer must be more careful. When a seller has made quite a few sales but in various types of goods instead of a single kind, the analysis becomes somewhat murkier. It is equally so when the seller has made few sales, but they are all the same type of good. Has the seller reached that point at which he ceases to be a “casual seller” and has now become a “professional” internet seller? Does a seller who claims to be a retired nurse or other professional but now is an eBay power seller in goods relating to a hobby count as a merchant professional?

Since Alabama courts have never addressed any of the issues relating specifically to Internet sellers and the U.C.C. merchant, the buyer must simply trust to eBay’s built-in protections and make sure to use the other tools at his disposal to have the best information available when deciding from whom to buy.

## Conclusion

It is hoped that this article has provided a framework for analyzing whether the IWM likely arises in a given eBay transaction. Given the differences in how

business between a buyer and merchant seller have evolved and changed since the time the IWM was created, such Internet transactions will continue to involve much “gray area” until the courts or the legislature provides a clearer understanding of the internet seller’s status under the merchant provisions of the U.C.C. ▲▼▲

## Endnotes

1. “Has eBay Hit Its Twilights?,” *Money Magazine*, October 17, 2008.
2. This article does not address the issue of whether a given eBay seller is subject to *in personam* jurisdiction in Alabama.
3. See *Cochran v. Rockwell Int’l Corp.*, 564 F. Supp. 237, 242 (N.D. Miss. 1983); *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710, 711 (Fla. Dist. Ct. App. 1988) (“The statute is written in the disjunctive, so if the person deals in goods of the kind, he is a ‘merchant’ under this section, whether or not he holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”); *Laird v. Scribner Coop, Inc.*, 466 N.W.2d 798, 804 (Neb. 1991).
4. See *Saratoga Spa & Bath, Inc. v. Beeche Sys. Corp.*, 656 N.Y.S.2d 787, 789-90 (N.Y.A.D. 1997); *Colopy v. Pitman Mfg. Co.*, 615 N.Y.S.2d 208, 209 (N.Y.A.D. 1994).
5. See *Cropper v. Rego Distribution Center, Inc.*, 542 F. Supp. 1142, 1154 (D.C. Del. 1982); *Joyce v. Combank/Longwood*, 405 So. 2d 1358, 1359 (Fla. Dist. Ct. App. 1981) (finding the sale of five repossessed cars in one year as isolated events because the bank did not usually deal in cars); *Ferragamo v. Mass. Bay Transp. Auth.*, 481 N.E.2d 477, 481-82 (Mass. 1985) (holding that, although transportation authority was not a seller of scrap or trolley cars, it was a merchant because it held itself out as having knowledge of the goods); *Miller v. Badgley*, 753 P.2d 530, 533-34 (Wash. Ct. App. 1988). *But see also Siemen v. Alden*, 341 N.E.2d 713, 715 (Ill. App. Ct. 1975) (stating that the “warranty of merchantability is applicable only to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty.” (emphasis added)); *Fred J. Moore, Inc. v. Schinmann*, 700 P.2d 754, 756-57 (Wash. Ct. App. 1985) (intimating that holding oneself out “to have certain skills or knowledge” may not be enough to meet § 2-314 standard).
6. See *Acevedo v. Start Plastics, Inc.*, 834 F. Supp. 808, 812-13 (E.D. Pa. 1993); *Donald*, 329 So. 2d at 95; *Joyce*, 405 So. 2d at 1359.
7. See *Donald*, 329 So. 2d at 95; *Siemen*, 341 N.E.2d at 715 (holding against merchant status on the basis of “isolated or casual seller” language in comment). *But see also Cropper*, 542 F. Supp. at 1154 (mentioning argument that isolated sales cannot create merchant status, then ignoring it in the analysis, indicating that the court did not consider it dispositive).

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*Judge John Godbold with his wife, Betty,  
and the author's daughter, Cate*

# “The Finest Man I’ve Ever Known”

**By Chad E. Stewart**

Several months ago I was talking with a notable Montgomery lawyer who shared several war stories from the Civil Rights era. Judge John Godbold’s name came up and I proudly explained that the judge taught me in law school, befriended me when I lived in Montgomery and mentored me from the day I met him. After patiently listening to me carry on for a while, the older gentleman said, very simply, “John Godbold is the finest man I’ve ever known.”

The more I thought about it, the more I realized that if a poll were taken, the vast majority of people who know John Godbold would honestly say the same thing. In fact, that would be the first thing

out of our mouths although it would be easier to just say that he is:

- Nationally regarded as a legal giant;
- The first and only person to serve as chief judge of two federal circuits;
- A decorated World War II veteran; and
- A remarkable lawyer and judge we are honored to claim as one of our own.

What is more remarkable, however, is the number of lives Godbold has influenced for the good on a personal level. The older I get, the more I come to understand that the latter accomplishment far outweighs the former ones. John Godbold has always understood that and lived his life accordingly. That is why



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this modest tribute is well deserved, and then some.

John Cooper Godbold was born in 1920 on a farm in Coy, Alabama. He grew up during the Great Depression and attended the public schools of Selma. In 1940, he earned his B.S. degree from Auburn University where he was editor of *The Plainsman*. At Auburn, he met his beloved Betty to whom he credits all of his success. Together they raised a large, wonderful family, which he values more than anything else.

Judge Godbold's attendance at Harvard Law School was interrupted by World War II, where he served with honor and distinction. Perhaps the thing that impressed me most about him was when I asked for the "umpteenth" time about his service in the war. With some arm-twisting and refilling of his glass, I persuaded the judge to reveal that he was in fact a true combat veteran who participated in the liberation of Europe. This soft-spoken, skinny little guy actually led soldiers into battle and helped overthrow the Nazi regime. If I had done that, it would be printed in detail on my business cards, but John Godbold told me about his war experience with the utmost reluctance and humility. He was just serving his country and felt no need to boast or even talk about it.

In 1948, John Godbold earned his J.D. from Harvard Law School and was admitted to the Alabama State Bar. He began practice with Richard T. Rives in Montgomery and became a partner in the firm of Rives & Godbold in 1949. Later, Truman Hobbs joined the firm and their accomplishments together are legendary. Rives was the first to be appointed to the federal bench in 1951; then Godbold in 1966; and Hobbs in 1980.

That impressive firm history is surpassed only by the personal stories Godbold shares about his partners. As to Judge Rives, he would always tell me that

"whenever any lawyer had a problem or a question, Rives would immediately drop what he was doing and help him. He was never too busy to be a mentor." As for Judge Hobbs, Godbold said there was one word that best described him—"fearless." Yet, he also remembered another side of Judge Hobbs best depicted when a conflict of interest prevented their firm from prosecuting an egregious civil rights case. Godbold recalled that Hobbs wept when he told the individual he would not be able to help. Judge Godbold would likewise get emotional when talking about his law partners because of the tremendous respect they had for one another. That spoke volumes to me and helped explain the extraordinary success they had.

After leaving private practice, Judge Godbold began his distinguished career on the "old" Fifth Circuit Court of Appeals. For more than a decade, he "rode the circuit" between Florida and Texas as a circuit judge and later chief judge of the Fifth Circuit, which was by far the largest judicial circuit in the nation. One of his colleagues described him as "indispensable" in the protracted efforts to divide the Fifth Circuit into two courts, which came to fruition in 1981 when the Fifth Circuit divided into the "new" Fifth and the Eleventh Circuit courts. Godbold became the first chief judge of the Eleventh Circuit and remains the only person ever to have served as chief judge of two federal judicial circuits.

In 1986, Judge Godbold temporarily left the bench when a committee chaired by the chief justice of the United States Supreme Court appointed him director of the Federal Judicial Center in Washington, D.C. The Judicial Center is the research and training arm of the entire federal court system. Judge Godbold served in that prestigious position for three years before returning to the Eleventh Circuit bench.

In 1990, Judge Godbold was named the Leslie S. Wright Distinguished Professor at Cumberland Law School. His classes at Cumberland filled so quickly that students had to sign up a year in advance to get a spot. He went out of his way to make students feel at ease and actually taught by means of a round-table discussion. Godbold always stressed the importance of concise and uncluttered legal writing to his students. His expertise on that subject is summarized in a law review article written more than 30 years ago entitled *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L. J. 801 (1976). That article is said to be the most widely reprinted law review piece written in the United States and is regularly reprinted as a teaching and reference tool in law schools, bar associations, CLE programs and law firms.

In the last class of each semester, rather than grill his students about the upcoming exam, Judge Godbold would tell a story about John Adams and what it really means to be a lawyer. His students persuaded him to put that lesson into an article called “*Lawyer*”—*A Title of Honor*, 29 Cumb. L. Rev. 301, 303 (1998-1999). If you ever need encouragement about our profession, read that essay and it will put a spring back in your step.

In 1996, Judge Godbold received the Edward J. Devitt Distinguished Service to Justice Award, which is perhaps the highest honor a federal judge can attain. The selection is made by a committee chaired by a justice of the Supreme Court and annually recognizes an Article III judge of national stature, whose distinguished lifelong career is characterized by:

Decisions that, through their wisdom, humanity and commitment to

the rule of law, make clear that bench, bar and community alike would willingly entrust that judge with the most complex cases of the most far-reaching import; writings, including opinions, lectures or other publications, that reveal scholarship and dedication to the improvement of the judicial process; and activities that have helped to improve the administration of justice, advance the rule of law, reinforce collegial ties within the judicial branch or strengthen civic ties, within local, national or international communities.

See American Judicature Society’s Web site (<http://www.ajs.org/>). Other recipients of the Devitt Award include Warren E. Burger and Frank M. Johnson, Jr.

Judge Godbold was also the first winner of Auburn’s Alumni Award for Achievement in the Humanities. He has been asked to speak, teach and receive honorary degrees from schools across the country. In 2002, John Godbold was inducted into the Alabama Academy of Honor.

While a complete list of Judge Godbold’s achievements would fill up volumes, suffice it to say that he has done pretty well for a farm boy from Coy, Alabama. Throughout his life, he has truly exemplified servant leadership. His contributions to our profession, state and country are simply astonishing. Yet, the people who have been privileged to know John Godbold personally would say that his most significant contributions have been the ones he has made to our individual lives. Those are the things that inspire us to become better people and to say unequivocally that “John Godbold is the finest man we have ever known.”



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# LAWYERS RENDER SERVICE: State Bar Fulfills Its Goals for Judicial Education

*By Edward M. Patterson*

**I**n 2005, the Alabama State Bar responded to a funding shortfall by tasking its Judicial Liaison Committee with raising money so that the state's circuit and district judges could attend the National Judicial College (NJC) in Reno. While the NJC is universally recognized as the preeminent entity in the country offering courses for judicial officers, the Alabama Administrative Office of Courts' (AOC) budget to send our state court judges to the NJC's General Jurisdiction Course—or any other institution in which Alabama's judges could learn alongside those from other states—was lost.

The bar's Judicial Liaison Committee (JLC) responded. Jere Beasley and Sam Franklin, co-chairs of the committee, appointed Teresa Minor, Tom Warburton and Joe Babington to coordinate the process of raising funds for this critical project. Over the course of 2006 and 2007, this subcommittee of the JLC spoke to groups across the state, publicized the need for this funding and promoted the

bar's solution, ultimately obtaining more than \$100,000 from generous members of the bar via solicitation letters, telephone calls and good-natured personal pressure on their friends, colleagues and law partners. The bar's overwhelming willingness to contribute to this worthy effort cut across all lines: large law firms and solo practitioners donated at high rates; attorneys practicing predominantly on behalf of plaintiffs and law firms who traditionally represent defendants also gave generously. Every lawyer in Alabama can be proud of their bar's selfless donation of resources in the service of ensuring that our judges have the tools they need to fairly administer justice.

In 2007 and 2008, the funds provided by the state bar were put to use. Numerous judges from across the state attended the NJC, among them circuit and district judges from Pike, Marion, Coffee and Chambers counties. The experience these judges obtained has resulted in the operation of courts and improved docket management. As stated

by prior attendee Circuit Judge Robert S. Vance, Jr., "The curriculum covered the spectrum of issues confronting trial judges. I found courses dealing with the rules of evidence, judicial writing, handling jurors and general courtroom management particularly helpful."

In late 2008, the JLC and the AOC again tackled the judicial education shortfall. Despite the funds raised by the JLC, and the dozens of trial judges sent to the NJC through the bar's generosity, judicial elections, retirements and appointments had resulted in a high number of judges again assuming the bench without in-depth training in "judging." Led by Tom Warburton, the JLC worked with the AOC to apply for and negotiate funds from the NJC to match those remaining from the JLC's original fundraising. After six month's effort, the JLC announced and delivered a final check in the amount of \$29,182.24 to the AOC, to be matched 100 percent by the NJC in scholarship funds. The AOC anticipates that this nearly \$60,000 will



allow it to send every Alabama trial court judge who had indicated an interest in attending 2009 judicial education to enroll in the NJC in 2009 or 2010.

Callie T. Dietz, administrative director of courts, recently issued the following statement about the Alabama State Bar's work to fund judicial education:

*"The Administrative Office of Courts is extremely proud of our partnership with the Alabama State Bar and continuing assistance from the National Judicial College. This is another wonderful example of the private sector joining hands with the public to assist when budgetary constraints force difficult decisions. The ultimate winners in this project are not only our judges who receive the outstanding training of this course, but the citizens of Alabama who come before*

*them. Thank you to all who participated in or work for this worthwhile project."*

This extraordinary result is something of which every member of the state bar can be proud, especially Jere, Sam, Teresa, Tom, and the other members of the JLC who worked long and hard to make it happen. Indeed, lawyers render service to their clients, communities and their profession. ▲▼▲



**Edward M. Patterson** is the assistant executive director of the Alabama State Bar.

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# A Primer on Applying Articles 3 and 4 to THE TEN MOST COMMON CHECK DISPUTES

By Gregory C. Cook and John D. Pickering

This article will provide an overview of the law relating to disputes over payments of checks.<sup>1</sup> We focus on what are likely the 10 most common scenarios and the common facts and arguments for those 10. Litigation over checks usually falls into one or more of three categories: (1) unauthorized drawer<sup>2</sup> signatures, (2) forged endorsements<sup>3</sup> and (3) employee wrongdoing (which might include creating fictitious payees for checks, forging drawer signatures, forging endorsements or altering received checks). Often, the wrongdoer is not solvent and therefore the Uniform Commercial Code (“U.C.C.”)<sup>4</sup> attempts to allocate the loss by placing it upon the party best able to avoid the loss. This may be the depository bank<sup>5</sup> (the bank that took the check), the payor bank (the customer’s bank) or the customer. Often, the liability rules change based upon the due care of the parties and based on the drawer’s deposit agreement with its bank. Lawsuits can arise between the drawer and its bank, as well as between the depository and payor banks.

## DISPUTE ONE (Drawer vs. Its Bank): Drawer’s Signature Unauthorized

The starting point for disputes between a drawer and its bank is *Ala. Code* § 7-4-401(a), which provides that a bank may only charge a customer’s account for an item if it is

“properly payable,” which means: (1) “authorized by the customer and” (2) “in accordance with [the deposit agreement].”

An unauthorized signature can be either a forgery or simply one made without actual, implied or apparent authority. *Ala. Code* § 7-1-201(43); *Ala. Code* § 7-3-402 (signature by representative). In general, a check signed by an unauthorized third person as drawer is not properly payable and the customer’s bank may not charge the customer’s account and must re-credit the account of the customer. The three most common questions that arise in such circumstances are: (1) whether there were repeated forgeries by the same wrongdoer before notice by the customer to its bank (known as the “repeat wrongdoer” rule), (2) when the customer provided notice to its bank (even if no repeat wrongdoer) and (3) whether the customer was negligent in causing the unauthorized signature. The question of whether the check was signed by a human or by automated or facsimile will usually not change the outcome.<sup>6</sup>

### Repeat Wrongdoer Rule; Comparative Negligence Standard Unlikely to Help

Section 7-4-406(c) states that if a bank sends its customer a periodic account statement, the customer must (1) “exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized” and (2) must promptly notify the bank if a payment was not authorized. Under § 7-4-406(d)(2), if the customer fails to exercise such reasonable promptness, it is precluded from asserting an unauthorized signature by the *same wrongdoer* on any other items paid in good faith after a reasonable period of time for the customer to examine the previous unauthorized

item or a statement listing such item (not exceeding 30 days). Normally, this requirement of good faith will not assist the customer who has failed the repeat wrongdoer test, because Alabama (unlike some states) follows a subjective test for “good faith” for purposes of U.C.C. Articles 3 and 4. *Ala. Code* § 7-3-103(a)(4) defines “good faith” as “honesty in fact in the conduct or transaction concerned.” *Cagle’s, Inc. v. Valley National Bank*, 153 F. Supp. 2d 1288 (M.D. Ala. 2001); *Continental Casualty Co. v. Compass Bank*, 2006 WL 644472 (S.D. Ala. March 9, 2006). The defenses in § 7-4-406 must be pled as affirmative defenses. *Pinigis v. Regions Bank*, 942 So. 2d 841 (Ala. 2006).

