

JULY 2011 • VOL. 72, NO. 4

THE ALABAMA  
**LAWYER**

**CREATING AN EFFECTIVE  
CORPORATE COMPLIANCE PLAN:  
PART II**

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# Fall 2011

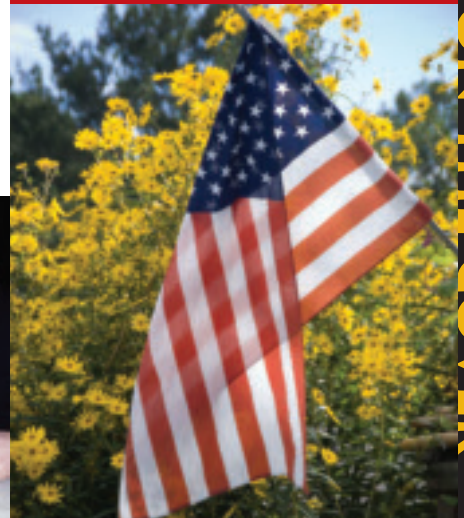
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# IN THIS ISSUE

- 281** Law Day 2011
- 284** Creating an Effective Corporate Compliance Plan:  
Part II  
By Pamela Bucy Pierson and Anthony A. Joseph
- 294** Navigating the Honest Services Fraud Statute  
After *Skilling v. United States*  
By J. B. Perrine and Patricia M. Kipnis
- 300** Why and How Alabama Courts Should Use  
Parenting Coordination in Divorce Cases  
By Joi T. Montiel
- 308** Settling the Claims of a Minor  
By William E. Shreve, Jr.
- 317** New MCLE Rule for Inactive and  
Special Members to Take Effect Next Year  
By H. Harold Stephens
- 318** Collaborative Effort Brings Legal Support to  
Tornado Survivors  
By Kimberly L. Wright
- 322** Memorandum: Act 2011-678—Provisions  
Relating to Appointed Counsel

Law Day is recognized across the country on May 1st. This year's statewide celebration, sponsored by the Alabama State Bar and the Law Day Committee, was even bigger and better, with numerous colorful and exciting posters, imaginative essays and creative social media from Alabama's primary- and secondary-school students. And, with the devastation left by the April tornadoes, it is more important than ever that we protect the rule of law and the role of lawyers in our communities.

Photo by Robert Fouts, Fouts Commercial Photography, Montgomery, www.photofouts.com  
(The photograph, with its vivid colors and simple design, was taken in the early morning light in a Montgomery garden against "swamp sunflowers," 125th @ f8, ISO 100 with a vignette.)

## DEPARTMENTS

- 257** President's Page  
*Believing in the Possible*
- 263** Executive Director's  
Report  
*Helping Lawyers Render Service  
During a Disaster*
- 269** Memorials
- 271** The Appellate Corner  
*The Big Story: Class-Action Bans in  
Arbitration Agreements Enforced*
- 277** Young Lawyers' Section  
*Section Springs into Service*
- 279** Important Notices  
*Reappointment of Paul W. Greene as  
United States Magistrate Judge*  
*Reappointment of Sonja F. Bivins as  
United States Magistrate Judge*  
*L. Burton Barnes, III Public Service  
Award Nominations Being Accepted*
- 323** Opinions of the  
General Counsel  
*Rule 4.2—Contact with Non-Managerial  
Employees of Opposing Party*
- 329** Legislative Wrap-Up  
*ALI Background*
- 333** Disciplinary Notices
- 337** About Members,  
Among Firms



# INDEX TO ADVERTISERS

ABA Retirement Funds .....	273
The University of Alabama Law School Foundation .....	291
Alabama Mediation Center.....	314
Atlanta's John Marshall Law School .....	328
Attorneys Insurance Mutual.....	250
Cain & Associates Engineers .....	303
Capital Lending.....	303
Christian & Small, LLP.....	326
CLE Alabama .....	252
CoreVault .....	267
Cumberland School of Law .....	255
Cumberland School of Law .....	256
Daniels-Head Insurance .....	327
Davis Direct .....	312
J. Forrester DeBuys, III .....	304
Drane Insurance .....	337
Expedited Process Serving, LLC .....	325
The Finklea Group.....	293
Garrison Legal Nurse Consulting, LLC.....	297
Gilsbar Management Services, LLC.....	339
Law Pay .....	330
The Locker Room .....	287
Mediation Media, Inc.....	340
The National Academy of Distinguished Neutrals.....	261
Professional Software Corporation.....	304
Upchurch Watson White & Max .....	289
WestlawNext/Thomson Reuters.....	251

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## Fall 2011 CLE Programs

*Check your calendar, mark the date and plan to attend.*

### September

- 23 Developments and Trends in Health Care Law 2011  
30 22<sup>nd</sup> Annual Bankruptcy Law Seminar

### October

- 7 25<sup>th</sup> Annual Workers' Compensation Law Seminar  
14 "Advanced Negotiation Strategies" *featuring* Martin E. Latz  
21 Professionalism (Prattville)  
27/28 Southeastern Business Law Institute 2011

### November

- 4 The Google Powered Law Office/Using Social Media for Investigative Research *featuring* Carole Levitt and Mark Rosch  
11 Professionalism (Birmingham)  
18 Trends in Commercial Real Estate Law

### December

- 2 18th Annual Employment Law Update  
9 "Attacking the Expert's Opinion" *featuring* Robert Musante  
16 "The Amazing Case-- Illustrations and Demonstrations of the Trial of a Commercial Case " *featuring* Thomas A. Mauet and Michael P. Cash  
28 16th Annual CLE by the Hour

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President-elect Jim Pratt, Lt. Gov. Kay Ivey, Gov. Robert Bentley and President Alyce Spruell visited before a recent Leadership Forum class.



ALYCE M. SPRUELL

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## Believing in the Possible

I vividly recall two years ago this July, standing in the hallway at the Grand Hotel with past President **Sam Crosby**, when he gave then incoming President **Tom Methvin** and me a wonderful gift: a prayer coin. He prayed for us, asking God to bless our work and the work of the bar. The coin has stayed in my car throughout my two years, first as president-elect and then president, and will travel with me from now on. Engraved on the coin, from *Mark 10:27*, is "With God, all things are possible." I truly believe that, and have appreciated Sam's continued prayers as well as many others. I thank all of you for your encouragement, your friendship and your support. I especially thank each member of our wonderful bar staff, my Executive Committee and the amazing men and women of the Board of Bar Commissioners for their tireless work and efforts. Our bar is truly blessed by the talents and leadership of them all.

In this, my final "President's Page," I am sharing the thoughts of incoming President **Jim Pratt**, as well as those of several local bar leaders from around the state. We lost our beloved longtime *Lawyer* editor, **Robert Huffaker**, during my tenure. Robert normally would be interviewing me for this issue, reviewing the issues and challenges the bar has faced the past two years. Instead, editor **Greg Hawley** and I thought we might start a new tradition: an interview with the president-elect by the current president. I posed five questions to Jim to allow the readers a glimpse into his thoughts and plans for the coming year.

Opportunities for  
success in this  
world are as great  
as we have the  
imagination to  
dream them.

—John Maxwell

## PRESIDENT'S PAGE Continued from page 257

To local leaders, I only asked this: What challenges have you faced as a bar leader this year? I know you will be as impressed as I am by the comments and observations of these talented men and women.

**Alyce Spruell:** As we approach July and your taking the reins of the ASB for the coming year, what are the issues you see facing our bar?

**Jim Pratt:** Our bar is now large and diverse, and we need to do the maximum we can to respond to the needs of our members through sections, committees, local and circuit bar associations, and other means. The ASB is very good in its regulatory role, but we need to be equally relevant to our members through our programs, and the way we address issues important to our members and the citizens we serve.

**AS:** If you could wave a magic wand and immediately make any change in our profession, what would that be and why?

**JP:** First, and you may not take this out, I would make you serve a second term. Second, I would change the way we select our judges. We have wonderful judges, and I would like to help them by addressing the costs and manner in which they now have to run for election.

**AS:** The recent disasters in our state have highlighted the need for our state Volunteer Lawyers Program and pro bono services to continue to mature and expand in the way they reach our citizens. What impact do you think that the recently approved regionalization plan will have on this?

**JP:** The new strategic plan for our VLP is the result of the work and vision of many of people who have dedicated their lives to serving those who need free or reduced-rate legal assistance. That vision anticipates that the larger urban bar associations throughout our state will be able to



*Bar leaders came from all over the state to discuss the challenges and issues their groups are facing.*

reach out and assist some of the rural areas in the delivery of pro bono services. The response to the April tornadoes reflects how these urban areas were able to send members and volunteers to assist the more rural bar associations. The sharing of resources worked in the disaster clinics and we think it will assist with the new VLP model.

**AS:** What has been the most interesting (or entertaining) experience you have had during your year as president-elect?

**JP:** Three things immediately come to mind. One, I have really enjoyed our partnership and the way we've worked together this year. I think it has been productive and enhanced our ability to address issues. Our ability to almost be interchangeable at times when working with state leaders and other issues has been helpful in how we resolved several matters and also to me, personally.

Two, I have enjoyed our ongoing work with the legislature and other state leaders. I see it as one of the more interesting and important things we do as bar leaders.

Three, the ability to work with and really get to know the members of the Leadership Forum has been rewarding and enriching. Not only have they challenged

**“There’s real magic in enthusiasm; it spells the difference between mediocrity and accomplishment.”**

*—Norman Vincent Peale, author, The Power of Positive Thinking*

“Remember—nothing will ever be accomplished if you wait for everyone’s approval or for the plan to be perfect.”

—John Maxwell

me with their questions, but they have given me great comfort in knowing the future of our bar and profession is bright because it will be in their hands.

**AS:** What are your focus issues for the coming year?

**JP:** I want to continue the existing volunteer lawyer programs, civics education and our expanded role in supporting our government leadership. I also want to review our bar operations to ensure that we are providing the maximum support to our membership, and I plan to look at judicial selection and see if we can address those issues with a fresh perspective.

**AS:** In late May, I asked several bar leaders to share with me the various challenges and issues they have faced.

**Robert C. Lockwood, president, Madison County Bar Association**

The greatest challenge to local bar leaders is the potential to become overwhelmed with service opportunities. You see such a variety of areas in which your bar association *could* be great, both in service to the community and to members of the bar. Rather than addressing every possible need, it is better, and ultimately more productive, to prioritize a few projects, and then work with future leaders to identify and address other issues.

**Jennifer L. Argo, president, Calhoun-Cleburne Bar Association**

Serving as president has given me the opportunity to lead a wonderful group of attorneys from this area and to learn much more about state bar leadership. In recent years, a lack of participation seems to be a normal challenge that most leaders face. This year I have been impressed by our local bar members, as they seem to be extremely interested in finding ways to support our bar association, our fellow attorneys and our community. Each time I reached out with a request to help with a project, to donate to a cause or to attend an event, they responded with an overwhelming willingness to help in any way possible. It



*During this conference, section, committee and local bar leaders shared their goals and long-term plans.*

was inspirational, to say the least! This was especially heartwarming since my husband and I suffered an incredible loss during the midst of my term, and [that] seemed to only encourage more participation and thoughtfulness on the part of our members. Our bar is made up of some of the most thoughtful and compassionate people I know.

**David A. Bagwell, president, Baldwin County Bar Association**

Our bar’s main problem and the county’s main blessing are the same: the geography of the county. Baldwin County is a little like California, in that it is a huge, long county with a long coast, or in our case, two coasts (the Gulf and Mobile Bay). The county is so long that if you start off at the bottom of Baldwin County and drive to Montgomery, 36 percent of your trip is in Baldwin County alone. This geographic distance might accentuate what could be called “cultural” differences in our bar. It’s an oversimplification but not by much: imagine beach lawyers in boat shoes, Eastern Shore lawyers in polo shirts and Bay Minette lawyers in suits (not far from the truth). And our bar’s “diaspora” makes it hard for some lawyers to make the meetings in our county seat, Bay Minette, at the north end of the county. We do pretty damned well anyway.