This “repeat wrongdoer” rule is often important because it is common for the same wrongdoer to submit multiple checks over several months or even years. *E.g.*, *Cagle’s Inc. v. Valley National Bank*, 153 F. Supp. 2d 1288 (M.D. Ala. 2001).

Notwithstanding this rule, if the customer can show a lack of “ordinary care” by the bank that substantially contributes to the loss, the liability will be determined comparatively. *Ala. Code* § 7-4-406(e). In the case of an unauthorized drawer signature, it is very unlikely that a customer could succeed on such an argument. Section 7-3-103(7) defines “ordinary care” as the observance of reasonable commercial standards prevailing in the area. In the case of a payor bank that processes checks by automated means (which would likely be most banks today), the *Code* expressly recognizes that reasonable commercial standards would normally not require the bank to examine instruments (a possible exception could exist if the customer’s bank was also the bank that accepted the check from the wrongdoer and there is some further indication of negligence). *Ala. Code* § 7-3-103(7).

Further, it is becoming more and more common for no physical checks to be transmitted between merchants and banks, and between the depository and payor bank. Increasingly, physical checks are not transferred for collection (this is known as “check truncation”), rather there are electronic transmissions of instructions or images.<sup>7</sup> Under such an electronic system, it will be even less likely that the customer’s bank could be found comparatively negligent when there is an unauthorized/forged customer signature.

## Late Report by Customer after Receiving Statement

In addition to the repeat wrongdoer rule, *Ala. Code* § 7-4-406(d)(1) provides that a customer’s failure to comply with its duty under § 7-4-406(c) of reasonable promptness in examining its statement or items and promptly notifying the bank of relevant facts can shift liability to the customer, if the customer’s failure causes a loss to its bank because of an unauthorized drawer signature. As with the “repeat wrongdoer” rule, *Ala. Code* § 7-4-406(e)’s comparative negligence standard can shift a portion of this liability back to the bank. Because the “repeat wrongdoer” rule often applies in the same circumstances and because it does

not require proof of a loss “by reason” of the customer’s delay, *Ala. Code* § 7-4-406(d)(1) is not often relevant.

Section 7-4-406(f) goes even further and provides that (1) without regard to due care, (2) without regard to repeat wrongdoer and (3) without regard to loss “by reason” of the delay a customer who does not discover and report such unauthorized drawer signatures is precluded from recovery unless the customer provides notice within (1) 180 days after the statement *and* the items (or a copy or image of the items) are *sent* to the customer, or (2) within

one year after the statement *or* items are otherwise *made available*.<sup>8</sup> Further, there is no good-faith requirement for the application of this defense. *Pinigis v. Regions Bank*, 977 So. 2d 446, 452 - 55 (Ala. 2007).

However, in virtually every case the customer’s bank will have a deposit agreement which shortens both the 180-day and one-year periods, typically to 30 days.<sup>9</sup> While some commentators have objected to shortening this period and argued that such a provision may not be enforceable, it is very likely that it would be enforced in Alabama. The customer is clearly in the best position to determine an unauthorized or forged signature and they are unlikely to examine their statement after 30 days if they have not examined it before 30 days—and there are public policy reasons to encourage early reporting.<sup>10</sup>

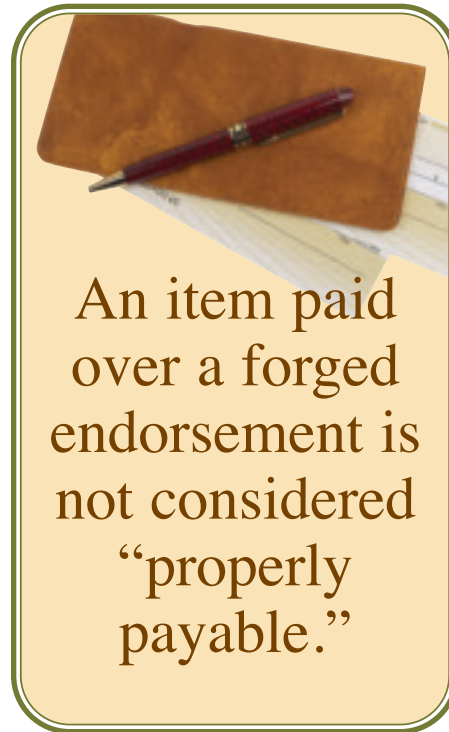
## Negligence Substantially Contributes to Making

Section 7-3-406 states that a person whose “*failure to exercise ordinary care substantially contributes*” to the making of a forged signature (not unauthorized<sup>11</sup>) is precluded from asserting such forgery against their bank. The burden of proving this lack of ordinary care is upon the bank. The Official Comments provide an example where an employer uses a rubber stamp to add signatures to a check and leaves the rubber stamp and blank check forms in an unlocked drawer; an unauthorized person then uses the rubber stamp to forge checks.

Conversely, the customer can again argue under § 7-3-406(b) that the bank failed to exercise ordinary care and such failure “substantially contributes to the loss.” Under § 7-3-406(c), the customer would bear the burden of proof on such an argument and it is unlikely that the customer will succeed on such an argument against its bank for an unauthorized drawer signature.

## DISPUTE TWO (Customer vs. Bank): Forged Endorsement

Again, only those checks that are “properly payable” may be charged against a customer’s account. An item paid over a forged endorsement<sup>12</sup> is not considered “properly payable.” With this said, there are a number of exceptions that recognize a bank’s ability to shift the loss to the customer.





## “Face-To-Face” Imposter Rule

If an imposter causes a customer to issue a check, then the endorsement of the imposter is deemed not to be a forgery and therefore the customer bears the loss. *Ala. Code* § 7-3-404(a). However, the bank must have paid the instrument in good faith. Further, if the person paying the instrument failed to exercise ordinary care then the person “bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.” *Ala. Code* § 7-3-404(d).

## “Fictitious Payee” Rule

If the payee is a fictitious person, then the endorsement of the payee is not deemed to be a forgery. *Ala. Code* § 7-3-404(b). For example, if an employee issues a check to a fictitious person and then forges the name of the payee and cashes the check, the customer’s bank would not be required to bear the loss (assuming it acted in good faith). The same rule applies if the employee writes the check to a real person but then forges the payee’s name.<sup>13</sup> In both cases, the forgery is deemed to be a legitimate endorsement. Note again the possibility of the customer claiming comparative negligence on the part of others. *Ala. Code* § 7-3-404(d).

## “Entrusting” Rule

If an employee wrongfully endorses a check, the employer will normally bear the loss if the employer has entrusted the employee with certain responsibilities. *Ala. Code* § 7-3-405. The entrusting rule covers both (1) an employee’s endorsing a check payable to the employer, or (2) an employee’s wrongful endorsement of a check issued by the employer.

For purposes of the “entrusting” rule, § 7-3-405 defines responsibility broadly, thus the employer may likely bear the loss. However, the employer must have done more than merely allowing access to checks, such as through the handling of the mail. Responsibility normally means the authority to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer or to control the disposition of instruments to be issued in the name of the employer. Further, “employee” is defined broadly to “include[] an independent contractor and employee of an independent contractor retained by the employer.”

If the person paying the instrument fails to exercise ordinary care and that substantially contributes to the loss, the person bearing the loss may recover to the extent that such failure contributed to the loss. *Ala. Code* § 7-3-405(b).

## Negligence Substantially Contributes to Making

As with unauthorized drawer signatures, § 7-3-406 states that a person whose “failure to exercise ordinary care substantially contributes” to the making of a forged endorsement is precluded from asserting such forgery.

## Standard Exception Requiring Consumer to Review Bank Statement—Rule Different for Endorsements


As with unauthorized drawer signatures, *Ala. Code* § 7-4-406 requires a customer to review its statement, but the standards are

somewhat different—requiring that notice of forged endorsements be provided within one year after statements or items are sent or made available (without regard to any negligence by the bank). Again, the deposit agreement may also have altered the rules for forged endorsements.

## DISPUTE THREE (Customer vs. Bank): Altered Checks

Normally, if a check is altered after it is written (for instance, the amount is changed), the customer’s bank may charge the account only according to the original terms. “‘Alteration’ means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.” *Ala. Code* § 7-3-407(a). However, the rules listed above can alter this outcome, including negligence by the customer that substantially contributes to the alteration (subject to a comparative negligence defense—*Ala. Code* § 7-3-406), failure to provide notice after receiving a bank statement (the rules from *Ala. Code* § 7-4-406 for unauthorized signatures apply to alterations also), or the deposit agreement.

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## DISPUTE FOUR (Theft Victim vs. Depository Bank): Forged Endorsement

Sometimes a thief steals a check made payable to the victim and forges the endorsement of the victim. Such a victim may have a conversion claim against a depository bank (although there may be some uncertainty if a physical check is not involved).<sup>14</sup> *Ala. Code* § 7-3-420(a) provides:

An instrument is converted under circumstances which would constitute conversion under personal property law. The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.

## DISPUTE FIVE (Depository Bank vs. Payor Bank): Forged Endorsement or Alteration (Send the check back or warranty claim)

Because there are typically only two banks<sup>15</sup> involved in a checking dispute (the bank that takes the check and the bank that ultimately pays the check), the dispute is often over which bank must bear the loss. In general, there are two basic questions for allocating the loss—(1) may the payor bank return the check through the Federal Reserve System (or some other “clearing house”<sup>16</sup> system) to the bank which presented it, or (2) may the payor bank allege a breach of presentment or transfer warranty?

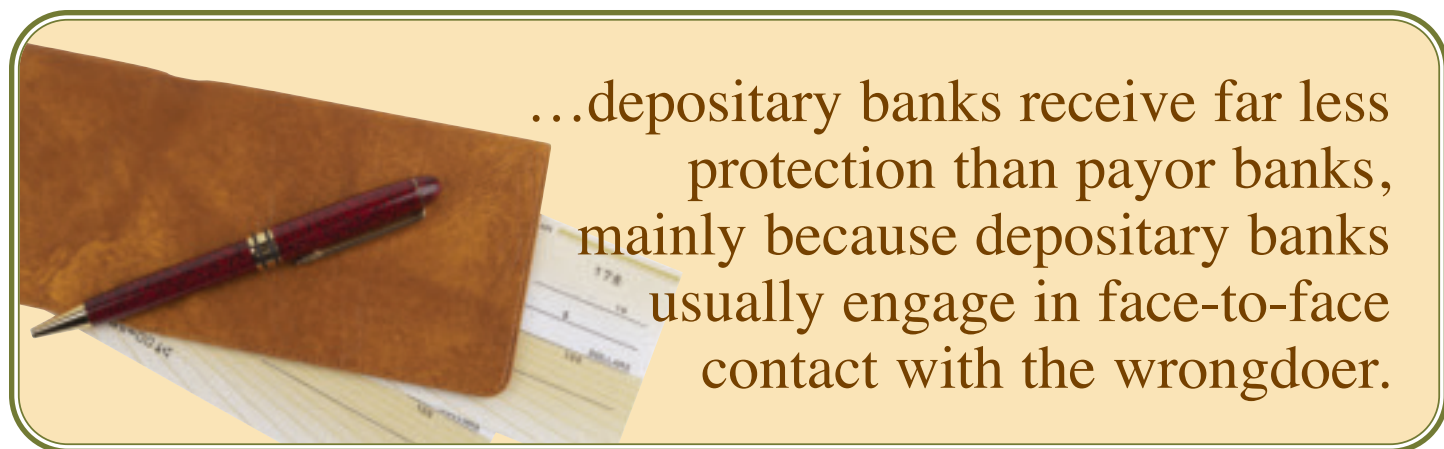
Returning the check through the Federal Reserve System is essentially a self-help remedy of the customer’s bank. It is very unlikely to occur without the customer’s bank being on the lookout for improper endorsements or alterations. The customer’s bank has very little time to exercise this remedy and may not do

so if it “retains the item beyond midnight of the banking day of receipt without settling for it or, whether or not it is a depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline.” *Ala. Code* § 7-4-302. The same result occurs under the Federal Reserve’s regulations. Under 12 CFR § 229.30(a), the payor bank must expeditiously return items it decides not to pay. Under 12 CFR § 229.30(a), this duty is satisfied only if the payor bank meets one of two tests: (1) under the two-day/four-day test, it returns an item in an expeditious manner if it sends the returned item in a manner such that it would be received by the depository bank not later than 4:00 p.m. on the second business day after presentment of local items, or not later than 4:00 p.m. on the fourth business day after presentment of non-local items, or (2) under the “forward collection test.” Under this second test, a payor bank returns an item in an “expeditious manner” if the bank sends the item in a manner that a similarly situated bank would normally handle an item, which is deposited for forward collection in the similarly situated bank by noon on the banking day following the banking day on which the check was presented to the payor bank.

In the alternative, the customer’s bank may assert a breach of presentment warranty against the depository bank if it is required to re-credit its customer’s account.<sup>17</sup> A transfer warranty claim may also be available to other entities in the chain. Typically, the presentment warranty would allow the customer’s bank to recover against the depository bank if (1) the check has been altered, or (2) the endorsement is forged but may not allow a recovery against the depository bank for an unauthorized drawer signature.<sup>18</sup>

In short, the two types of warranties that may be relevant are: (1) presentment warranties made by transferors to the payor (also sometimes known as the drawee) (*Ala. Code* §§ 7-3-417, 7-4-208),<sup>19</sup> (2) transfer warranties made by transferors to transferees other than the drawee or payor (*Ala. Code* §§ 7-3-416, § 7-4-207)<sup>20</sup>. If there are only two banks involved, the transfer warranty may therefore not apply; however if there have been transfers prior to the check reaching the banking system this warranty might apply or if there have been more than two banks involved, it may apply. Notice of a claim for a presentment warranty must be “within 30 days after the claimant has reason to know of the breach” or the warrantor is discharged “to the extent of any loss caused by the delay.”<sup>21</sup>

In sum, depository banks receive far less protection than payor banks, mainly because depository banks usually engage in face-to-face contact with the wrongdoer.<sup>22</sup>



...depository banks receive far less protection than payor banks, mainly because depository banks usually engage in face-to-face contact with the wrongdoer.

## DISPUTE SIX (Depository Bank vs. Payor Bank): Unauthorized Drawer's Signature

As between banks, the customer's bank is likely to bear the loss for the forged drawer's signature. The presentment warranty provides only a very narrow warranty of the authenticity of the drawer's signature by the earlier bank. This warranty is almost never applicable. The transferor only warrants that it "has no knowledge that the signature of the . . . drawer . . . is unauthorized." *Ala. Code* § 4-208(a)(3). Thus, in the case of an unauthorized drawer signature, where no defenses are available to the bank, the losses most often rest on the payor bank.<sup>23</sup> The justification for such liability is that a payor bank is in the best position to ascertain a forged drawer's signature, as the payor bank possesses the signature card of the drawer.

Of course, the customer's bank could send the check back through the Federal Reserve System (or other clearing house), but only if it meets the strict deadlines discussed earlier. Because the customer's bank is unlikely to meet this requirement, it will bear the loss.

There is also the possibility that both the drawer's signature and the endorsement have been forged. The *Code* and relevant case law treat "double forgeries" "as forged drawer's signature cases and impose liability solely on the payor bank."<sup>24</sup>

Finally, the drawer's bank might argue that the depository bank has been negligent in dealing with the wrongdoer. There is typically no duty to question customers in transactions,<sup>25</sup> but the customer's bank might argue that the depository bank failed to exercise ordinary care (for instance, depending upon the facts, arguments might be made where a bank accepts repeated checks without endorsements, or does not require identification, or the pattern of check-cashing (size, teller, date, etc.) indicates possible wrongdoing).

## DISPUTE SEVEN (Depository Bank vs. Payor Bank): Payable to Fictitious Person or to Person Not Intended to Have an Interest

Absent knowledge, it is not a breach of the presentment or transfer warranties for a depository bank to present a check to a payor bank which is payable to a fictitious person or to a person not intended to have an interest in the check. This is because the depository bank is considered a holder entitled to enforce the check. *Ala. Code* § 7-3-404(b). However, since a depository bank may sometimes be in a position to prevent fraud, the U.C.C. applies comparative fault with respect to such endorsements. *Ala. Code* § 7-3-404(d) (failure must "substantially contribute to loss"). For instance, it might be argued that a portion of the loss should be shifted to the depository bank if it allowed the opening of a corporate account in the name of the fictitious

party and made no effort to verify that depositors may act on behalf of such fictitious party by requiring corporate resolutions or other evidence of authorization.<sup>26</sup>

## DISPUTE EIGHT (Depository Bank vs. Endorser): Dishonored Check

If the check is returned to the depository bank (or if the depository bank is forced to pay under a presentment warranty), the endorser (if found) will be required to pay the depository bank. *Alabama Code* § 7-3-415 imposes liability on an endorser if an instrument is dishonored, and "the endorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the endorser endorsed an incomplete instrument, according to its terms when completed." See *Ala. Code* § 7-3-415. Endorsement includes signing the reverse of the check, stamping the reverse of the check or even simply depositing the check. *Ala. Code* § 7-3-204.