## PRESIDENT'S PAGE Continued from page 259

### **Calvin Poole, III, president, Butler County Bar Association**

The biggest challenge is erosion of the client base. Institutional and corporate clients are now owned by distant holding companies with captive legal counsel. Insurance companies consolidated their legal representation among a few firms rather than have a firm in each county to represent insureds. Most aggravating is the shameless TV advertising that lures away the clients for whom we have done pro bono work all these years, following the TV ads when they finally have a case which might generate a reasonable fee.

### **James S. Lloyd, president, Birmingham Bar Association**

One challenge is to finish the project involving our having a first-class website and communications system for our approximately 4,000 lawyers and judges. New **Executive Director Bo Landrum** is doing a great job on this. My major goals were and still are to have more inclusivity, greater diversity, improved communication (with members and the community) and more focus on civility between lawyers and lawyers, lawyers and non-lawyer clients and the public, lawyers and judges and court personnel, and, of course, judges and lawyers.

We are working closely with the **Magic City Bar Association** on service projects, bar activities and social events. Three sections have been formed (the Federal Practice Section, the Business Law Section and the Probate Section) and the support of the new sections has been unbelievable.



*President-elect Jim Pratt and President Alyce Spruell compare their gifts from the bar staff.*

We have two new task forces (the Crisis Relief Task Force, which has morphed into the Crisis Relief Committee under the chairmanship of **Bob Methvin** and **Diandra Debrosse**, and the Lawyer Transitions Task Force, chaired by **Alan Rogers** and **Robin Beardsley Mark**, which will develop a system to assist lawyers in transition through all phases of the practice of law). I think we have the best lawyers in the country right here in Alabama, and when we all work together, it is amazing what we can do.

“Doubt, hesitation, reflection, consideration, and re-consideration: these are all the good companions of proper decision-making. But the ultimate obligation is to decide.”

*—Tony Blair*

**Hon. James H. Roberts, Jr., president,  
Tuscaloosa County Bar Association**

Issues and challenges facing our bar changed dramatically with the April 27<sup>th</sup> devastating tornado that destroyed so much of our community. Even though the TCBA has always been a leader in "Lawyers Rendering Service," I am still awed by the dedication to community shown by our members after the tornadoes. Not only did the TCBA immediately set up a Legal Assistance Project providing free legal aid to those affected by the storm, but countless lawyers delivered food and water,

cut down trees and worked disaster-relief stations. The immediate needs have been met and more have arisen, and our members continue to volunteer with the same tenacity and commitment to service. It has been an honor to serve as president of such a fantastic bar and to work with such amazing lawyers.

**Tamula R. Yelling, president, Alabama Lawyers Association**

Serving as president of the statewide bar association for minority lawyers proved to be challenging,

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yet rewarding. One of the many challenges facing all of the smaller specialty bars is staying visible to potential members. Through what I now know was self-imposed pressure, I constantly sought to think of innovative ways to retain our members' interest. In time, I realized there was no need to come up with anything new. Instead, I focused on improving what has worked for many years—simply serving as a resource for my colleagues and striving to improve the professional development of future lawyers.

**Patrick L.W. Sefton, president, Alabama Defense Lawyers Association**

The highlight of my term and my career has been opportunity to interact with so many outstanding lawyers while serving in bar leadership roles. Cases and clients often change but the relationships formed with people in our respective communities are what make for a rewarding and rich life! It really is easy to serve as a local or specialty bar leader in Alabama because of the quality and character of Alabama lawyers. It never ceases to amaze me the level of service from lawyers when asked to contribute, no matter what the project or need.

**R. Brian Smith, president, 17<sup>th</sup> Circuit Bar Association**

The biggest issue facing this bar (Greene, Sumter and Marengo counties) is the uncertainty of indigent defense funding and the effect the current proposed indigent defense commission bill will have on firms in our circuit who devote a large portion of their practice to criminal defense.

**M. Lynn McCain, president, Etowah County Bar Association**

The issues in this circuit center on economic concerns for the bar and the community. One example: Without sponsorship of our annual local seminar, we must go out of town and spend lots of money for our CLE credits. And the recent cutback on jury weeks, both civil and criminal, are drastically affecting bar members' ability to earn a living. These cutbacks in court staffing directly affect both civil litigants and victims in criminal cases. Attorneys for either party usually cannot get paid until after the disposition, putting local bar members in a position of financial hardship.

**Lea L. Mosley, president, Marshall County Bar Association**

In Marshall County, I have seen needs evolve from the most basic things, like water and shelter, into questions about insurance and loss of income. The issue now will be helping people resume their everyday lives and remembering it will take a long time. It is easy to slip back into an everyday routine until you see the damage that the Ruth community suffered.

**AS:** It has been an honor and a privilege to serve as your president this year. I have learned so much from all of you and the experiences this position has allowed me to have. Please stop by and visit whenever you are in Tuscaloosa! And, of course, I have to add, especially because of the allegiances held by President-elect **Jim Pratt** and President-elect designate **Phillip McCallum... Roll Tide!** ▲▼▲

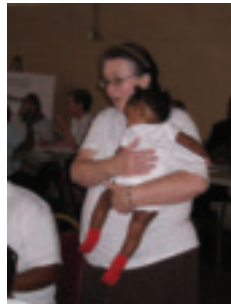
“Unless someone like you cares an awful whole lot,  
nothing is going to get better. It's not.”

—Dr. Seuss



**KEITH B. NORMAN**

*keith.norman@alabar.org*



## Helping Lawyers Render Service during a Disaster

On April 27<sup>th</sup>, a Wednesday that many Alabamians will never forget, multiple tornadoes rampaged across our state, leaving in their wake unprecedented destruction and death. The devastation was so complete in some areas that it will take years to rebuild. Many of the landscapes will never look the same as they did before the tornadoes struck.