Typically the endorser will have a bank account at the depository bank. The deposit agreement will usually allow the depository bank to charge back the endorser's account if a check is returned. The *Alabama Code* also provides for a right to charge back the account or receive a refund, but limits this right if the depository bank delays and the right terminates once the depository bank receives final settlement of the item from the payor bank.<sup>27</sup>

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A depository bank must exercise ordinary care by providing such notice before midnight of the next banking day following receipt of a returned check or “within a reasonably longer time.”



The U.C.C. also imposes a duty upon a depository bank to notify its customer of a returned check in many circumstances. *Ala. Code* § 7-4-202(a)(2). A depository bank must exercise ordinary care by providing such notice before midnight of the next banking day following receipt of a returned check or “within a reasonably longer time” (but the bank must show this was reasonable). *See Ala. Code* § 7-4-202(b); 12 CFR § 229.33(d). However, the customer’s recoverable damages for such delay under 12 CFR § 229.33(d) are reduced by the amount of any loss they would have incurred even if the depository bank had provided the notice before its deadline to do so. *See* 12 CFR § 229.38(a).

## DISPUTE NINE: *What Common-Law Claims Can Customers or Banks Bring?*

Although articles 3 and 4 contain no express “displacement” provision, *Ala. Code* § 7-1-103 can be interpreted to reject the use of common law actions, given the concerns that the certainty and predictability of the U.C.C. would be undermined by allowing common-law claims to be raised and allowing different types and sizes of damages than allowed by the U.C.C. “The certainty which the Uniform Commercial Code seeks to achieve in respect to commercial transactions would quickly dissipate if *ad hoc* exceptions to its commands were too eagerly crafted to accommodate the occasional ‘hard case.’”<sup>28</sup> Thus, a large number of courts refuse to allow any common law torts such as conversion claims or negligence actions when not expressly authorized by the U.C.C.,<sup>29</sup> although there is a scattering of contrary precedent. Alabama appears to have adopted displacement.<sup>30</sup>

## DISPUTE TEN: *Drawer Customer vs. Depository Bank*

Although some states appear to allow a drawer to maintain a direct action against a depository or collecting bank for breach of presentment warranty (for instance, where the depository bank presented a check over a forged endorsement), Alabama does not.<sup>31</sup> Moreover, an issuer (that is, drawer) may not maintain a conversion claim; some plaintiffs have asserted a money had and received claim in such circumstances but there does not appear solid precedent on this claim yet.<sup>32</sup>

## CONCLUSION

There are a number of exceptions to the conclusions listed above. Because the U.C.C. is drafted with the intent of addressing most every situation possible, it is not always easy to find the answer to the recurring and more simple disputes. However, the basic rule of thumb is to assume the U.C.C. will place liability on the party who has the best opportunity to avoid liability and assume that the account agreement will likely alter the default U.C.C. rule. ▲▲▲

## Endnotes

1. For a detailed analysis of check fraud claims, *see* A. Brooke Overby, “Check Fraud in the Courts after the Revisions to U.C.C. Articles 3 and 4,” 57 *Ala. L.Rev.* 351 (2005).
2. The “drawer” of a check is the “person who signs or is identified in a draft as a person ordering payment.” *Ala. Code* § 7-3-103(a)(3).
3. An “endorsement” is “a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of . . . negotiating the instrument.” *Ala. Code* § 7-3-204(a).
4. Both Article 3 and 4 of the U.C.C. have relevant provisions for disputes over checks. For the purposes of this article, no distinction is necessary between these U.C.C. provisions. Article 3 is directed at negotiable instruments (which include, but are not limited to, checks). Article 4 is directed at bank deposits and collections.
5. A “depository bank” is “the first bank to take an item.” *Ala. Code* § 7-4-105(2). The “payor bank” is “a bank that is the drawee of a draft.” *Ala. Code* § 7-4-105(3); *Ala. Code* § 7-3-103(c).
6. *Ala. Code* § 7-1-201(37) (signature is “any symbol executed or adopted with present intention to adopt or accept a writing,” comments note that court should “use common sense and commercial experience in passing” on whether a symbol is a signature); *Ala. Code* § 7-3-401(b) (“signature may be made . . . by means of a device or machine, and (ii) by the use of any name . . . or by a word, mark or symbol”). Moreover, banks today typically address facsimile signatures in their deposit agreements, allowing the drawee bank to rely on facsimile signatures as authorized. Such agreements regarding facsimile signatures should not violate the rule of *Ala. Code* § 7-4-103.
7. Congress recently passed “Check 21” (codified at 12 U.S.C.A. §§ 5001-5018 (Supp. 2005)). Check 21 encourages check truncation by allowing “substitute checks”—or electronic images of checks. Under the Act, substitute checks have legal status as checks.
8. The Official Comments to § 7-4-406 note that banks should provide information sufficient to allow the customer reasonably to identify the items paid. If the bank uses the minimum amount of information that is sufficient, the customer may argue that it could not have reasonably been able to discover the unauthorized payment. Such an argument may be relevant to *Ala. Code* § 7-4-406(d)(1) or possibly to other relevant provisions of 7-4-406. Of course, if the customer made a record of the issued checks on the check stub or carbonized copies, the customer should be able usually to verify the paid items and discover any unauthorized checks. There could be exceptional circumstances if a check is altered by changing the name of the payee; the customer could not detect this fraud normally without seeing the check.
9. *Ala. Code* § 7-4-103(a) provides that an agreement may vary the U.C.C. rules, but cautions that the parties cannot disclaim any applicable responsibility of a bank “for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure.”
10. Among the many reasons to encourage early reporting is the ability to mitigate the loss, and not just for repeated wrongdoers. For instance, if the proceeds from the check are deposited into another bank account (surprisingly often the case), there is no real loss until those funds are withdrawn. *See Ala. Code* § 7-4-214; *Ala. Code* § 7-

3-418. Further, the bank's customer agreement will likely provide the bank the right of setoff to recover such funds.

11. The Official Comments to *Ala. Code* § 7-3-406 explain that negligence contributing to the making of an unauthorized signature (as opposed to a forged signature) are handled under agency law and therefore *Ala. Code* § 7-3-406 is not necessary for such cases.
12. For purposes of this rule, endorsement includes both (1) an endorsement in a substantially similar name as the payee, and (2) the deposit into an account in a name substantially similar to the payee (no matter how the actual endorsement appears on the check). *Ala. Code* § 7-3-404(c).
13. *Ala. Code* § 7-3-110 states that the identity of the person to whom an instrument is payable is determined by the intent of the person who signs on behalf of the issuer of the instrument. Section 7-3-404 states that if a person whose intent determines to whom an instrument is payable does not intend the person identified as payee to have any interest, then the endorsement by any person in the name of the payee is effective in favor of a person who in good faith pays the instrument or takes it for value or for collection.
14. *Compare Southtrust Bank v. Donely*, 925 So. 2d 934, 941-2 (Ala. 2005) (refusing to recognize conversion claim where bank refused to pay CD and distinguishing other cases where a physical CD form was involved).
15. The exception to this rule that only two banks are involved is when there is an "intermediary bank" which is a bank handling an item for collection—normally acting for smaller banks. *Ala. Code* § 7-4-105(2). Typically, the warranty rules simply treat this bank as another link in the chain and it would likely be relevant only if there were insolvency involved or if the intermediary bank somehow failed to act appropriately (for instance, lost the check) or with reasonable promptness.
16. A "clearing house" is an association of banks that regularly clears items between those banks. *Ala. Code* § 7-4-104(a)(4). Such a "clearing house" can occur in large metropolitan areas with several very large financial institutions.
17. See *Ala. Code* § 7-3-417; *Longview Bank and Trust Co. v. First National Bank of Azle*, 750 S. W. 2d 297, 6 U.C.C. Rep. 2d 447 (Tx. Ct. App. 1988) (failure to return the check does not stop a breach of warranty action).
18. *Ala. Code* §§ 7-4-207, 7-4-208. If an employee has wrongfully endorsed the check under *Ala. Code* § 7-3-405, the result may change and there may have been a breach of the presentment warranty by the depository bank because of § 7-3-405(b), which states that such an endorsement is "effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person"; however, comparative negligence may prevent such a result. *Ala. Code* § 7-3-405(b) ("fails to exercise ordinary care...and that failure substantially contributes to loss").
19. A party who presents an item to the payor bank warrants in good faith:
  - (1) they are a "person entitled to enforce the draft" or authorized to obtain payment on behalf of a person entitled to enforce;
  - (2) the draft has not been altered;
  - (3) they have no knowledge that the signature of the drawer is unauthorized.

*Ala. Code* § 7-4-208. A "person entitled to enforce" normally means a "holder." *Ala. Code* § 7-3-301. To be a holder, a party must have obtained the check via "negotiation" which means a transfer of possession by a person who is not the issuer. Negotiation can only occur from a holder. *Ala. Code* § 7-3-201(b). Therefore, a depository bank which cashes a check from a thief is not a holder and therefore breaches its presentment warranty by presenting the check to the payor bank.
20. A party who transfers an item (other than to the drawer bank or drawer) warrants in good faith, the same three items for a presentment warranty. *Ala. Code* § 7-4-207. In addition, they warrant that the item is not subject to a claim of recoupment that can be asserted against the warrantor and that the warrantor has no knowledge of any insolvency proceeding commenced against the maker or acceptor or, in the case of an unaccepted draft, the drawer.
21. *AOD Federal Credit Union v. State Farm Fire and Cas. Co.*, 931 So. 2d 31, 36 (Ala. Civ. App. 2005) (citing 4-208(e) and 4-207(d) and refusing breach of warranty claim because issuer of check failed to provide notice of breach (failure to have all payees endorse) within 30 days; court noted need for a causal connection between delay and loss by the depository bank from untimely notice).
22. Sometimes even a depository bank uses automated means for deposit. See, e.g., *Grand Rapids Auto Sales, Inc. v. MBNA Am. Bank*, 227 F. Supp. 2d 721, 726 (W.D. Mich. 2002) (credit card bank used wholly automated means to process checks sent for payment of credit card bills).
23. No presentment warranty is created as to the genuineness of the drawer's signature. See, e.g., Raymond Nimmer, *Hawklund, Uniform Commercial Code Series*, Sec. 3-417.7 and 3-418.2 (2006); see also *Decibel Credit Union v. Pueblo Bank & Trust Co.*, 996 P.2d 784 (Co. Ct. App. 2000) (holding presenting bank did warrant forged maker's signature);

*Ala. Code* § 7-3-417, Official Comment 3 ("drawee takes the risk that the drawer's signature is unauthorized unless the person presenting the draft has knowledge that the drawer's signature is unauthorized"); *Ala. Code* § 7-3-301 ("A person may be a person entitled to enforce the instrument even though the person... is in wrongful possession.").

24. *Perini Corp. v. First Nat. Bank of Habersham County*, 553 F.2d 398, 402 (5th Cir. 1977); *Cumis Ins. Society, Inc. v. Girard Bank*, 522 F. Supp. 414, 419 (E.D. Pa. 1981).
25. *Smith v. AmSouth Bank, Inc.*, 892 So. 2d 905, 912 (Ala. 2004) (finding that a bank's failure to follow its established policy was insufficient evidence of failure to exercise ordinary care); *Schmitz v. Firststar Bank Milwaukee*, 664 N.W.2d 594, 596 (Wis. 2003); but see *Am. Parkinson Disease Assoc. v. First Nat'l Bank of Northfield*, 584 N.W.2d 437, 439 (Minn. Ct. App. 1998) (not a commercially unreasonable practice to accept checks without payee's endorsement).
26. *Ala. Code* § 7-3-404(d) and Official Comment 3 (cross-referencing Official Comment 4 to 3-405); *Ala. Code* § 7-3-405(b) & Official Comment 4.
27. *Ala. Code* § 7-4-214(a) (allowing depository bank to recover when there is a "provisional" settlement but establishing a delay rule subject to reasonableness inquiry); Official Comment 3 (right to refund terminates upon final settlement); see generally *Ala. Code* § 7-4-215 (defining when final payment occurs).
28. *Brown v. Cash Mgmt. Trust of Am.*, 963 F. Supp. 504, 506 (D. Md. 1997).
29. See *Cagle's Inc. v. Valley Nat'l Bank*, 153 F. Supp. 2d 1288, 1298 (M.D. Ala. 2001) (holding that embezzlement victim's common law and gross negligence claims were displaced by the U.C.C.); *Gress v. PNC Bank*, 100 F. Supp. 2d 289, 292 (E.D. Pa. 2000) ("[D]isplacing common law tort liability . . . is vital to [the U.C.C.] project."); *Lee Newman, M.D., Inc. v. Wells Fargo Bank*, 104 Cal. Rptr. 2d 310, 317 (Cal. Ct. App. 2001) ("We therefore conclude that the common law cause of action for negligence has been displaced."); but see *Bucci v. Wachovia Bank, N.A.*, 591 F.Supp.2d 773, 780-81 & n.7 (E.D.Pa. 2008) (allowing negligence claim to survive 12(b)(6) but indicating displacement might apply at summary judgment).
30. See, e.g., *SpanCom Services, Inc. v. SouthTrust Bank, N.A.*, 744 So. 2d 931 (Ala. Civ. App. 1999) (holding that, where the bank has a defense under § 7-4-406(f), the plaintiff "is absolutely barred from recovering damages, regardless of whether SouthTrust [the depository bank] was negligent in cashing the checks and regardless of whether Compass [the payor bank] was negligent in drawing money from SpanCom's account"); *AOD Federal Credit Union v. State Farm Fire and Cas. Co.*, 931 So. 2d 31, 36 & n.3 & n.4 (Ala. Civ. App. 2005) (noting that UCC displaces common law conversion claims but noting the "split of authority" about common law negligence for drawers against depository banks).
31. See *Ala. Code* § 7-3-417 and Official Comment 2 ("There is no warranty made to the drawer under subsection (a) when presentment is made to the drawee"); *Cassello v. Allegiant Bank*, 288 F.3d 339, 341 (8th Cir. 2002) (determining that warranties do not extend to the drawer).
32. *Ala. Code* § 7-3-420(a); *AOD Federal Credit Union v. State Farm Fire and Cas. Co.*, 931 So. 2d 31, 36 (Ala. Civ. App. 2005) (stating that issuer may not bring conversion claim); *Continental Casualty Co. v. Compass Bank*, 2006 WL 566900 (S.D. Ala. March 6, 2006) (refusing to dismiss a money had and received claim brought by an issuer because of factual dispute over whether depository bank still had any funds from such checks).



**Gregory Carl Cook** is co-chair of the business litigation practice group at Balch & Bingham LLP where he has practiced since 1991. His practice centers on complex and financial services litigation. He received his law degree, magna cum laude, from Harvard Law School and his B.A. from Duke University.



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# ALABAMA LAWYERS HALL OF FAME

The Alabama Lawyers Hall of Fame was established six years ago to spotlight significant contributions lawyers have made to the state throughout its history, exemplifying the Alabama State Bar's motto, "Lawyers Render Service." The most recent induction ceremony was held April 3rd at the Heflin-Torbert Judicial Building and included the installation of Vernon Z. Crawford, Edward M. Friend, Jr., Elisha Wolsey Peck and John B. Scott.

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 a minimum of two years are considered.

## Vernon Z. Crawford

Vernon Z. Crawford was born in Mobile, Alabama in 1919 and graduated from the Allen Institute. During World War II he served as a merchant seaman and in 1951 he graduated from Alabama State University with a Bachelor of Science degree. Crawford attended Brooklyn Law School from which he graduated in 1956.

Returning to Mobile, he established the city's first African-American law firm which was located on Davis Avenue.

Some of the important lawsuits which were handled by his firm included the constitutional law landmark *L. B. Sullivan v. New York Times*, *State of Alabama v. Willie Seals*, *Bolden v. City of Mobile*, which challenged the constitutionality of Mobile's commission form of municipal government and brought about the mayor-council system of government, *Birdie Mae Davis v. Mobile County School Board*, and *Broughton v. City of Mobile*. While working pro bono for a white Kilby Prison inmate, Crawford successfully obtained the first writ of error coram nobis in the history of Mobile County.

Crawford mentored many of the successful African-American attorneys in Mobile. Among his law partners and associates were A.J. Cooper, who served as mayor of Prichard; Michael Figures, who served in the Alabama State Senate; Cain Kennedy, a Mobile County circuit judge; and David Coar, a United States District Court Judge. He was honored by the black lawyers' association in Mobile when that organization was named the Vernon Z. Crawford Bay Area Bar Association.

Crawford was a cooperating attorney with the NAACP Legal Defense Fund. He founded the Gulf Federal Savings and Loan in Mobile, and he continued a successful law practice in Mobile until his death in 1986. His legal papers are preserved today in the University of South Alabama Archives.



Crawford is remembered as the "dean" of African-American attorneys in Mobile.

## Edward M. Friend, Jr.

Edward M. Friend, Jr., whose name aptly described his personality and his efforts to help his fellow man, was born in Birmingham May 1, 1912. He graduated from Phillips High School and was a 1933 Phi Beta Kappa graduate of the University of Alabama. He received a commission in the Army Reserve



and later a law degree from Alabama in 1935. He practiced law in Birmingham until 1941, when he entered military service.