### **A plan is formed**

By the next day, as the extraordinary extent of damage became clear, a disaster planning meeting took place at the state bar involving numerous ASB departments, including the Volunteer Lawyers Program (VLP), Office of General Counsel (OGC), Communications, Practice Management Assistance Program (PMAP), and Information Technology (IT). As we mapped out a plan to assist those affected by nature's wrath, our collective experience dealing with previous tornadoes, hurricanes and floods proved invaluable. What became immediately clear was that despite our past experience with other natural disasters, the bar had never dealt with one of this scope in Alabama.

# EXECUTIVE DIRECTOR'S REPORT Continued from page 263



*A T-shirt worn by an attorney volunteer describes the feelings of those assisting during the various legal clinics.*



*Members of a local bar, including state bar president-elect designate Phillip McCallum (center), listen to a storm survivor's story.*

## Relief and thanks

Even though previous storms had never wrought such widespread destruction, we had learned of the many unique issues of mass disasters that confronted our colleagues in Mississippi and Louisiana after Hurricane Katrina. Fortunately, as our planning progressed and more information became available about the disaster-affected areas of the state, we were relieved to learn that the dislocation of lawyers and disruption of the courts did not approach the epic proportions of Mississippi and Louisiana as a result of that hurricane. We were especially relieved that President **Alyce Spruell**, who is from Tuscaloosa, came through relatively unscathed. She was able to communicate with bar staff and provide leadership, as well as timely and appropriate suggestions for the bar's response to the disaster via spotty cell phone service.

## Twin goals

Our planning quickly focused on the twin goals of helping the public and assisting affected lawyers. With past natural disasters, we have partnered with the ASB **Young Lawyers' Section** (YLS) to man a legal assistance hotline for survivors. Calls are screened by the bar's call center to determine the nature of the legal issue. The caller's information is then referred to a section member, who

contacts the caller and determines his or her possible legal problem. If the YLS member decides that more extensive legal services are needed, the individual is then referred to another volunteer lawyer for more in-depth legal consultation.

We also concluded that because of the extensive nature of this disaster, a series of free legal clinics were needed in the affected communities, letting disaster survivors speak face to face with a volunteer lawyer about their legal problems. We coordinated our efforts with local bar associations, including the **Birmingham, Cherokee, Cullman, DeKalb, Huntsville-Madison, Jefferson, Lawrence, Limestone, Marshall, Tuscaloosa, and Walker bar associations**, in particular.

As damage reports circulated, we learned there were fellow attorneys among the disaster survivors. Our plan included helping them resume their practice as quickly as possible so they could then help their local clients and take part in restoring professional services to their communities.

## Using social media to spread the word

Right away, the bar arranged for displaced lawyers to be able to provide alternative contact information using Twitter, Facebook and LinkedIn. Donations of office furniture and computer hardware and software were





solicited for those attorneys who lost their offices. Because of the circumstances of this particular disaster, lawyers whose homes and practices were severely damaged or who might be suffering from the emotional strain of losing a loved one were reminded that professional counseling was available through the Alabama Lawyer Assistance Program.

Based on our experience dealing with natural disasters, we knew that there would be a huge outpouring of concern and a desire by lawyers and others to help. With this in mind, we hoped to make it possible for members to take part in the bar's disaster assistance efforts. Our goal was to encourage lawyers not already part of the VLP to sign up online for the program. We knew there would be bar members who would also want to make financial contributions for disaster relief. To accomplish this, a **Tornado Disaster Assistance Fund** was established in conjunction with the **Alabama Law Foundation** so that monetary contributions could be made to benefit relief agencies such as the Salvation Army and the Red Cross.



*Numerous volunteers from the legal community, including paralegals and attorneys, worked almost non-stop to assist those suffering from the effects of the April tornadoes.*

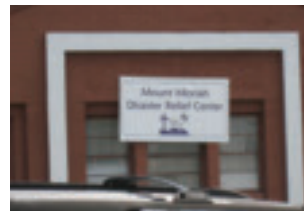
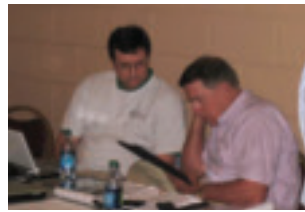


*Volunteers at the free legal clinics will continue to answer questions and provide assistance for many months.*



*Photos courtesy of the Birmingham Volunteer Lawyers Program*

# EXECUTIVE DIRECTOR'S REPORT Continued from page 265



## A team effort

As the bar's disaster plan solidified, we began implementing its various components. Communications Director Brad Carr prepared media releases announcing the disaster hotline and the schedule of free legal clinics. Through our partnership with the **Alabama Broadcasters' Association**, he coordinated disaster assistance public service announcements for television and radio stations statewide. Brad and President Spruell worked together on a series of e-mails informing members of the bar's disaster assistance response plan, the services available to affected members and the ways lawyers could help. The director of service programs, Laura Calloway, secured free software and cloud computing services from vendors for lawyers who lost their offices, and Linda Lund, VLP director, worked with YLS President **Clay Lanham** and members of the VLP Committee to energize the disaster hotline and organize free legal clinics. Programmer Dolan Trout, with the bar's IT department, and website administrator Willie Murphy created the **Disaster Response Page** for [www.alabar.org](http://www.alabar.org). The page is easy to access and utilize with appropriate links, pulling together all aspects of the disaster assistance plan.

## The generosity of strangers

As of this writing, our disaster response network has been in operation for many weeks. The hotline receives calls each day that are referred to YLS members for follow-up. In addition, a number of walk-in clinics for disaster survivors have been held across north Alabama that have proven to be very helpful. These and other volunteer legal efforts continue and no doubt will for many months to come. As terrible as the tornadoes were that ravaged this state, the local bars and the state bar were able to quickly implement plans to help those affected with their legal problems. Because this will be a long, drawn-out affair, we must not lose patience but continue to assist those who seek the help of lawyers for some time to come.

Since that awful day in April, we have witnessed other natural disasters, including the extensive, record-breaking flooding of the Mississippi River and the devastation of Joplin, Missouri by tornadoes. Despite the death and destruction caused by these disasters, much goodness and generosity has been shown by ordinary people, usually to total strangers, in an effort to simply help those who lost so much. I am very proud that included in these efforts of offering aid and comfort to those who need it the most are lawyers embodying the precept: **Lawyers Render Service.** ▲▼▲



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**Hon. Caryl Privett, Circuit Judge, 10th Judicial Circuit**

"The only way to describe my emotions upon reading your new book is that I was awestruck. I'm very proud that a member of our bar could write such a book. I can open it to any page and immediately become wholly absorbed by the pictures and words I find there. Your book is one I will be reading for the rest of my life. Thank you for sharing your talents with us. I really enjoy reading this one!"

**Michael L. Edwards, Balch & Bingham**

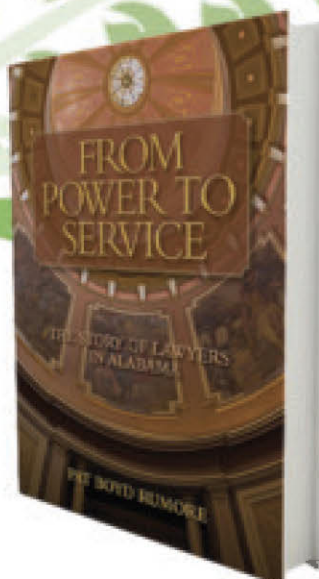
"I have commenced reading your book. I find it difficult to put down, stimulating, and informative—on behalf of all Alabama lawyers, thank you!" **Albert P. Brewer, former Governor of Alabama**

"From Power to Service is beautiful...The book will have a special place in our library, as I am sure it will throughout the state."

**Hon. W. Harold Albritton, Sr. Judge, U.S. District Court, Middle District of Alabama**

"This book will stand the test of time and be a valuable source from this day on."

**Thomas M. West, Jr., Past President, Birmingham-Jefferson Historical Society and Founder, Birmingham History Center**



## What readers are saying about "From Power to Service"

### From Power to Service: The Story of Lawyers in Alabama

Written by attorney-author Pat Boyd Rumore. This hardcover book, filled with pictures, many of which were not previously published, is the ideal gift.

This 336-page book captures the story of lawyers in Alabama who promoted professionalism and who showed their dedication to a just legal system. It is a tribute to the thousands of lawyers who are members of The Alabama State Bar, who strive daily to serve the public and the legal profession. Publication of this book was co-sponsored by the History and Archives Committee of the Alabama State Bar and the Alabama Bench and Bar Historical Society. Proceeds from the sale of this book go to the Alabama Law Foundation and the Bench and Bar Historical Society.

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## Travis Massey Bedsole

Travis Massey Bedsole, 93, a long-time member of the Mobile Bar Association, died January 1, 2011.

Massey Bedsole was born in Grove Hill August 1, 1917 to Judge and Mrs. Travis Jessie Bedsole. He was a 1939 graduate of the University of Alabama and a 1941 graduate of the University of Alabama School of Law. While at Alabama, he was a member of Alabama's Million Dollar Band. Shortly after graduation, he entered the Navy and served as a naval aviator in the Pacific Campaign during World War II.

After leaving the Navy, he entered the practice of law with the firm now known as Hand, Arendall, where he served for 60 years.

Mr. Bedsole loved the law, his church (the First Baptist Church of Mobile), the University of Alabama and the University of Mobile. He was a past president of the Mobile Bar Association, and a director of both the First National Bank of Mobile and BankTrust. He also served as a director of the Alabama Power Company and as chairman of the Board of Trustees at the University of Mobile. He served for a decade on the Board of Trustees at the University of Alabama where he was named trustee emeritus.

Mr. Bedsole was elected a member of the Alabama Academy of Honor and a recent recipient of the Mobile Bar Association's Liberty Bell Award.

Alex Lankford, a senior partner at Hand, Arendall, stated, "Massey was a great law partner whose door was always open, especially to younger lawyers who sought his advice and wisdom."

Massey Bedsole is survived by his wife of 64 years, Martha Jones Bedsole; his son, Travis M. Bedsole, Jr.; his daughter, Curry Bedsole Adams; four grandchildren; one great-granddaughter; and numerous loving nieces and nephews.

*—Henry A. Callaway, III, president, Mobile Bar Association*

## Ralph John Perry

Ralph John Perry, 77, a long-time member of the Mobile Bar Association, died March 20, 2010.

John Perry was born in Chicago December 8, 1932 to Ralph and Josephine Perry. He came to Mobile on a basketball scholarship for Springhill College, from which he graduated in 1954. After that, he served two years in the U.S. Army and then settled in Mobile as a converted

TRAVIS MASSEY BEDSOLE

RALPH JOHN PERRY

## MEMORIALS Continued from page 269

Southerner who spent many years in civic activities and as a successful businessman. During this time, he attended Jones School of Law, graduating in 1986 and being admitted in 1987. He then entered active practice with his daughter, Linda S. Perry. Both before and after admission to the bar, he volunteered a great deal of time in youth and church work. He played in the intercity basketball league and coached Little League Baseball for many years.

Mr. Perry was passionate about Mardi Gras. He was the last living charter member of Le Krewe de Bienville. He and his wife were invited to lead the ball in 2011, celebrating that association's 50<sup>th</sup> year. That ball was dedicated to the memory of John Perry.

He lived on and loved Mobile Bay, though he hated seafood and anything to do with boats. His well-known comment about the jubilees was, "Wake me up when the rib eyes start coming in."

As an attorney, he represented his clients with respect, professionalism and zeal and spent a great deal of time at work for the Mobile Bar Association's Volunteer Lawyers Program.

He is survived by his wife of 55 years, Susie M. Norrell Perry; his daughter, Linda S. Perry; his sons, Michael John Perry and Patrick James Perry; eight grandchildren; and numerous nieces and nephews.