Ed Friend, the soldier, served in North Africa, participated in the invasion of Sicily and then landed on Utah Beach on June 7, 1944, the day after D-day. He took part in the capture of Cherbourg, the breakthrough at St. Lo, the Battle of the Bulge and the invasion of Germany. Friend received the Legion of Merit, the Croix de Guerre and the European Campaign Ribbon with seven battle stars. After he was released from active duty with the rank of colonel he continued his military service in the Army Reserve and the Alabama National Guard, retiring with the rank of major general.

Following World War II Friend returned to Birmingham to practice law and co-founded the firm now known as Sirote & Permutt. He was an expert in the fields of tax law and corporate and estate-planning. General Friend was an outstanding lawyer but he is most fondly remembered for being an outstanding humanitarian.

Early in his career he organized, founded and served as the first president of the Birmingham Legal Aid Society. He espoused improving race relations and worked tirelessly to that end. As president of the Birmingham Bar Association he publicly adopted as his goal the admission of black attorneys to that segregated organization. He served as president of the Birmingham Jewish Federation, the Family Counseling Association, the Birmingham Area Council of Boy Scouts, the Downtown Rotary Club, the Metropolitan Arts Council, and the 1982 Birmingham United Way Campaign.

General Friend was an unwavering supporter of the University of Alabama School of Law. He was an early president and organizer of the Law School Foundation and a co-founder of the Farrah Law Society, and he devoted countless hours to fundraising for his alma mater.

As stated by Mason Davis in his nominating letter, "General Friend knew instinctively what was fair, just, and honorable; he was a great role model who brought great dignity and civility to the profession he loved. He did the right things for the right reasons."

## Elisha Wolsey Peck

Elisha Wolsey Peck is regarded as one of Alabama's great early advocates, usually representing the defense or handling appeals. He was born in New York State in 1799 and was admitted to the Bar of New York in 1825. That same year, he moved to Alabama, settling at Elyton. He later moved to Tuscaloosa, then the capital of the state, which offered him more opportunities. In 1832, he formed a partnership with Harvey W. Ellis. In the June term of 1836 they handled between them 25 appellate cases. Later he partnered with Lincoln Clark and during the June term of 1847 he argued appellate cases originating in Covington, Dallas, Lowndes, Marengo, Mobile, Monroe, Perry, Pickens, Russell, Shelby, and Tuscaloosa counties.

A case which illustrates Peck's skill as an advocate involved a black woman in Tuscaloosa named Milly Walker. She had asserted her status as a free person of color in an action against a man who had come to Alabama from Virginia claiming that Walker and her children were fugitive slaves. Walker had been born to a free black woman in Virginia around 1800 and therefore was free herself. At about the age of 15 she moved to Tennessee and eventually came to Alabama as an indentured servant. She had to litigate her status when she was unknowingly sold with her children into slavery. That litigation ended in a finding of her freedom.

Peck entered the life of Milly Walker 15 years after this litigation when Richard W. Fields of Virginia filed a claim that Milly and her three children were all his slaves and were fugitives from Virginia. Peck first attempted to end this matter with a non-jury habeas corpus proceeding which he won but which the Alabama Supreme Court reversed. He then had to file a formal petition for Walker's freedom which called for a jury trial. The trial was held in September 1852 and a jury once again decided that the Walkers were free persons of color. Richard Fields then appealed the trial court judgment. However, Peck's brief won the day when the Alabama Supreme Court affirmed the trial court. This case is reported in 23 *Ala* 155 (1853).

Peck was appointed one of the first judges in chancery in Alabama and served for a few years before returning to private practice. He was a Whig and a Union man who opposed secession. He favored returning to the Union during the Civil War, though he was never disloyal to the Confederacy. After the war he became a Republican. For a short time he left Alabama and lived in Illinois but after a few months he returned to his home in Tuscaloosa. Thereafter, in 1867, he was elected chairman of the military reconstruction convention. A few months later he was chosen to serve as chief justice of the Alabama Supreme Court. He remained on the bench for five years until he resigned. Peck continued to practice law in Tuscaloosa and died a respected citizen in 1888.

Peck was described in the memoirs of E.A. Powell, a circuit court clerk, as simply the best lawyer he had ever seen in a courtroom. Peck's long history of service to the profession and his desire to remain in Alabama testify to his stature as a member of the Alabama legal community.

## John B. Scott

John B. Scott began the study of law at age 17, in 1923, straight out of high school. He graduated from the University of Alabama School of Law in June 1926. At the time of his admission to the bar on June 14, 1926, he was the youngest lawyer in the state of Alabama. Though a young lawyer, his family roots in Alabama were long and deep. He was the great-great-grandson of General John Scott, one of the founders of Montgomery.




John practiced law from 1926 to 1964, with the exception of his service years during World War II from 1943 to 1946, when he was separated from the Army with the rank of major. He also served continuously as a City of Montgomery Municipal Court Judge from 1929 to 1956, again only with the exception of his military service time. And he served on the Board of Bar Commissioners from 1930 to 1950, again the only break being his time in the Army.

On September 1, 1950, Judge Scott assumed the duties of secretary of the Alabama State Bar. At that time this was a part-time position. It was in this capacity that he set about the task of securing funding and support for the construction of the Alabama State Bar Building. The dedication of that beautiful structure took place in 1964 and the Board of Bar Commissioners placed a bronze plaque there in appreciation to John B. Scott for his vision and leadership in the conception and erection of the building. He also supervised the creation of the Alabama State Bar Foundation which was the vehicle for fundraising and which owns the building.

In 1964 Judge Scott closed his law office to become the first full-time secretary of the Alabama State Bar. He continued in this position until June 1, 1969, when he became the reporter of decisions for the Alabama appellate courts. He served as the reporter until his death February 23, 1978.

Judge Scott lived a full life and had a fulfilling legal career, but he was also an accomplished writer and poet. The following is one of his poems, entitled "An Appellate Judge."

"An appellate judge is but a drudge  
With work that's never done with  
Read and write and write and read  
Is all he can have fun with.  
Those who aspire to robes' estate  
Had best put thought of gain behind them  
For banks and brokers neither never  
Take the time to find them.  
That some reward in fact exists  
Isn't quite a fable  
Because every now and then  
They are at the speaker's table.  
Now one would think a life like this  
Would cause some disaffection  
But strange to say they every one  
Always seek reelection."

John B. Scott was a leader, a literary man, a soldier, a free spirit, and a great lawyer. 



# LAW DAY 2009

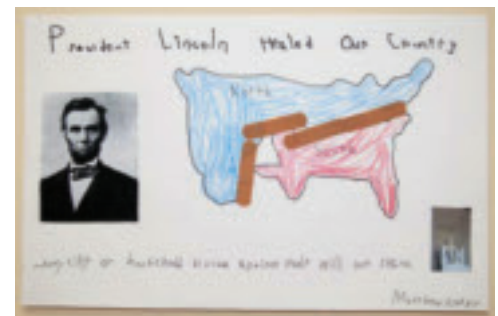
A Legacy of Liberty – Celebrating Lincoln's Bicentennial



More than 400 posters, depicting the life of Abraham Lincoln, were displayed at the state bar awaiting the judges' selections.



Grove Hill's Emily Huckabee from Clarke Prep School revealed the many ways Lincoln's foresight contributed to his legacy and made an impact on our nation.



Carson Peevy of Elmore County's Edgewood Academy showed a unique perspective of Lincoln's second inaugural address where he vowed to "...bind up the nation's wounds."

This year, for perhaps the first time in memory, the annual Law Day Awards Celebration had to be postponed. Exercising an abundance of caution, that decision was made because of concerns about the H1N1 flu outbreak. Ironically, two of the four winners are from Madison county, which was the first county in the state to close schools as a precautionary measure. We regretted having to inform students, parents and teachers that there would not be a ceremony but we publicly acknowledge and thank the following individuals for taking the time and effort to plan, organize, conduct and participate in the ceremony

to recognize the winning recipients of the poster and essay contest:

**Hon. Tommy Bryan**, judge, Alabama Court of Criminal Appeals

**Thomas J. Methvin**, ASB president-elect (Beasley, Allen, Methvin, Crow, Portis & Miles, P.C.)

### Judges, poster contest:

Attorneys **Ashley Swink** of Huntsville (Richardson Callahan & Frederick, LLP) and **Holly Alves** of Mobile (Leavell Investment Management, Inc.), co-chairs of the Law Day Committee  
Montgomery attorneys **Tommy Klinner** (Alabama Dept. of Mental Health) and **Tim Lewis** (director, State Law Library)

### Judges, essay contest:

**Lt. Col. Susan Turley**, Air Force Legal Operations Agency, Maxwell Air Force Base

**Capt. Jerry Crowley** and his spouse, **Capt. Suanne Crowley**, both from the Judge Advocate General's Corps, Maxwell Air Force Base

Columnist **Alvin Benn** (*The Montgomery Advertiser*)

Montgomery attorney **Craig Baab** (Alabama Appleeed Center for Law & Justice, Inc.)



# C O N T E S T P A R T I C I P A N T S

## POSTERS

### Grades K-3

Jon Thomas Coley  
Laken Lee  
Mackenzie Johnston  
Emily Isbell  
Hunter Wesson  
Gabbie Smith  
Dawson Parker  
Shaela McMahon  
Mason Towne  
Tyson Wilson  
Rebeka Cannon  
Harris Woodruff  
C.J. Weldon  
Turner Payton  
Madison Caffee  
Luke Justiss  
Wilson Johnston  
Elijah Lowman  
Ben Parker  
Alex Sessions  
Cooper Gray  
Brady Lewis  
Braydon Parker  
Reese Owen  
Craig Kenady  
Hannah Mercer  
Sydney Brown  
Kamden Burleson  
Morgan McVay  
Drew Carter  
Katie Roberts  
Jay Kujala  
Will Parker  
Carter Spears  
Sydney Reeves  
Clare Wilson  
Chandler Allen  
Ward Golden  
Bella Farmer  
Owen Hughes  
R.J. Sutherland  
Caleb Justiss  
Ethan Niel  
David Gray  
Payton Gray  
Avery Roberts  
Brenna Lee  
Madison Maddox  
Tyler Chase Robertson  
Hunter Merritt  
Brooke Carr  
Kaitlyn Sampson  
Till Cousins  
Chapel Courson  
Michael Weas  
Tripp Carr  
Peyton Rodie  
Cole Clark  
Darcie Smith  
Omid Naseri  
Cooper James  
Jordyn Burleson  
Caitlin Jones  
Chloe Spivey  
Sydney Kallman

Amber Jean Goolsby  
Carson Perry  
Matt Story  
Caden Gray  
Gracie Gray  
Joseph Brackin  
Brittany Brackin  
Christie Singleton  
Jarien Singleton  
Jasmine Wilder  
Santwon Howard  
Jarvis Ford  
Kionna Hadden  
Chance Spencer  
Asohnte Fonfield  
Jaylon Hancock  
Arcadian White  
Sebastian Tave  
Chase Young  
Lavonne Martin  
Hannah O'Brien  
Shealtiel Passmore  
Jaylin Moran  
Elijah Jones  
Laboron Carson  
Michelle Meacham  
Joshua Reeves  
Taniya Sellers  
Jakayla Williams  
Gabrielle Gregory  
Colin Mellon  
Nathaniel Jones  
Tamaara Taylor  
Logan Riddle  
Kayland Mastin  
Markiseus Love  
Andreyah Ash  
Austin Holley  
Zniaya Boyd  
Cherishe Long  
Leonard Carpenter  
Dalton Coleman  
Dakota Coleman  
Ryan Grant  
Robert Smith  
Ardaisia  
Kylie Jones  
Antionette Green  
Celeste McWilliams  
Morgan Johnson  
Charles Medlock, Jr.  
Malcolm Hayes  
Aneka Surlis  
Demareus Cheatham  
Nathan Howard  
Rico James  
Devin Berry  
Oscar McCall  
Rodney Moorer  
Jeremy Morgan  
Tyler Whiting  
Londell Hill  
Trinity Hardy  
Malik Patterson  
Queenbresha Johnson  
Sycorie Edwards  
Kyle Brown

Kiosha Williams  
Tyler Patterson  
  
**Grades 4-6**  
Jimin Im  
Samantha Bell  
Sarah Elizabeth Atkins  
Joshua Brisbon  
Johnathan Robinson  
Maria Stan  
Ebony Tolliver  
A'Neshia Turner  
Silver Wallace  
Caroline Dymond  
Farhan Hossain  
Min Ji Kim  
Caleb Gosnell  
Alex Farris  
Julie Bae  
Elizabeth Dudley  
Mary Beth Cassidy  
Owen Bullington  
Emmanuel Barnes  
Amy Ahn  
Koriann Tiesi  
Matthew Thompson  
Diandra Williams  
Dalton Sawyer  
Tessa Pringle  
Antin St. Clair  
Joe Kilpatrick  
Dane Lunsford  
Jala Harrison  
Isabel Huggins  
Emily Sellers  
Harmony Frye  
Airianna Brown  
Oaklee Williams  
Morgan Shipp  
Bayana Shajahan  
Alanna Pringle  
Kiara Peters  
Hee-Dong Park  
Se Hyun Jang  
Sabrina Sabir  
Teja Ginjupalli  
Neal Robinson  
Caleb Probst  
Bill Whatley  
Leah Taylor  
Joshua Trimble  
Hilina Woldemichael  
Katie Luckie  
Sean Choi  
Danica de Jesus  
Trey Downes  
Lindsey Elrod  
Tykira Fisher  
Brandon Headley  
Francesca Geis  
Deja Hampton  
Jordan Jackson  
Hayoon Jung  
Sydney Mills  
Kiel Murdock  
Seong-Min Park  
Penelope Ann Campbell

Artairous Billups  
Glen Nolte  
Hunter Woodruff  
Kaley Hughes  
Adler Hulsey  
James Turner McCall  
Mady Weldon  
Mary Dolman  
Cory Maddox  
Annie Culverhouse  
Ashley Jones  
Donnie McArthur  
Payton Robertson  
Logan Crawford  
Morgan Angelette  
Emily Strickland  
Gray Geddie  
Jesse Benton  
Paige Wooldridge  
Conner Hughes  
Matthew Weas  
Campbell Hulsey  
Tanner Payton  
Avery Johnston  
Tyler Anderson  
Blake Walters  
Hannah Golden  
Sawyer Pyle  
Morgan Brown  
Hunter Coker  
Caity Jo Lee  
Emily Shaw  
Dalton McHenry  
Katelyn Nicole Berrey  
Rebecca Chapman  
Austin Barnett  
Collin Lee  
Hayden George  
Madison Eller  
Carson Clark  
Stephen Moore  
Taylor McQueen  
Katie Mack  
Emilee Ellis  
Jordan Roberts  
Dalton Brown  
Dee White  
Wade Scanlan  
Samantha Robbins  
Morgan Burdell  
Cameron Mercer  
Nick Oates  
Rachel Mitchell  
Dillon Johnson  
Ally Davis  
Garrett Gibson  
Kailey Rodie  
Meredith Martin  
Dalton Green  
Taylor Stallworth  
Eron Blue  
Anna Russell  
Stacy Bass  
Brittany Boston  
Phillip Lane  
Tyler Miles  
Jessie Norris

Courtney Hamrick  
Gage Bradley  
Katie Carothers  
Ammad Hashmi  
Pruett Singleton  
Savannah Snowden  
Gregory Pritchett  
Connor Davis  
Coleman Barton  
Grant Lieberman  
Kristin Alford  
Carmen Saunders  
Jaycee Robinson  
Rebecca Liepins  
Drew Gayle  
Natasha Watts  
Aubrey Grant  
Mara Bradford  
Payton Smithee  
Marquis DeRamus  
Abigail Tuten  
Sam Delaney  
Brina Barker  
Emily Huckabee  
Allison Johnson  
Victoria Hodge  
Max Stronicher  
Caleb Borders  
Justala Simpson  
Kayla Magnus  
Bryan R. Davis  
Trajan Morrisette  
Madalyn Long  
Sean Glass  
John Alan Frost  
Christopher Cargle  
Autumn Whitman  
Noah P. Verble  
Angela Smith  
Tashayla Benefield  
Cody Millican  
Joshua Felix  
Collin Washington  
Alexis Jones  
John Angell  
Nicole Stephens  
Gabrielle Crews  
Karime de los Santos  
Reese Smith  
Morgan Maxwell  
Zane Deason  
Daniel Armstrong  
Caylee Gardner  
Olivia Foxworth  
Abby Waatts  
Logan Cargile  
Mallory McGough  
Shelby Churchwell  
Miles McCollum  
Leyden Skipper  
Robert N. Smith  
Anna Williams  
Morgan Davis  
Traci Dickens  
John David Watts  
Taylor Campbell  
Kye Todd