*—Henry A. Callaway, III, president,  
Mobile Bar Association*

**Barnes, David**  
Birmingham  
Admitted: 1974  
Died: March 25, 2011

**Murray, William Robert**  
Northport  
Admitted: 1974  
Died: February 18, 2011

**Samford, Thomas Drake, IV**  
Montgomery  
Admitted: 1986  
Died: April 15, 2011

**Beck, William Morris, Jr.**  
Fort Payne  
Admitted: 1961  
Died: April 12, 2009

**Norwood, Ronald Leonard**  
Huntsville  
Admitted: 1993  
Died: February 3, 2011

**Shirley, Donna Richardson**  
Birmingham  
Admitted: 1990  
Died: March 6, 2011

**Graves, Daniel Benjamin**  
Birmingham  
Admitted: 1983  
Died: March 7, 2011

**Powell, Sherman Blackstone, Jr.**  
Decatur  
Admitted: 1970  
Died: March 3, 2011

**Smith, Carol Jean**  
Anniston  
Admitted: 1973  
Died: March 20, 2011

**MacMahon, William Otis, III**  
Birmingham  
Admitted: 1953  
Died: March 11, 2011

**Reid, Barbara Holley**  
Codan  
Admitted: 1982  
Died: January 28, 2011

**Thomas, Charles Gregory**  
Fairhope  
Admitted: 1994  
Died: December 1, 2010

**Mullins, Mark David**  
Perrysburg, OH  
Admitted: 1992  
Died: March 12, 2011

**Roper, Tom Steven**  
Bessemer  
Admitted: 1995  
Died: April 20, 2011

## The Big Story: Class-Action Bans in Arbitration Agreements Enforced

The decision in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. April 27, 2011), though long-awaited, was probably inevitable after last term's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 123 S. Ct. 1758 (2010). *Stolt-Nielsen* had held that, where an arbitration agreement is silent on whether arbitration can proceed on behalf of a putative class, there is no authority in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, for forcing a party to arbitrate against a putative class. The *Stolt-Nielsen* Court reasoned that arbitration is a matter of contract and an inherently individual process, and, thus, for class arbitration to be appropriate, there must be some affirmative indicia that the parties intended to allow class arbitrations. A silent agreement, of course, lacked such an indicia.

The arbitration agreement in *Concepcion* contained a class-action waiver, which is a provision prohibiting the consumer from bringing a class action. *Concepcion* brought a class action in federal district court, and AT&T moved to enforce its arbitration agreement. *Concepcion* opposed, contending that the clause's banning the class-action mechanism was unconscionable under California law. California courts had previously held that arbitration agreements containing class-action waivers are unconscionable if they compel individual arbitration of "negative value" claims—which are claims where the costs of prosecution are too small or disproportionate to the potential recovery.

*Concepcion* addressed whether a court must enforce a class-action waiver contained in a consumer arbitration clause where a "negative value" claim might be involved. The district court and the Ninth Circuit found the waiver unconscionable, and further held that California's unconscionability determination as to class-waivers was non-discriminatory. The Supreme Court reversed. Writing for the Court's majority of five, Justice Scalia reasoned that the FAA preempted California's unconscionability law because arbitration is inherently an individualized proceeding (the holding from *Stolt-Nielsen*), and, thus, the prohibition of a class-action waiver in any context of arbitration is inimical to the arbitral process itself.

The decision in *Concepcion* likely undermines the holding in *Terminix Int'l. Co., LP v. Leonard*, 854 So.2d 529 (Ala. 2002). In *Leonard*, our supreme court held unconscionable an arbitration agreement, because arbitration was an inherently individual process, and because the value of the claim was negative-value. Given the holdings in *Stolt-Nielsen* and *Concepcion*, it now appears that any principle of state law which challenges the inherently individual nature of arbitration is discriminatory, so that the FAA prohibits enforcing such state-law defenses.



WILSON F. GREEN

wgreen@fleenorgreen.com

## Noteworthy Decisions from the Alabama Supreme Court

### Venue; *Forum Non Conveniens*

*Ex parte Wachovia Bank, NA*, No. 1100645 (Ala. May 27, 2011)

A Lee County business had money taken from its account through forgery. The checks were processed in Lee County at the bank's offices. The business sued the bank in Macon County, and the bank moved for transfer based on *forum non conveniens*, which was denied. The supreme court granted mandamus relief under the "interest of justice" prong of *forum non conveniens*. The court reasoned that there was no sufficient "nexus" between the dispute and Macon County because all of the salient events occurred in Lee County.

### Venue; Bessemer Division

*Ex parte Ford Motor Co.*, NO. 1090938 (Ala. May 27, 2011)

The issue in the case is one of first impression: whether a case in which venue in the Bessemer Division is proper may nonetheless be transferred to another venue that is also proper. Put differently, do principles of *forum non conveniens* apply to cases which are properly brought in the Bessemer Division, given the Bessemer Act's use of the term "jurisdiction?" The court answered the question in the affirmative.

### State Immunity

*Ex parte Murphy*, No. 1090699 (Ala. May 12, 2011)

The court held that even where a case falls within the "exception" to Section 14 immunity for actions where a state official has acted fraudulently, in bad faith, beyond his authority or in a mistaken interpretation of law, Section 14 immunity still applies in all cases where a judgment for the plaintiff would result in a recovery of money from the state.

### Medical Liability (Pharmacies); Learned Intermediary Doctrine

*Nail v. Publix Super Markets, Inc.*, No. 1091740 (Ala. May 12, 2011)

The patient sued the pharmacist under AMLA, contending that the pharmacist had a duty to warn her of the change in her prescription made by a physician's office through a call-in refill. The trial court granted summary judgment to the pharmacist. The supreme court reversed, reasoning that the learned intermediary doctrine did not bar the claim, because a pharmacist's warning of a change in the prescription did not interfere with the physician-patient counseling relationship, the protection of which is the purpose behind the doctrine.

### Discovery; Depositions of Corporate Executives

*Ex parte Community Health Systems Professional Services Corp.*, No. 1100523 (Ala. May 6, 2011)

The City of Irondale sued CHS, asserting claims arising from agreements concerning the potential relocation of a CHS hospital. During discovery, Irondale sought to depose the CEO of CHS, which CHS opposed because the CEO lacked any specific knowledge concerning the matter. The trial court denied the motion, and CHS petitioned for mandamus. The supreme court denied the writ, reasoning that even if the CEO was not the primary decision-maker, the evidence established that he had some involvement in the decisions at issue, and therefore was a proper subject of discovery.