Curtis Dorsey  
Richard Grant  
Katey James  
EJ Brasington  
Hayden Davis  
Beth Peel  
Jessica Smith  
Krista Smith  
Audrey Fowler  
Abby Norris  
Breanna Newton  
Bryan Rodopades  
Madeleine Daniell  
Kaitlyn Hill  
MK Cassidy  
Renee Ingram  
Brandon McCoy  
Kandice Baldwin  
Justice Pinter  
Josh Williams  
Geoffrey Percival  
Rickie Knerb  
Patrick Knerbemus  
Genesis James  
Min Ju Kim  
Maegan Cobb  
Makenzie Kilpatrick  
Elidia Dominguez  
Harrison Stevens  
Bailey Winfield  
Allyson Trimble  
Jacob Culbreth  
Jordan Flowers  
Mary Glen  
Gabrielle Aboki  
Nathaniel Thomas  
Tanner Van Gilder  
Noah Probst  
Jamie Delker  
Eboni Hart  
Jenny Lee  
Kassie Dismukes  
Zachary K. Rusley, Jr.  
Michael Chi  
Neha Patel  
Tambrea Patterson  
Le'Darius Maull  
Tyriq Whiting  
Jeremy Rimmer  
Taylor Whiting  
Tishinore Scott  
Standarius Scott  
Elijah Hester  
Meghan Hilloy  
Christina Mercado  
Kristin Richards  
Parker Chavers  
Daniel Jones  
Mary Cate Norris  
Ester V. Mayo  
George Lash  
Johnny George  
Ally Courson  
Sarah Lee  
Blayne Adkinson  
Josh Sippial  
Maddy White

Tami Zachary  
Anna Roberts  
Gray Arnone  
Meili Wang  
William Watkins  
Alexandria Tanner  
Lauryn Green  
Bailey Tadlock  
Leah Holtman  
Winston Morgan  
Darius Jenkins  
Johnathan Jenkins  
Joydan Grant  
Trey Highland  
Alana Jemison  
Emily Mann  
Michael Head  
Lindsey Robertson  
Amber Varner

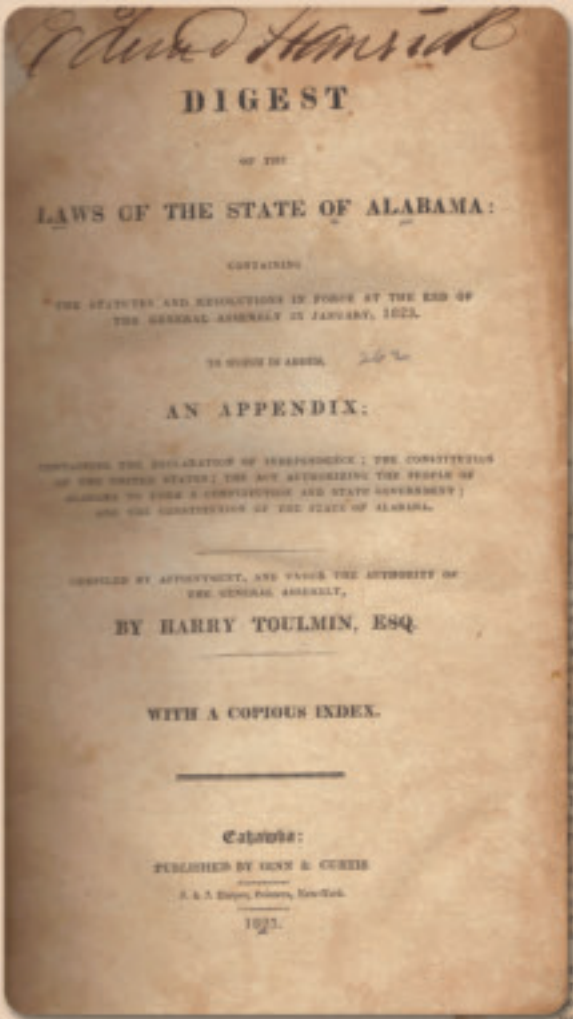
## ESSAYS

### Grades 7-9

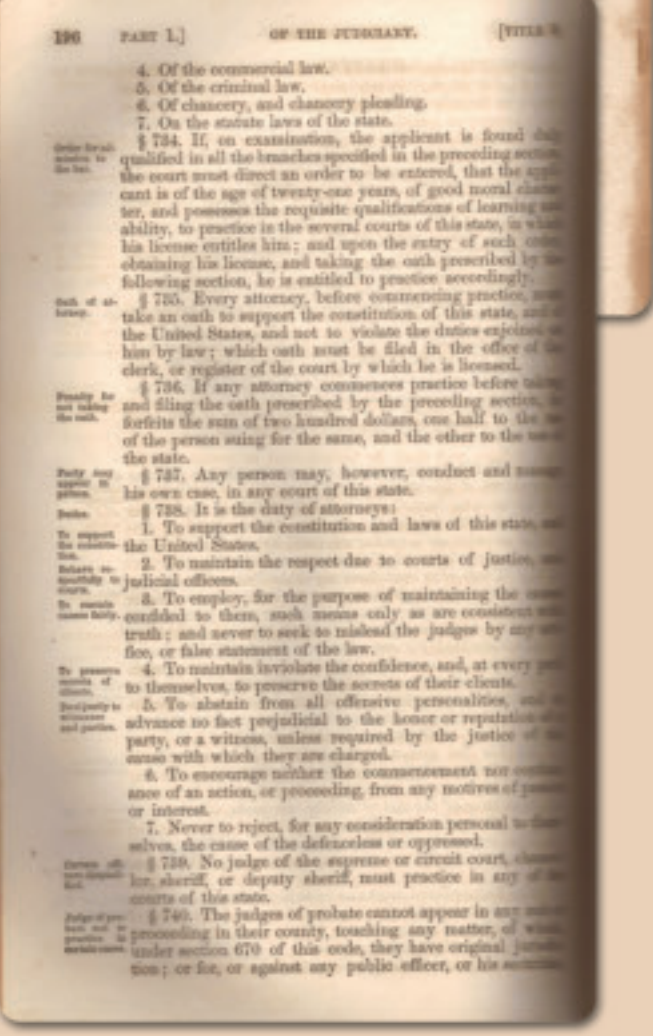
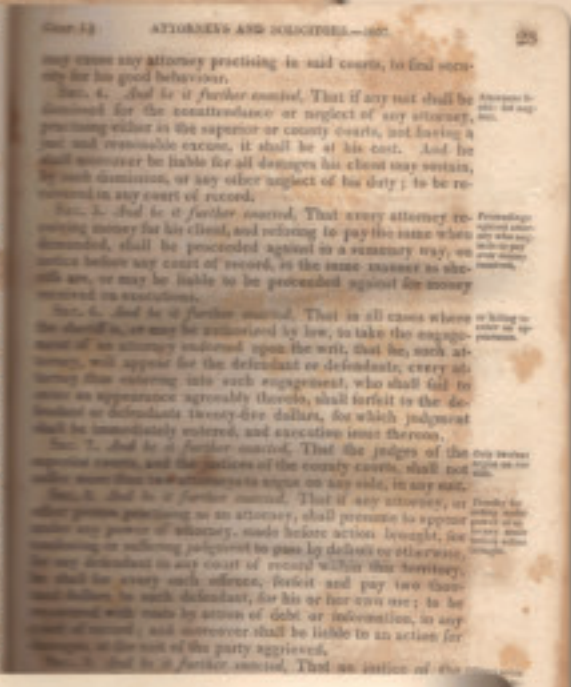
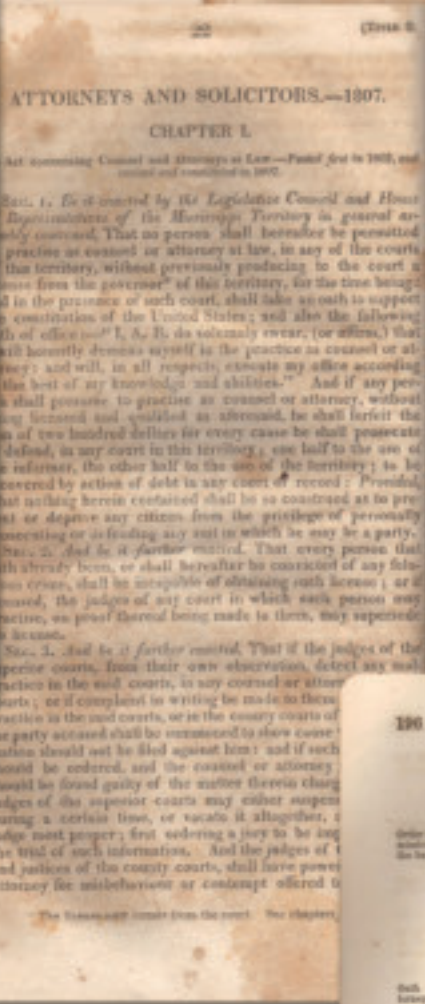
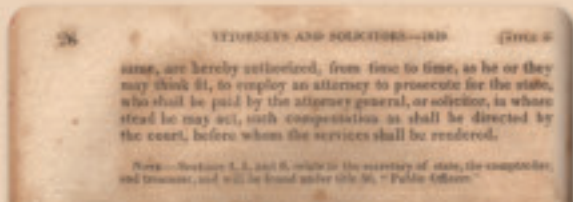
Cortez Vaughns  
Rachel Warwick  
Monique Humphrey  
Mimi Chung

### Grades 10-12

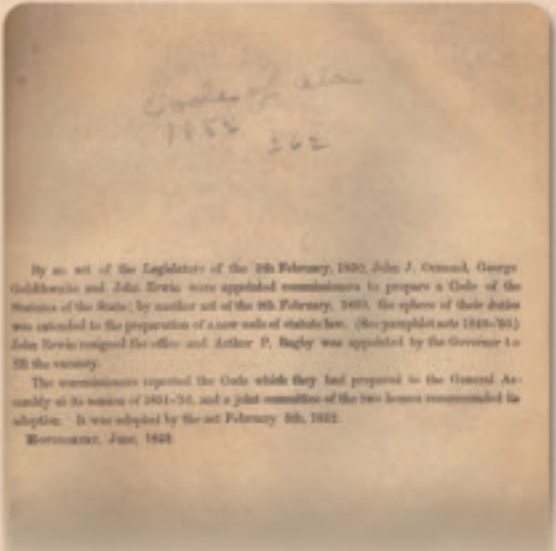
Da'Ron M. Anthony  
Chelsea Burgess  
Will Chumbley  
KC Jones  
Brett Westbrook  
Jordan Pugh  
Haley Chittam  
Tad McFall  
Tyler Sherrod  
Mary Ellen Coleman  
Rebecca Croomes  
April Petty  
Benjamin Nelson  
Colby Phillips  
Elizabeth Fontanez  
Jonathan Winland  
Caleb George  
Cameron Pickup  
David Watson  
Connor Brown  
April Riggins  
Jenna Bloemer  
Christina Ivey  
Stephanie Smith  
Haley Horton  
Dallas Lee Gibbons  
McKenzie Dungan  
Conner Dungan  
Beth Long  
John Moore  
Dillon Hall  
Ethan Elmore  
Andrea Bagley  
Jonathan Tyler Motes  
Kathryn Haley Wilson  
Kaitlyn Gary  
Bria Williams



Pictured above and right are four pages from the Digest of the Laws of Alabama 1823.



Pictured above and right are two pages from the Code of Alabama 1852.





# PROFESSIONALISM IN ALABAMA: A Look at Our Past and Present in Planning Our Future

**By Justice Hugh Maddox**

**“THE PURITY and efficiency of  
judicial administration, which,  
under our system, is largely  
government itself, depend as  
much upon the character,  
conduct, and demeanor of  
attorneys in this great trust, as  
upon the fidelity and learning  
of courts, or the honesty and  
intelligence of juries.”**

*Preamble to the first Code of Ethics  
adopted December 14, 1887  
by the Alabama Bar Association*

Professionalism of lawyers in Alabama has been required for many, many years. In fact, it was required by law when Alabama was part of the Mississippi Territory, when Alabama became a state and when, in 1887, the recently-formed Alabama State Bar adopted the first *Code of Ethics* for lawyers that became the model for the *Code of Ethics* adopted by the American Bar Association and other state bar associations. That was in the past.

Today, when the Alabama State Bar, the Chief Justice’s Commission on Professionalism and the American Inns of Court Foundation are actively pursuing initiatives that promote professionalism among Alabama lawyers and judges, there is a renewed interest in the image that the bench and bar portrays, and Alabama’s efforts to improve the professionalism of lawyers and judges could rank Alabama, as it did in 1887, as a leader in the nation for encouraging professionalism of the bench and bar.

The history of professionalism of lawyers in Alabama and the regulation of lawyer conduct is recorded in ancient Alabama law books. In 1802, before Alabama became a state, and not too many years after the people had ratified the Constitution of the United States, the territorial legislature provided that “[n]o person hereafter shall be permitted to practice as counsel or attorney at law, in any of the courts of this territory, without

previously presenting to the court a license from the Governor of this territory, for the time being; and in the presence of such court shall take an oath to support the constitution of the United States; and also the following oath of office—‘I, A.B., do solemnly swear, (or affirm) that I will *honestly demean myself* in the practice as counsel or attorney, and will in all respects, execute my office according to the best of my knowledge and abilities.’” Toulmin’s Digest of the Laws of Alabama, Title 3, Chapter 1, Section 1, p. 22. (Emphasis added.) The oath required to be taken at that time, especially as it relates to the conduct of attorneys and their legal skills, is strikingly similar to the oath that every Alabama lawyer has taken since 1907, that reads as follows:

“I do solemnly swear (or affirm) that I will *demean myself as an attorney*, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person’s cause for lucre or malice and that I will support the Constitution of the State of Alabama and of the United States, so long as I continue a citizen thereof, so help me God.” (Emphasis added.)

*Ala. Code* § 34-3-15.

In 1819, when Alabama became a state, the Alabama legislature, by Act passed on December 16, 1819, which stated that “no person shall be permitted

by any court to practice therein as counsellor or attorney at law, unless he shall have obtained a license from the supreme court of this state, and it shall be the duty of the said court, when application shall be made by any person for a license as aforesaid, on his producing satisfactory evidence that he sustains a good moral character, to examine, or cause to be examined in open court the person so applying; and if after such examination, it be the opinion of said court that he is duly qualified, it shall be the duty of the judges thereof to grant a license under their hands and seals, which shall be attested by the clerk of said court." The law further provided "[t]hat every counsellor or attorney, before he be permitted to practice, shall take the following oath or affirmation, to wit: 'I \_\_\_\_, do solemnly swear, that I will *honestly demean myself* in the practice as a counsellor or attorney at law; and will execute my said office according to the best of my skill and abilities.'" Title 8, Chapter 4, sections 1 and 2. (Emphasis added.)

Likewise, the Alabama legislature, in Title 8, § 735, *Code of Ala.* 1852, provided that: "Every attorney, before commencing practice, must take an oath to support the constitution of this state, and of the United States, and not to violate the duties enjoined on him by law; which oath must be filed in the office of the clerk, or register of the court by which he is licensed." The legislature further provided, in Section 738 of Title 8, the following:

"It is the duty of attorneys:

- "1. To support the constitution and laws of the state and of the United States.
- "2. To maintain the respect due to courts of justice and judicial officers.
- "3. To employ, for the purpose of maintaining the cases confided to them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice, or false statement of the law.
- "4. To maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients.
- "5. To abstain from all offensive personalities, and to advance no fact

prejudicial to the honor or reputation of a party, or a witness, unless required by the justice of the cause with which they are charged.

- "6. To encourage neither the commencement nor continuance of an action, or proceeding, from any motive of passion or interest.
- "7. Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed."

The words "demean myself as an attorney," or words of similar import, are contained in the early codes and laws, and are still in the oath that is required to be taken today. What do those words really mean? They obviously mean that an attorney is a professional person, and that there is a higher standard of conduct expected and required of attorneys. But the real question is: How can Alabama lawyers be encouraged to again read the oath that they took and carry out the promises therein made? Stated differently, how can Alabama lawyers recapture a spirit of professionalism today when most polls show that, in society at large, there is a decreased respect for lawyers in spite of increased efforts by lawyers and judges to emphasize professionalism?

William Hairston, of the Birmingham bar, probably answered those questions succinctly when, on July 18, 1980, at the annual meeting of the Alabama State Bar in Birmingham, attired in the style of the 1870s, entered the assembly and delivered a magnificent address entitled *The State Bar of Alabama Enters Its Second Century*. That address is printed in 41 *Alabama Lawyer* at page 475.

Hairston delivered a similar message on professionalism on January 18, 1996, when he was a participant in a drama entitled *History of the Bench and Bar of Alabama 1820-1996*, that was presented in the supreme court courtroom of the Heflin-Torbert Judicial Building in Montgomery by the Montgomery County American Inn of Court, which is now the Hugh Maddox American Inn of Court. The Inn had invited Hairston to participate in the production and to describe the history of the creation of the Alabama State Bar and the adoption of the first

lawyer's code of ethics. On that occasion, Hairston delivered the following address to the assembled group that consisted of members of the Montgomery Inn, circuit and district judges who were attending their annual meeting in Montgomery, some federal circuit and district judges and judicial building staff and personnel:

"Many years ago, God called Moses up into the mountain and gave him the laws, the yardsticks, with which to turn a tribe of slaves into a nation. When he came down from the mountain with his eyes aglow from the wonder of it all he found his people had removed all restraints and succumbed to their animal passions.