### UM Benefits; Effect of Default Judgment

*Bailey v. Progressive Specialty Ins. Co.*, No. 1081801 (Ala. Apr. 29, 2011)

Bailey sued Caver (tortfeasor) for injuries sustained in an auto accident, and made a claim against Progressive for UM benefits. Progressive intervened and contested the liability. Bailey obtained a default judgment against Caver, and then sought to enforce it against Progressive. The circuit court concluded that the default judgment was not binding on Progressive as to its liability for UM benefits. Bailey appealed, but the supreme court affirmed, holding that the carrier had an independent right to contest liability.

### Workers' Compensation; Causation Requirement

*Ex parte Patton*, No. 1080960 (Ala. April 22, 2011)



The court rejected and abrogated the “but for” causation test espoused *in dicta* in *Ex parte Byrom*, 895 So. 2d 942 (Ala. 2004), and in *Ex parte Trinity Industries, Inc.*, 680 So. 2d 262 (Ala. 1996), for cases involving accidental injury on the job due to unforeseen or sudden events. Instead, the recovery of benefits under the Act requires proof of legal causation, that is, that there is a causal connection between the work being performed and the injury.

## Venue; Workers’ Compensation; Doing Business by Agent

*Ex parte Tyson Chicken, Inc.*, No. 1090866 (Ala. April 15, 2011)

The plaintiff (a resident of Etowah County) brought a comp action against the employer in her resident county, arising from on-the-job injuries sustained in Marshall County at a processing plant. The trial court denied the motion to transfer venue to Marshall County based on Tyson’s allegation that it was not doing business in Etowah County because it had no offices or employees regularly performing work there. Tyson petitioned for mandamus. The supreme court granted the

writ, reasoning that merely having employees who reside in the county and having a completed product come to rest in the county was insufficient to establish “doing business by agent” under *Ala. Code* 6-3-7, and therefore would not support venue in Etowah County.

## Sale of Land; Damages

*Radetic v. Murphy*, No. 1091462 (Ala. April 15, 2011)

The buyer of the home admittedly breached the contract with the seller for the sale of the home when he failed to close in April 2006. As damages, the seller claimed the difference between the contract price and the fair market value in February 2007, when the seller sold the home for substantially less. The trial court agreed and entered judgment for the seller on that difference. The supreme court reversed, holding that the measure of damages was properly the difference between the FMV at the time of the breach and the contract price.

## Outrage

*Little v. Robinson*, No. 1090428 (Ala. April 8, 2011)

The supreme court held that although the tort of outrage is not confined to the three circumstances identified

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Web: [www.abaretirement.com](http://www.abaretirement.com)



The American Bar Association Members/Other Test Collective Trust (the “Collective Trust”) has filed a registration statement (including the prospectus, herein the “Prospectus”) with the Securities and Exchange Commission for the offering of Units representing pro-rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program approved by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (800) 826-8901, by visiting the website of the ABA Retirement Funds Program at [www.abaretirement.com](http://www.abaretirement.com) or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02208-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under this Collective Trust. Her stock there be any sale of the rights of the Collective Trust or any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the Alabama State Bar as a member benefit. However, this does not constitute an offer to purchase, and is to be kept a recommendation with respect to, any security that is available through the Program.

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# THE APPELLATE CORNER

Continued from page 273

in *Potts v. Hayes*, 771 So. 2d 462, 465 (Ala. 2000), (which include misconduct toward dead bodies, financial coercion and sexual harassment) the level of conduct in issue (involving verbal assault by the mayor against a councilman) did not rise to a sufficiently outrageous level.

## UM/UIM; Carrier Opt-Out Procedure

*Ex parte Littrell*, No. 1100344 (Ala. April 1, 2011)

After the UIM carrier opted out of litigation, the UIM carrier engaged counsel to begin participating in depositions. The insured plaintiff did not object to counsel's participation. Thereafter, the UIM carrier's counsel entered an appearance as co-counsel for the tortfeasor. The insured then objected to further participation by counsel for the UIM carrier/tortfeasor. The trial court denied the motion. The supreme court granted mandamus relief, reasoning that the additional appearance for the tortfeasor of the former UIM lawyer was an end-run around the carrier's election to opt out.

## Jefferson County; State Constitutional Law

*Jefferson County v. Weissman*, No. 1100283 (Ala. March 16, 2011)

The court invalidated the latest statute authorizing Jefferson County's occupational tax and business license tax. The court held: (1) there is no conflict between Section 106, which requires that the legislature publish notice of the proposed local laws before their introduction and passage, and Section 122, which empowers the governor to call a special session of the legislature; (2) the substantive adequacy of a section 106 notice of the proposed local law is not a nonjusticiable political question, but rather is a matter within the province of the courts; and (3) the notice of the proposed local law was insufficient in that it failed to notify the public of certain material elements of the legislation.

## Workers' Compensation; Out-of-Schedule Injuries

*Ex parte Hayes*, No. 1070315 (Ala. March 18, 2011)

The court of civil appeals had reversed the trial court's determination that under *Ex parte Drummond*, 837 So. 2d 831 (Ala. 2002), the injury to the plaintiff's foot (a

fractured heel) was eligible for outside-the-schedule compensation due to its impairment to the body as a whole. The supreme court granted certiorari and reversed, holding that the evidence supported the trial court's factual determination concerning the impairment to the body as a whole.

## Post-Judgment Interest

*Ex parte State of Alabama*, No. 1091320 (Ala. March 18, 2011)

The court held, in an action concerning arrearages on past-due child support, that the trial court had no discretion to refuse to apply post-judgment interest to the award.