"In disgust, he stomped the tablets, the laws, into the dust. And then he realized what he had done. He had destroyed the hope of building a civilization out of these nomadic tribesmen.

"He called to the Lord for forgiveness and restitution. The Lord responded by telling Moses, 'Hew ye two tablets like unto the first.' A basic truth that is just as important today as it was then, 'Go right back where you got off track and start all over again.'

"We do well to look at our heritage to find if we are steering a true course and if not, to straighten it out.

"Mobile laid the foundation of the Alabama State Bar when the Mobile lawyers incorporated the Mobile Bar Association in 1869. About ten years later, the Alabama State Bar, a voluntary association consisting of 30 members, was incorporated.

"Captain Walter W. Bragg was elected as our first President. We find in those that followed in this office distinguished personalities such as: Senators E. W. Pettus, Frank S. White and Howell Heflin; Governors Edward O'Neal, Thomas H. Watts, Thomas G. Jones and Emmett O'Neal; Ambassador Hannis Taylor; Justice Edward deGraffenried; Dean William S. Thorington; President of the American Bar, Henry Upton Sims; President of Lions International Roderick Beddow; Judge Richard Rives, but to name a few.

“It would be shortsighted to restrict the pillars of our Association to those names that are highlighted on the pages of history. In the 117 years of this Association’s existence, many have met the challenge laid down by Teddy Roosevelt when he declared, ‘Every man owes some of his time to the upbuilding of his profession.’

“The Alabama State Bar was, and is, a social organization. I doubt that we will ever reach the magnitude of the banquets that took place in the Exchange Hotel here in Montgomery, although Birmingham’s annual reception comes mighty close. These lavish meals were not the only matters of substance enjoyed by the Association. In addition to the social interaction there were at the very beginning of our Association, the primary concerns as to administration of justice and self-discipline of the profession, or ethics. At the fifth annual meeting of the Association, a committee chaired by Colonel Thomas Goode Jones presented the results of two years spent drafting a code of conduct for lawyers.

“In Colonel Jones we find our Moses. He ran the gauntlet from the dizzy peaks of life to the desert of despair. He carried his country’s white flag of surrender to General Grant. As a Democrat, he was appointed to the federal bench by a Republican president. Reduced to bankruptcy, he rose to occupy the Governor’s office. It was this man of destiny that in 1887 authored the nation’s first *Code of Legal Ethics*.

“The 56 Canons, those 56 moral principles, authored by Colonel Jones, and honed in committee and floor debate, became the ‘Ten Commandments’ of the legal profession for the entire nation.

“The importance of the *Code* to our founding fathers is found in the Preamble:

“The purity and efficiency of judicial administration, which under our system is largely government itself, depends as much upon the character, conduct and demeanor of attorneys in this great trust, as upon the fidelity and learning of the

courts, or the honesty and intelligence of juries.

“The tenets start off with a reminder that basic to the relationship between bench and bar is respect for the bench. The lawyer is cautioned not to withhold the respect due the judge’s station, and also to refrain from ‘marked attention and unusual hospitality to a judge.’ Our present-day canons of judicial conduct recognize that respect is a two-way street by charging the judge to observe the high standards of conduct so that the integrity of the judiciary may be preserved.

In 1923, the Legislature integrated the Alabama State Bar with an Act entitled, ‘An act to provide for the organization, regulation and government of the State Bar including admissions and disbarments of lawyers.’

“R. E. Gordon, President of the Mobile Bar Association, opened the 46th Annual Meeting with the following remarks:

‘Yea, gentlemen, if we are to be true to our profession, if we are to practice upon that high plain upon which the profession is pitched, *our every day deportment as lawyers is impressing upon the world the realization that the Golden Rule is the ethics of the legal profession.*’ (Emphasis added).

“That meeting adopted rules governing the conduct of attorneys. The 1923 canons varied substantially in language from those adopted in 1887.

“Since 1923, there have been two other substantial revisions of the canons. Many are of the opinion that each revision, including that of 1923, resulted in a relaxation of the level of conduct required of a lawyer.

Hairston then recounted “[t]he early concerns over the administration of justice,” that he said “were slow in developing, but develop they did,” and he pointed out the judicial reform that occurred in Alabama with the adoption of the Judicial Article and the adoption of rules of procedure. He stated that “[t]he system that came out of the work of the Bar under Presidents Howell Heflin, Truman Hobbs, and Robert Albritton was proclaimed as the finest in the country,” and indeed it was. He also pointed out in his address the importance of the publication of *The Alabama Lawyer*, under the leadership of its three editors, Walter B. Jones, J. O. Sentell and Robert Huffaker, in keeping the bar informed. He praised the establishment of the Continuing Legal Education program of the bar.

He closed his address, looking at the present and to the future, and stated:

“Over the years the Bar had moved, some times barely moved, *but always upward in the improvement of the character and quality of those who would practice law in Alabama*; in the improvement of discipline of those who tend to ignore the rules we live by; and in the improvement of our system of justice.

*There are problems ahead, but the men and women who make up this Bar have shown that they have what it*



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takes to overcome our problems. . . “  
(Emphasis added).

Hairston, in his presentation, referred to Thomas Goode Jones as “our Moses.” Clearly, the adoption of the first *Code of Ethics* in 1887 was a significant turning point for professionalism among lawyers. But it was not the starting point for regulating lawyer conduct. Most scholars seem to agree that Jones, in drafting the first code of ethics in Alabama, used the writings of George Sharswood, a University of Pennsylvania Law School professor who had delivered lectures on ethics that were summarized and published in his *1854 Essay on Professional Ethics*, and who would later serve as chief justice of the Pennsylvania Supreme Court. But most scholars seem to agree that Sharswood, in developing his ethical principles, relied heavily on scriptural writings and his belief that “law is derived from principles laid down by a Supreme Being,” and that “the book of Proverbs was a source of

ethical principles for lawyers.” Maddox, *Lawyers: The Aristocracy of Democracy or “Skunks, Snakes and Sharks,”* 29 Cumb. L. Rev. 323, 328 (1998-1999). In fact, Jones used a quote from Sharswood in the preamble to 1887 *Code of Ethics* that reads as follows:

“There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and mantraps at every step, and the mere youth, at the outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belongs commonly to riper years. High moral principle is the only safe guide; the only torch to light his way amidst darkness and obstruction.”

— *Sharswood*

In view of the fact that some polls show that, in society at large, there is a decreased respect for lawyers in spite of increased efforts by lawyers and judges to emphasize professionalism, what is currently being done in Alabama to foster professionalism that looks to the future? For one thing, the current president of the Alabama State Bar, Mark White, graphically demonstrated the importance of the oath all lawyers take before they become lawyers when he, at the 2008 Annual Meeting of the Alabama State Bar, had the oath printed on a business card, and when he delivered his initial address as president of the bar, he asked each Alabama attorney present to stand and voluntarily take the oath again in order to demonstrate the sanctity of the obligation that each had undertaken upon entering into the profession. There are also other things that are being done to promote professionalism in Alabama.

Chief Justice Sue Bell Cobb has established the Chief Justice’s Commission on Professionalism, and she and former president of the bar Douglas McElvy are the co-chairs of that Commission. The current members of the Commission are:

## Managerial Roles:

Chief Justice Sue Bell Cobb

J. Douglas McElvy, chair

Judge Harold L. Crow, executive director, Chief Justice’s Commission on Professionalism

## Members/Former Members of the Judiciary:

Former Chief Justice Drayton Nabers, Jr.

Justice J. Gregory Shaw

Judge Sharon Lovelace Blackburn

Judge Charles W. Fleming, Jr.

Judge William C. Thompson

## Deans:

Dean John L. Carroll, Cumberland of Law

Dean Charles I. Nelson, Jones School of Law

Dean Kenneth C. Randall, the University of Alabama School of Law

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J. Mark White

The mission of the Chief Justice’s Commission is “to support and encourage judges and lawyers to aspire to and to exercise the highest levels of professional integrity in their relationships with litigants, lawyers and their clients, the courts and the public; to sustain a high level of respect for professionalism among all members of the Alabama bench and bar and law students; and to ensure that the practice of law remains a high and worthy calling which serves clients and the public good.”



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The Chief Justice's Commission conducted a 2008 Professionalism Consortium at the Cumberland School of Law on February 21, 2008 which was attended by many Alabama justices and judges and lawyers. Under the leadership of retired Judge Harold Crow, it recently created a program entitled "The Professional Initiative (PSI)," whose purpose is "to promote professionalism and thereby bolster public confidence in the legal profession." PSI is an informal, voluntary, local lawyer and judge assistance program that handles client-lawyer, lawyer-lawyer and lawyer-judge issues, and uses local volunteer peers to communicate privately and informally with lawyers and judges when complaints have been filed against a lawyer or judge. Pilot projects are being set up in three circuits in the state. Any lawyer or judge who desires to be a volunteer in the PSI program may call the state bar at (334) 269-1515.

Additionally, the Chief Justice's Commission on Professionalism, on July 2, 2008, adopted a resolution in which it agreed to cooperate with the state liaison for the American Inns of Court Foundation (the author of this article) "to co-operate with the American Inns of Court Foundation in carrying out the separate,

but consistent, missions of both the Commission and the American Inns of Court Foundation." The mission of the American Inns of Court Foundation is "to foster excellence in professionalism, ethics, civility and legal skills," and one of the goals of the American Inns of Court Foundation is "to promote the American Inns of Court mission by encouraging members of the legal profession to participate in an American Inn of Court, and to communicate a culture of excellence in professionalism, ethics, civility and skills to the legal community and generally." The state liaison is currently attempting to establish additional

Inns of Court at the three accredited law schools, which would include law student members. He is also attempting to establish Inns of Court in other areas of the state where there are no active Inns of Court, and to encourage those already established to carry out the mission of the American Inns of Court Foundation.

Based on the foregoing, it is apparent that Alabama has a glorious past of professionalism, and that during this time when there is an increased emphasis on professionalism, each lawyer in Alabama should look at the past and the present, and will plan for a more glorious future of the profession. ▲▼▲



*Justice Hugh Maddox retired in January 2001 as the senior associate justice on the Alabama Supreme Court. After being appointed to the supreme court by then Gov. Albert Brewer in 1969, he was elected on five different occasions. He has written numerous books, articles and stories, including a children's book he not only authored but also illustrated. Justice Maddox graduated from the University of Alabama with a degree in journalism and the university's school of law. He served in the U.S. Air Force for two years as a commissioned officer. He continued his service in the Air Force Reserve, eventually retiring as a colonel. He served three governors as a legal advisor.*

The Hugh Maddox Inn of Court in Montgomery recently presented a \$3,000 contribution to the Montgomery YMCA Youth Judicial Program. The program was founded in 1979 by Justice Hugh Maddox and annually involves over 500 public and private high school students in Alabama in mock trial competitions, with students serving as judges, lawyers, jurors, witnesses, and bailiffs. The gift will be used for scholarships for deserving youths to participate in statewide competition that is held annually in Montgomery.



*Pictured are, left to right, Justice Maddox; Sam Adams, YMCA Youth Judicial director; D'Jara Britton, 2009 YMCA Youth Judicial chief justice and a junior at Montgomery Catholic High School; Jeff Duffey, 2007-08 president, Hugh Maddox Inn of Court; and Mark Englehart, 2008-09 Inn president.*

# Alabama Native Becomes Chief Judge of Eleventh Circuit Court of Appeals

By Dean John L. Carroll

**O**n June 1, 2009, Judge Joel Dubina was sworn in as the seventh Chief Judge of the United States Court of Appeals for the Eleventh Circuit. He becomes the second Alabamian to hold this important position. Judge John Godbold was the first (*see article on page 273 of this issue*). Judge Dubina's elevation is yet another milestone in a long and distinguished career as a lawyer and a judge.

Judge Dubina was born in Elkhart, Indiana and graduated from the University of Alabama in 1970 and from the Cumberland School of Law at Samford University in 1973. Following graduation, he clerked for Judge Robert Varner, who was a United States District Court Judge in the Middle District of Alabama in Montgomery. He then entered the private practice of law with the Jones, Murray, Stewart & Yarborough firm where he became a skilled and respected litigator with a special expertise in cases in federal court.

In the early 1980s, Judge Dubina's and my professional paths crossed for the first time in the ongoing litigation involving the Alabama Department of Mental Health. I was representing the plaintiff class and Judge Dubina represented the then-governor, Fob James. During the course of that representation, Judge Dubina and I took depositions, visited the state mental health facilities with expert witness and argued against each other in court. It was during that litigation I came to realize Judge Dubina was an exceptional lawyer, but more importantly, an exceptional person. The litigation involved very deep and serious constitutional issues and was hotly contested. Judge Dubina represented his client with great skill. He was the classic respectful yet forceful adversary.

In 1983, Judge Dubina began his judicial career as a United States Magistrate Judge in the Middle District of Alabama. He served in that capacity until 1986 when President Ronald Reagan appointed him as a United States District Court Judge. As fate would have it, our professional paths crossed again. I was fortunate enough to be appointed to fill the vacancy created when Judge Dubina was elevated. In my capacity as a United States Magistrate Judge, I was a judicial colleague of Judge Dubina and had the opportunity to observe, firsthand, his great contribution to the cause of justice as a federal trial judge. It is impossible to overstate the respect that the practicing bar had for Judge Dubina as a trial judge. He was the perfect judge—fair, efficient and respectful of the parties and their lawyers. In 1990, Judge Dubina was appointed to the United States Court of Appeals for the Eleventh Circuit, the court he now leads.

The hallmarks of Judge Dubina's tenure as a judge have been fairness and courage. There are two cases which serve as perfect examples of his display of those attributes. The first is *United States of America v. Thomas Reed*. Thomas Reed and Fred Gray were the first African-Americans elected to the Alabama legislature in November 1970. Reed had a distinguished career as a legislator and was one of the leaders in the movement to remove the Confederate flag from the Alabama state capitol building. In May 1988, Reed was charged with taking \$10,000 to use his influence as a state legislator to help an inmate obtain an early parole. The case garnered national attention because of Reed's status as one of the first black legislators and his fight over the Confederate flag. There were allegations that he was being selectively prosecuted for his stand.

The case was assigned to Judge Dubina who had been a federal district court judge less than two years. One of his first acts was to grant a motion to transfer venue filed by Reed to ensure that the publicity over the Confederate flag would have no effect on the proceedings. Judge Dubina then presided over

the trial and was praised by both the prosecution and defense for his fair and even-handed rulings. He passed his early test of fire with flying colors.

The second case is *Gonzalez v. Reno*, more commonly known as the Elian Gonzalez case. By way of brief background, Elian Gonzalez was a refugee from Cuba who became the center of a dispute between his father, who was living in Cuba, and American family members over whether Elian should remain in the United States or return to Cuba. The case garnered national publicity which became even more intense after federal law enforcement officials stormed the house of his uncle where Elian was staying, seized him and returned him to his father who by this time was in Washington, D.C. The whole nation became transfixed over the issue of whether Elian should remain in the United States with his Cuban-American relatives or return to Cuba.

The case generated an incredible amount of media coverage. The Center for Public Affairs reported that the network news coverage of this case exceeded coverage of the massacre at Columbine High School, the Oklahoma City courthouse bombing and the death of John F. Kennedy, Jr. The random draw of the Eleventh Circuit threw Judge Dubina into the firestorm generated by the case. He was assigned as a member of the panel to hear the case, along with Judges J. L. Edmondson and Charles Wilson.

On June 1, 2000, following oral argument, the panel decided that the decision of the Immigration & Naturalization Service that Elian should be returned to his father was not arbitrary and capricious. It was a decision that was both courageous and correct. In the fall of that year, the Supreme Court declined to review the decision and Elian and his father returned to Cuba.

The story of Judge Dubina's fairness and courage is not his whole story. He has a full and rich life outside the law. There are occasions when I have called his chambers and found that he was in Texas shooting mule deer or at the Gulf coast fishing. There are other occasions when I was informed he has taken up a new avocation—mountain climbing (see article in the November 2007 issue of *The Alabama Lawyer*). In the past few years, Judge Dubina has climbed Mt. Ranier, in the state of Washington, and Mt. Kilimanjaro in Africa.

Judge Dubina has had a unique career to say the least. I believe he is the only judge in the United States to have been appointed to all three of the federal judge positions below Supreme Court—Magistrate Judge, District Judge and Court of Appeals Judge. In each of those positions, Judge Dubina has been a leader for the cause of justice, the rule of law and the fair administration of our justice system. I can think of no one more suited to lead our Court of Appeals than Judge Joel Dubina. ▲▲▲



*Dean John L. Carroll is dean and Ethel P. Malugen Professor of Law at Cumberland School of Law, Samford University. He received his undergraduate degree from Tufts University and holds law degrees from Cumberland (J.D.), magna cum laude, and Harvard University (LL.M.). Dean Carroll has served as a U.S. Magistrate Judge in the Middle District of Alabama, a professor of law at Mercer University School of Law and the legal director of the Southern Poverty Law Center.*





J. ANTHONY MCLAIN



## Unclaimed Client Trust Funds— Escheat to State

### QUESTION:

A solo practitioner with an active trust account died. Attorney “A” was appointed executor and undertook to wind up the practice and to distribute the funds from the trust account. The solo practitioner maintained an accounts ledger of the trust account but the balances did not reconcile with the bank account. After several years “A” was able to determine the clients who owned the various accounts and appropriate disbursements were made. He was unable, however, to determine the owners of some of the funds or the whereabouts of certain clients. What distribution should “A” make in order to close the account?

### ANSWER:

There are two categories of funds in the account. The first category involves those funds that cannot be attributed to a particular client. After a reasonable and good-faith effort is made to determine the ownership of the funds, and after holding the funds as long as necessary to assure that no unidentified client could make a successful claim against the account, “A” may distribute the funds to the solo practitioner’s estate. The second category of funds in the account involves those that can be attributed to a

## OPINIONS OF THE GENERAL COUNSEL Continued from page 297

client but the location of that client is unknown. After making a good-faith and reasonable effort to locate the client, "A" must hold the funds until they are presumed abandoned under state law, at which time he should turn them over to the state.

### DISCUSSION:

Attorney "A" should first make every reasonable effort to ascertain the identity and location of the clients entitled to the funds. This would include publication of a notice in a newspaper of general circulation, not only in the area where the decedent practiced but also in the last known area where the client or clients reside or do business.

Regarding the funds that cannot be attributed to a client or clients, several state ethics committees have held that after reasonable and good-faith attempts to ascertain the ownership and after holding the funds

long enough to ensure that no unidentified client could make a claim against the funds within any applicable statute of limitations, they may be distributed to the attorney's personal account or his estate.

Unidentified funds in a trust account could properly be funds deposited to pay service charges [DR 9-102(A)(1)] or to avoid any possibility of a shortage in the account or fees earned but not withdrawn [DR 9-102(A)(2)].

The Michigan Bar Committee on Professional and Judicial Ethics held that funds that could not be associated with any particular client or file, or were presumed to belong to attorneys formerly with the firm or to be interest earned on an account, after notifying former clients of the existence of the funds and providing them with an opportunity to substantiate any claim, could be retained by the attorneys involved [Opinion CI-947 (1983) and CI-752 (1982)].



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Similarly, in Virginia, it was held that such unidentifiable funds must be placed in an interest-bearing account a sufficient length of time to determine that no successful claim by an unidentified client could be made. If no owners or claims are found, the lawyer may then transfer the funds to his own account [Virginia Opinion 548 (3/1/84)].

In another Virginia opinion, it was held that unidentifiable funds in a trust account could be distributed to a deceased lawyer's estate or distributed according to law to meet the deceased lawyer's non-trust obligations, provided a good-faith effort to determine ownership is made and the funds are retained a sufficient length of time to assure that a successful claim could not be made.

The Alabama Disciplinary Commission addressed a similar question in RO-82-649. In that case there were several thousand dollars in a deceased attorney's trust account that could not be "traced to its rightful owner." The Commission held that:

"Some type of legal proceeding should be instituted whereby notice by publication could be given to potential claimants. Although other pro-

ceedings may be available we suggest that the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, Section 35-12-20, *Code of Alabama*, 1975."

In this case the commission assumed that the funds were client funds and were "not earned attorney's fees which [the attorney] deposited in a trust account pursuant to the provisions of DR 9-102(A) and failed to withdraw therefrom." The opinion then cites an earlier opinion where the client was known but could not be located.

In the case at hand, we make no such assumptions and hold that where it cannot be determined that the funds are client funds by reasonable, diligent and good-faith efforts, including public notice in a newspaper of general circulation, and after holding the funds long enough to assure that no successful claim will be filed by an unknown client, the funds may be distributed to the deceased attorney's estate.

The second category of funds in the trust account involves those that can be attributed to a client but the whereabouts of the client are unknown. In this situation, Attorney "A" does not have the option of distributing the funds to the deceased attorney's estate because



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## OPINIONS OF THE GENERAL COUNSEL Continued from page 299

the money clearly does not belong to the deceased attorney. In situations such as this, numerous opinions of state bar ethics committees, including the Disciplinary Commission of the Alabama State Bar, have held that the funds must be retained until presumed abandoned under state law at which time the funds must be turned over to the state [Mississippi State Bar Ethics Committee Opinion 104 (6/6/85); State Bar of New Mexico Advisory Opinions Committee, Opinion 1983-3. (7/25/83); North Carolina

State Bar Association Ethics Committee Opinion 372 (7/25/85); Michigan Committee on Professional and Judicial Ethics of the State Bar of Michigan, Opinion CI-1144 (4/9/86); Committee on Professional Responsibility of the Vermont Bar Association, Opinion 87-9 (8/87)].

The Office of General Counsel and the Disciplinary Commission have, in a number of opinions, held that where funds in a trust account may be attributed to a client but the location of the client is not known, some type of legal proceedings should be instituted whereby notice by publication could be given to the owner of the deposited funds. The opinions also hold that although other proceedings may be available the property could be disposed of under the Alabama Uniform Disposition of Unclaimed Property Act, §35-12-20, *Code of Alabama*, 1975, [RO-82-649, RO-83-14, RO-84-26, RO-84-48, RO-83-146, and RO-84-106]. In situations where the client is known but cannot be found the money clearly does not belong to the attorney. Consequently, the lawyer has no alternative but to retain the funds on the client's behalf at least until such time as the funds may be considered legally abandoned.

Consequently, in the case at hand, we hold that lawyer "A" must make every reasonable effort to locate the client, including public notices in a newspaper of general circulation in the area where the deceased lawyer practiced as well as in the area where the client maintained his last known address or business. If these efforts are unsuccessful then Attorney "A" must hold the funds until such time as they may be considered abandoned under the Alabama Uniform Disposition of Unclaimed Property Act, Chapter 12, Article II of Title 35, *Code of Alabama*, 1975. [RO-1988-92] ▲▲▲

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The 2009 Regular Session of the Alabama legislature came to an end Friday, May 15<sup>th</sup>. Over 1,600 bills were introduced and 436 passed the legislature. This article was written immediately after the conclusion of the session. The acts signed by the governor have act numbering while those without still await his signature.

Unlike recent years, when the senate often waited until the last five days to pass any bills, this year, under the leadership of President Pro-Tem Rodger Smitherman, the senate actually passed as many general bills as did the house of representatives during these first 25 days.

## Bills Drafted by the Alabama Law Institute of Interest to Lawyers:

### SB 142 (Act 2009-508)—Ad Valorem Tax Sale and Redemption Process

Sponsors: Senator Wendell Mitchell and Representative Mike Hill

This bill clarifies and codifies the current law by amending relevant code sections concerning the redemption of property from *ad valorem* tax sales. It also codifies case law on redemption and delineates the counties' responsibility with regard to holding and refunding an "overbid" by the tax sale purchaser who paid all taxes, fees and charges and any additional sums paid to the tax collector. The bill also:

1. Provides a procedure for redemption by the landowner from multiple tax sales.
2. Allows the owner who remains in possession after the sale to always redeem. (The owner has a statutory redemption period for three years from sale; there is an additional three-year redemption period by the owner from the purchaser after the original three-year statutory redemption period.)
3. Allows the tax status for Class 3 property to remain to be taxed as Class 3 residential property so long as the owner occupies the property.
4. States after three years from the date of the tax sale, the probate judge must receive proof that all *ad valorem* taxes have been paid before a tax deed is issued.
5. Provides a less complicated procedure for redeeming property sold at a tax sale.

This act becomes effective September 1, 2010.

### SB 87 (Act 2009-621)—Uniform Limited Partnership Act

Sponsors: Senator Roger Bedford and Representative Cam Ward

This revision updates the 1983 Limited Partnership Act to reflect modern business practices. This new act provides:

1. *Perpetual Entity*. No automatic termination of a limited partnership unless the agreement so provides. A limited partner who leaves does not dissolve the entity.
2. *Entity Status*. A limited partner is clearly an entity.
3. *Convenience*. The new Lt. Partnership Act (Lt. P.) provides a single, self-contained source of statutory authority for issues pertaining to limited partnerships. The act is no longer dependent upon the general partnership law for rules that are not contained within it.
4. *LLLP Status*. Under this new act, limited partnerships may opt to become limited liability limited partnerships (LLLP), simply by so stating in the limited partnership agreement, and in the publicly-filed



ROBERT L. MCCURLEY, JR.

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

## LEGISLATIVE WRAP-UP

Continued from page 301

certificate. The primary reason for a limited partnership to elect LLLP status is to provide direct protection from liability for debts and obligations of the partnership to the general partner of the limited partnership.

5. *Liability Shield.* The current limited partnership law provides only a restricted liability shield for limited partners. The new act provides a full, status-based shield against limited partner liability for entity obligations. The shield applies whether or not the limited partnership is an LLLP.
6. *Express Default Statute.* The act provides default provisions between the partners and between partners and the partnership. Therefore, when the partnership agreement does not define the relationship, there is a fall-back default law.

The act also addresses issues such as allocating power between general partners and limited partners; and setting fiduciary duties owed by general partners to other general and limited partners. This act is effective January 1, 2010.

### SB 90 (Act 2009-510)—Electronic Recording of Real Estate Records

Sponsors: Senators Del Marsh, Larry Dixon and Roger Bedford and Representatives Marc Keahey, Marcel Black and Cam Ward

As a result of the enactment of the Uniform Electronic Transactions Act passed by the Alabama legislature in 2001, it is now possible to have contracts in electronic form with electronic signatures of the parties. However, real estate transactions require another step not addressed by the e-sign law. This act essentially does three things:

1. Equates electronic documents and electronic signatures to original paper documents and manual signatures. Thus, any requirements for original paper documents or manual signatures are satisfied by an electronic document and signature. The process is essentially a scan-in of the document and electronic filing by e-mail.
2. Establishes that electronic filing and storage of electronic records is purely an opt-in option by

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probate offices in each of the 67 counties and does not mandate them. Those counties that elect to have electronic recording will be able to do so while also maintaining the procedure for walk-up filing of paper documents.

3. Establishes a board to set uniform standards for filing electronically in every probate office that elects to utilize electronic filing. This 13-person board consists of probate judges, lawyers and other officials who have an interest in the recording process.

This act is effective January 1, 2010.

## HB 222 (Act 2009-513)—Business and Non-Profit Entities Code

Sponsors: Representatives Marcel Black and Ken Guin and Senators Rodger Smitherman, Roger Bedford and Zeb Little

This act is a reorganization of the business and non-profit laws much like the revision in 2007 of the *Election Code*. There is no substantive change except when there currently exist conflicts between entities. In that case, we have opted to take the most prevalent law.

The *Code* is organized on a “hub and spoke” model in Title 10. Article 1, constituting the “hub,” consists of provisions applicable to each of the various business entities. The remaining articles are the “spokes” of the act and are the individual entities, such as the Business Corporation Act. When possible, each entity will retain its current chapter designation in the “spoke.” For example, business corporation provisions, presently in Chapter 2, will be in Chapter 2 of the new act. This will make it easier to find for those familiar with the current law.

Corporation, Non-profit, Partnership, Lt. Partnership, LLP, LLC, and numerous other entity laws were passed over the past 10 to 50 years with little regard as to the relation of similar, different or even conflicting provisions in one law to another. Businesses, in particular small businesses, may have multiple entities for ownership of their property and running their business. This requires knowledge by the owner and their attorney of each type of law. Otherwise, these subtle differences become a trap for the unwary. This act should resolve these conflicts.

The act **will not become effective until January 1, 2011** to enable attorneys to become educated on the new reorganization. The revision **will not affect existing entities or business nor will they be required to make any changes** to their organizing documents.

## SB 397 (Act 2009-633)—Landlord and Tenant Amendments

Sponsors: Senator Lowell Barron and Representatives Jeff McLaughlin, Laura Hall and Cam Ward

The Residential Landlord Tenant Act was passed in 2006. These are the first amendments to the act.

1. Clarifies: Building codes by counties and municipalities must be the same for rental and owner-occupied property.

2. New: A landlord may enter a unit to show the dwelling to prospective future tenants or buyers within four months of the end of the lease with the tenant present, provided the tenant has signed a separate agreement allowing entry.
3. Clarifies: A landlord may schedule repairs or pest control of a unit during certain times, provided the tenant has at least two days’ notice separate from the lease.
4. Clarifies: The filing of a post-judgment motion suspends the time for the filing of an appeal.
5. Clarifies: The right of a tenant to be restored to the premises after a successful appeal.
6. New: After an eviction judgment and no post-trial motion or appeal is made by the tenant, an execution on the eviction judgment for possession of the property may be served after seven days from the judgment.

This act will become effective August 1, 2009.

## Other bills of interest to lawyers and their clients:

### HB 1 (Act 2009-558)—Sex Offenders

Amends §15-20-26 to provide that sex offenders cannot live within 2,000 feet of any elementary or secondary school, or college or university, nor shall they loiter within 500 feet of a school bus stop.

### HB 29 (Act 2009-503)—Cigarettes

Amends *Alabama Code* §8-19-12 to authorize agents with the Department of Revenue to seize any cigarettes that do not have state tax stamps on them.

### HB 33 (Act 2009-145)—Senior Alert

Sets up the Missing Senior Citizen Alert Program by the Department of Public Safety.

### HB 36 (Act 2009-638)—Elections

Allows for county election officials to provide for split shift poll workers on election day, provided their pay is also split. This amends §17-8-1.

### HB 37 (Act 2009-567)—Probate Records

Authorizes the judge of probate to redact certain records available in the electronic format to remove the Social Security number and birth date of the individual.

### HB 41 (Act 2009-295) Autism

Creates the Alabama Interagency Autism Coordinating Council to coordinate services to meet the needs of individuals with autism.

# LEGISLATIVE WRAP-UP

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## HB 59 Expungement

Authorizes a person to petition the court to have their record of certain felony or misdemeanor offenses, violations or traffic violations expunged from the record in certain instances.

## HB 69 (Act 2009-144)—Entertainment Incentives

Provides incentives to attract the entertainment industry and to provide for exemptions from certain sales, use and lodging taxes.

## HB 71 (Act 2009-568)—Scalping Tickets

Allows for the resale of certain admission tickets at a price greater than the original price and the individuals selling the tickets do not have to have a business license under §40-12-167.

## HB 142 (Act 2009-146)—Child Support

Amends *Alabama Code* Section 30-3-60 to include all orders for income withholding for spousal or child support and not just those collected by DHR under IVD (Social Security Act).

## HB 146 (Act 2009-320)—DNA Testing

Provides for DNA testing for people who are arrested for felony offenses or sexual offenses, and the cost being a part of what is added to the court cost in all criminal and civil cases.

## HB 147 (Act 2009-320)—Breast Cancer

Amends § 22-6-11 to provide Medicaid eligibility for women who have been screened or diagnosed with breast or cervical cancer.

## HB 149 (Act 2009-646)—American Flag

Allows an individual to fly the American flag on their property irrespective of any restriction on the property.

## HB 164 (Act 2009-570)—Landlord Tenant

Prohibits the provider of goods and services from requiring the landlord or real property owner to pay a delinquent bill of the tenant for goods or services provided to the tenant of the landlord if the account for the goods or services is in the name of the tenant and the provider will not have a lien on the real property.

## HB 175 (Act 2009-546)—Liquor

Amends § 28-2A-1 to allow any municipality having a population of 1,000 or more to change its classification from dry to wet, or wet to dry, by petition of the voters. Further, revises how liquor licenses are to be issued.

## HB 207 (Act 2009-656)—Domestic Violence

Establish domestic violence fatality review teams and confidentiality of certain information to prohibit the testimony in civil or disciplinary proceedings or records presented to the review team.

## HB 216 (Act 2009-571)—Student Harassment

Established the Student Harassment Prevention Act and requires the State Board of Education to develop a model policy for local school boards.

## HB 220 (Act 2009-502)—State Employees

Amends *Alabama Code* §36-26-26 to provide that no state agency may abolish a classified position through state layoffs to remove a merit employee and hire a non-merit employee.

## HB 225 (Act 2009-572)—Firearms

Requires a law enforcement officer who has disarmed an individual of a firearm to return the firearm to the individual unless the firearm is used as evidence in a crime.

## HB 297 (Act 2009-511)—Death Penalty

Amends § 15-18-83 to add additional people who may observe the death penalty being carried out, to include not more than six members of the immediate family of the deceased victim.

## HB 316 (Act 2009-281)—Electronic Records

To allow for electronic filing of motor vehicle registrations.

## HB 421 Clerk, Continuing Education

Establishes a Municipal Clerk and Magistrate Certification Program and a continuing education program administered by AOC.

## HB 432 Pistol Permits

Provides that sheriff pistol permit records are not open to public disclosure except for the use of law enforcement.

## HB 463 Learner's License

Amends *Alabama Code* §32-6-7.2 to provide that a person under the age of 18 who has a learner's license in another state can apply for a driver's license in Alabama.

## HB 464 Driver's License

Creates a system for increasing the age at which a person is eligible to apply for a driver's license which



takes into account students in schools who have committed school infractions. They may have their right to apply for a learner's permit delayed according to the number of disciplinary points obtained.

### **HB 497 (Act 2009-223)—Tax Refunds**

Adds a new section, § 40-18-110, to the *Code of Alabama* to provide that a fee charged by the U.S. Government when Alabama intercepts a federal income tax refund to pay unpaid Alabama tax liability be paid by the debtor out of the funds intercepted.

### **HB 518 (Act 2009-586)—Assault**

Assault in the second degree includes a person who prevents a correctional officer in any city, county or state jail from performing their lawful duty and causes injury to any person.

### **HB 528—Possession of Explosives**

Repeals §13A-7-44 and in its place creates a new crime of criminal possession of explosives.

### **HB 611—Code of Alabama**

Requires that governmental officials and legislators who are given free sets of the *Code of Alabama* must request them rather than having them automatically sent to them. Notice must be sent within one month after the first legislative day of the first Regular Session of each legislative quadrennium.

### **HB 615 (Act 2009-592)—Autism Centers**

Establishes geographic regions of the state for autism centers to provide nonresidential resource and training services for persons who have autism.

### **HB 713—Voter List**

Gives AOC a copy of the statewide voter list to be used in the makeup of the master jury list.

### **HB 760—Support Orders**

Amends §30-3-197 to revise the terms under which the Department of Human Resources may take administrative action to establish paternity or modify and enforce support orders.

### **SB 1 (Act 2009-500)—Insurance Discounts**

Provides an insurance premium discount for insurance for homebuilders who build or rebuild property for better resistance of hurricanes and catastrophic windstorms.

### **SB 15 (Act 2009-616)—Eluding Law Enforcement**

Amends §§ 32-5A-193 and 195, providing for a two-tier crime for eluding or fleeing a law enforcement officer who is attempting to enforce a traffic violation.

### **SB 23 (Act 2009-617)—Real Estate Brokers**

Real estate brokers, reciprocal license and the requirement for their training and also the listing of their names on sale signs.

### **SB 28 (Act 2009-562)—Appellate Court**

Requires that persons serving on the supreme court, court of civil and criminal appeals must have been licensed to practice law for 10 years; Circuit Judges must have practiced law for 5 years and a District Court Judge must have been a member of the Bar for 3 years.

### **SB 46 (Act 2009-399)—Small Estate Act**

Revises the Small Estate Act, § 43-2-691, from \$3,000 to \$25,000 and further provides that this may be adjusted annually by the state finance director for changes in the consumer price index.

### **SB 47 (Act 2009-283)—Drugs**

Amends §20-2-190 regarding the manufacture and sale of products, including ephedrine or pseudoephedrine.

### **SB 58 (Act 2009-619)—Sex Offender's Address**

Increases the time from 145 to 180 days' notice of address prior to the release of an adult criminal sex offender. Sex offenders must provide the actual physical address where the person will be living. The person may not be released until they provide such information.

### **SB 60 (Act 2009-148)—Banks**

Limits the use of bank information, including loan numbers and amounts, for solicitation for services of products without the specific consent of the lender.

### **SB 61—Missing Instruments**

Amends §7-3-390 that a person who acquires ownership of a missing instrument is still entitled to enforce the instrument.

### **SB 89 (Act 2009-490)—Infection Data**

Requires health care facilities to report patient infection data.

# LEGISLATIVE WRAP-UP

Continued from page 305

## **SB 97—Truth in Sentencing**

Delays the implementation of voluntary truth-in-lending sentencing standards from October 1, 2009 to October 1, 2011.

## **SB 98 (Act 2009-622)—Boxing Commission**

Creates an Alabama Boxing Commission.

## **SB 120—Sex Offenses**

Provides a person may be charged with solicitation of a child if they utilize a computer or online service to solicit a child under the age of 16.

## **SB 136 (Act 2009-143)—Metal Coils**

Increases the penalties for motor carriers and drivers who fail to comply with federal regulations for securing metal coils, or who allow metal coils to fall on public roads. It would provide both civil and criminal penalties.

## **SB 137—Sex Offenders Residing Close to Colleges**

Amends §15-20-26 to include colleges and universities in the definition of schools, thereby prohibiting adult sex offenders from residing within 2,000 feet of a college.

## **SB 151—Manufactured Homes**

Creates a new titling procedure for manufactured homes and removes it from the current Uniform Certificate of Title Law.

## **SB 175—State Employees**

Provides that state employees are entitled to receive payment for any accrued and unused annual leave in excess of 60 days, up to a maximum of 10 days per year.

## **SB 178 (Act 2009-149)—Codification of Acts**

The annual re-codification of the prior year's statutes.

## **SB 205—Elections**

Requires campaign contributions, expenditures and reports to be filed whether the candidate has or does not have opposition and amends §17-5-8.

## **SB 233—Residential Mortgage Fraud**

Creates a crime of residential mortgage fraud against individuals who commit such a crime.

## **SB 234 (Act 2009-625)—Mini Code**

Amends the mini code to require a creditor to have a license for each location in which they extend credit.

## **SB 242 (Act 2009-626)—Mortgage Foreclosures**

Mortgages of active duty military killed in action overseas cannot be foreclosed against their surviving family for 180 days.

## **SB 255 (Act 2009-151)—Boating Accidents**

Requires the filing of boat accident reports when the damage exceeds \$2,000, (it previously was \$50).

## **SB 297—State Employees**

Identifying information of state employees is excluded from information available to the public.

## **SB 334 (Act 2009-564)—School Age**

Amends Chapter 28 of Title 16 to increase the age of children required to attend school from 16 to 17.

## **SB 373 (Act 2009-461)—Deregulation**

Ends regulation of telephone service by the Public Service Commission for basic residential telephone service.

## **SB 418 (Act 2009-418)—Competitive Bids**

Removes from competitive bids city and county school boards of education.

## **SB 422 (Act 2009-498)—Subdivision Powers**

Amends *Alabama Code* § 11-52-30 to provide that cities are not required to exercise subdivision powers over land outside their city limits but within their five-mile limit.

# Annual Alabama Law Institute Meeting

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

## Reinstatement

- On March 12, 2009, the Supreme Court of Alabama entered an order reinstating Birmingham attorney **Timothy Paul Brunson** to the practice of law in Alabama based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar. Brunson had been on disability inactive status since April 24, 2007. [Rule 28, Pet. No. 09-01]

## Disbarment

- The Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Board, Panel I, disbarring Livingston attorney **Robert Mills Seale** from the practice of law in Alabama, effective March 17, 2009. On March 4, 2009, Seale filed a consent to disbarment regarding misappropriation and conversion of client funds. [Rule 23(a), Pet. No. 09-1126; ASB No. 09-1050(A)]

## Suspensions

- Tuscaloosa attorney **Terry Eugene Collins** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective October 1, 2008, the date of Collins's previously ordered interim suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Collins's conditional guilty plea wherein Collins admitted that he violated rules 1.3, 1.4(a), 8.1(b), 8.4(a), and 8.4(d), *Alabama Rules of Professional Conduct*. Collins failed to appear in court on behalf of his clients and failed to respond to repeated requests from the bar concerning pending disciplinary matters. The Disciplinary Commission also ordered that Collins be placed on probation for a period of three years. [Rule 20(a), Pet. No. 08-60; ASB No. 08-204(A)]
- Dothan attorney **Malcolm Rance Newman** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for six months, effective April 3, 2009. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar. Newman was found guilty of violations of rules 1.7(a), 1.9, 1.15(b), 4.1, and 8.4(a), (c) and (g), *Ala. R. Prof. C.* Newman was also ordered to make restitution to the complainant in the amount of \$8,285.85 and was ordered to pay a fine of \$6,000.

Newman represented a husband and wife in the years preceding the husband's death and, after the husband's death, Newman represented the husband's estate, children and other individuals in an action adverse to his wife. Newman represented clients with conflicting interests; represented clients with interests adverse to former clients; mismanaged trust or fiduciary funds; made false statements of material fact to others; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaged in other conduct that adversely reflects on his fitness to practice law. [ASB No. 05-165(A)]

# DISCIPLINARY NOTICES

Continued from page 307

- Montgomery attorney **Christopher Bernard Pitts** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated March 6, 2009. The Disciplinary Commission found that Pitts's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 09-1246]
- Birmingham attorney **Kimberly Jean Snow** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 91 days, effective September 7, 2007, the date of Snow's previously-ordered interim suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Snow's conditional guilty plea wherein Snow admitted that she violated rules 8.4(a), 8.4(b), 8.4(c) and 8.4(g), *Alabama Rules of Professional Conduct*. In September 2007, Snow consented to an interim suspension after she was arrested on a misdemeanor charge of theft of property. The charge against Snow was dismissed after she completed a diversion program. Snow agreed to a 91-day suspension retroactive to the initial date of her interim suspension. [Rule 20(a), Pet. No. 07-54; ASB No. 07-140(A)]
- Summerdale attorney **Laurence Peter Sutley** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for the period of his incarceration and the period of his supervised release following his incarceration, effective February 9, 2009. The supreme court entered its order based upon the Disciplinary Commission's order of February 9, 2009. On or about February 23, 2007, the United States District Court for the Southern District of Alabama found Sutley guilty of conspiracy, four counts of mail fraud, two counts of wire fraud and one count of obstruction of justice. Sutley was sentenced to 27 months' imprisonment followed by three years of supervised release. In addition, Sutley was fined \$50,000 and ordered to forfeit his interest in certain property. On or about July 23, 2008, Sutley's convictions were affirmed by the U.S. Court of Appeals for the Eleventh Circuit. On or about December 10, 2008, Sutley pled guilty in state court to two counts of violating §13A-10-62, *Code of Alabama*. Sutley was subsequently sentenced on the state convictions to 365 days imprisonment to run concurrently with his incarceration for the federal convictions. [Rule 22(a), Pet. No. 08-67]
- Mobile attorney **Herman Young Thomas** was interimly suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective March 30, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Thomas had been arrested March 27, 2009 and charged with 57 felony counts. [Rule 20(a), Pet. No. 09-1392]
- Montgomery attorney **David Coleman Yarbrough** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective March 6, 2009. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Yarbrough's conduct is causing or likely to cause immediate and serious injury to his clients and the public. [Rule 20(a), Pet. No. 09-1244] ▲▼▲



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## About Members

**Gregory Scott Berry** announces the opening of **Scott Berry PC, Attorney at Law** at 210 E. Laurel St., Ste. C, Scottsboro 35768. Phone (256) 259-5959.

**Mary E. Cash** announces the opening of **The Law Offices of Mary Cash** at The Mountain Brook Center, 2700 U.S. Hwy. 280 E., Ste. 210 W, Birmingham 35223. Phone (205) 332-1449.

**Sara Doty** announces the opening of **Sara Doty, Attorney at Law LLC** at 116 Jefferson St.,

S., Ste. 209, Huntsville 35801. Phone (256) 519-9970.

**Leigh Mattox** announces the opening of **Leigh Mattox, Attorney at Law** at 4500 Valleydale Rd., Ste. 200-A, Birmingham 35244. Phone (205) 637-3072.

**Andrew R. Salser** announces the opening of **Andrew R. Salser PC** at 16712 Hwy. 280, Ste. C, Chelsea 35043. Phone (205) 618-8005.

**Nathan A. Wake** announces the opening of **The Wake Law Firm LLC** at 1232 Blue Ridge Blvd., Birmingham 35226. Phone (205) 823-8916.

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10	\$110	\$110	\$132	\$220	\$282	\$475	\$748
15	\$125	\$125	\$152	\$270	\$398	\$600	\$960
20	\$152	\$152	\$202	\$340	\$515	\$775	\$1,325
30	\$230	\$241	\$339	\$525	\$797	\$1,545	

\$500,000 Level Term Coverage  
Male, Super Preferred, Non-Tobacco  
Annual Premium

AGE:	30	35	40	45	50	55	60
10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
15	\$195	\$200	\$255	\$485	\$725	\$1,150	\$1,830
20	\$255	\$255	\$355	\$620	\$950	\$1,480	\$2,520
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## ABOUT MEMBERS, AMONG FIRMS

Continued from page 309

### Among Firms

**Adams, Umbach, Davidson & White LLP** announces that **Blake L. Oliver** and **Michael E. Short** have become partners.

**Matthew W. Bowden** has been named vice president of **Alabama Power Company**.

**Baker, Donelson, Bearman, Caldwell & Berkowitz PC** announces that **Donald J. Nettles** has been elected a shareholder.

**Brian Collins** and **Howard Downey** announce the opening of **Collins & Downey PC** at 2021 Morris Ave., Birmingham 35203. Phone (205) 324-1834. **Adam R. Colvin** has joined as an associate.

**John P. Furman** and **Melissa Posey Furman** announce the opening of **Furman & Furman LLP** at 17764 Fox Branch Dr., Loxley 36551. Phone (251) 228-1744.

**Campbell, Gidiere, Lee, Sinclair & Williams PC** and **Leitman, Siegal & Payne PC** have combined firms and the new firm name is **Leitman, Siegal, Payne & Campbell PC**. **Andrew P. Campbell, Caroline Smith Gidiere, Brandy M. Lee, Thomas O. Sinclair, M. Clay Williams,** and **Gregory A. Brockwell** have joined as shareholders.

**Martinson & Beason PC** announces that **Morris H. Lilienthal** and **Andrew M. Sieja** have joined as associates.

**Wettermark, Holland & Keith LLC** announces that **John McElheny** has joined as an associate. ▲▼▲



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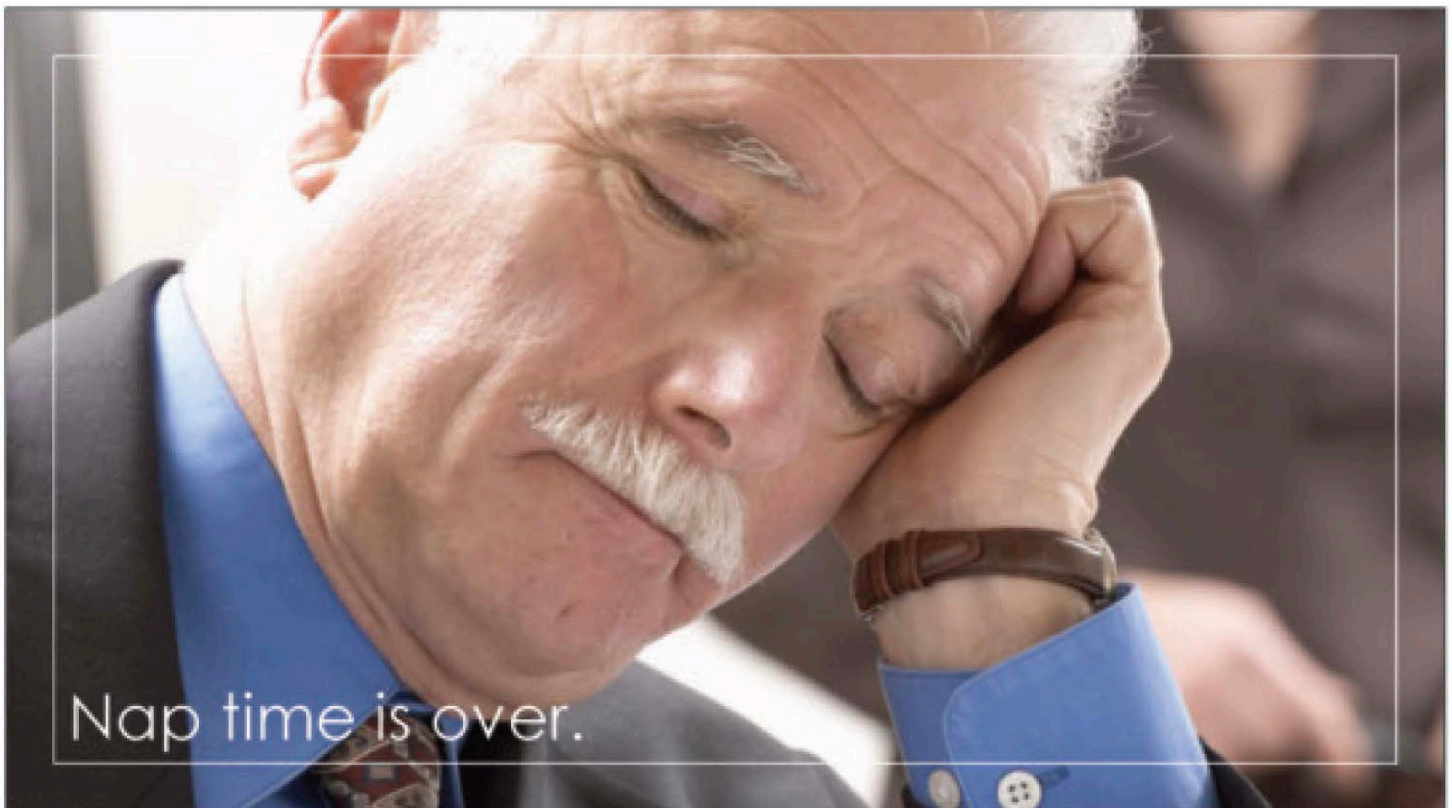
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