## FELA

*Norfolk Southern Rwy. Co. v. Johnson*, No. 1090111 (Ala. March 11, 2011)

In a FELA action involving a truck-train accident, the railroad claimed contributory negligence based on the failure of the driver to stop, look and listen before proceeding through the rail line intersection. The trial court denied summary judgment, and the plaintiff obtained a judgment on the jury verdict. The supreme court reversed, holding that despite the plaintiff's own testimony concerning the inability to see, conclusive photographic evidence from the scene showed the plaintiff had sufficient space to pull the truck forward of the crossbuck without entering the zone of danger.

## Outrage; Sexual Abuse

*O'Rear v. B.H.*, No. 1090359 (Ala. March 11, 2011)

The minor patient sued the physician, seeking a recovery of damages for emotional distress associated with the physician's luring the patient into a drug-for-homosexual sex arrangement after the patient sought treatment from the physician. The court affirmed a judgment of \$1,000,000 for the plaintiff. The court held that claims were not entirely encompassed within the AMLA because some misconduct did not arise from treatment. Under Alabama law, sexual advances made on a minor child are presumed to be without consent and are presumed to result in profound damage. The award of damages was not excessive.

## Medical Malpractice

*Breland v. Rich*, No. 1091425 (Ala. March 11, 2011)

The child sued the doctor for medical malpractice based on a failure to document the need for follow-up treatment, all of which eventually led to the child's blindness. The trial court granted summary judgment to the defendant doctor, holding that expert testimony did not create a fact issue as to a breach of standard of care. The supreme court reversed, holding that testimony by a qualified expert showed the physician did not meet the standard of care in the child's treatment in several respects, including writing incorrect information in the eye-exam book regarding the child's need for follow-up treatment, and that a better outcome would have been likely but for the negligence.

## Noteworthy Decisions of the Alabama Court of Civil Appeals

### Will Contests; Jurisdiction and Procedure

*Hodges v. Hodges*, No. 2090610 (Ala. Civ. App. May 6, 2011)

The court held that the circuit court has exclusive jurisdiction of a will contest that is initiated in the probate court, when coupled with a request to transfer the contest to the circuit court, after a petition to admit the will to probate has been filed in the probate court (but before the probate court has acted upon the merits of the petition).

### Contracts; Statute of Frauds Inapplicable to Executed Contracts

*Mobile Attic, Inc. v. Kiddin' Around of Alabama, Inc.*, No. 2090735 (Ala. Civ. App. Apr. 29, 2011)

In a dispute concerning an alleged oral contract for talent renewal fees associated with advertising contracts, the court of civil appeals affirmed the trial court's judgment for the plaintiff, holding (1) there was sufficient evidence of mutual assent to the fees, and (2) the statute of frauds did not apply to the contract because the contracts were executed, in that the party

seeking enforcement had already performed the services under the contract.

### Will Contests

*Stone v. Parish*, No. 2100204 (Ala. Civ. App. March 25, 2011)

Stone's will contest was filed in circuit court and dismissed for a lack of jurisdiction. No contest was filed in the probate court. Stone appealed, arguing that no will contest had been filed "in writing" in the probate court pursuant to *Ala. Code* § 43-8-190 and, thus, that the circuit court had jurisdiction over the will contest pursuant to § 43-8-199. The court of civil appeals agreed. The case contains a good synopsis of the two-option procedure under Alabama law for challenging a will.

## Noteworthy Federal Decisions


### Evidence; Video Re-enactment of Accidents

*Burchfield v. CSX Transp. Inc.*, No. 09-15417 (11th Cir. March 30, 2011)

This is an interesting evidence case concerning an expert's re-enactment simulation video of an accident, which was admitted by the defendant over objection by the plaintiff. The Eleventh Circuit reversed the judgment for the defendant, concluding that the video was not used by the defendant at trial as merely demonstrative of general scientific principles, but rather was repeatedly argued by counsel to be re-enactment evidence. Under *Barnes v. Gen. Motors Corp.*, 547 F.2d at 275, 277-78 (5th Cir. 1977), such a video required that it represented "substantially similar conditions," which was not met. The video was thus inadmissible. ▲▼▲

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*Wilson F. Green* is a partner in *Fleenor Green & McKinney* in *Tuscaloosa*. He is a summa cum laude graduate of the *University of Alabama School of Law* and a former law clerk to the *Hon. Robert B. Propst*, *United States District Court for the Northern District of Alabama*. From 2000-09, *Green* served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation. Contact him at [wgreen@fleenorgreen.com](mailto:wgreen@fleenorgreen.com).



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CLAY A. LANHAM  
*clanham@vickersriis.com*



*Lake Martin, April 2011—photo by Noelle Buchannon*

## Section Springs into Service

On Wednesday, April 27th, the northern half of our state was devastated by what is believed to be the fourth deadliest tornado outbreak in United States history. It is reported that over 226 tornados occurred within a 24-hour period, killing at least 340 people across seven states. I am proud to report how your Young Lawyers' Section (YLS) responded to this disaster. Section members worked with the ASB Volunteer Lawyers Program, as well as with FEMA representatives, to establish a disaster hotline. YLS members answered the calls and gave free legal advice to those affected by the tornado outbreak. Legal clinics were set up in multiple tornado-damaged counties across the state and YLS members worked at those, too. Thanks go to all of the young lawyers who gave their time and effort to help the survivors of this disaster. It is times like this that make me proud to be a lawyer and president of the ASB Young Lawyers' Section.

# YOUNG LAWYERS' SECTION

Continued from page 277

In addition to helping with the post-disaster efforts, the YLS has had a busy spring. In May, the section held its annual CLE Seminar at Sandestin, and once again, the seminar was a great success. The YLS is grateful to the following firms that sponsored this year's seminar:

## Platinum

Beasley, Allen, Crow, Methvin, Portis & Miles PC  
Bradley Arant Boult Cummings LLP  
Burr & Forman LLP  
Carr, Allison, Pugh, Howard, Oliver & Sisson PC  
Cunningham Bounds LLC

## Silver

Attorneys Insurance Mutual of the South, Inc.  
Bain & Associates Court Reporting Service, Inc.  
Baker & Baker Reporting and Video Services, Inc.  
Ball, Ball, Matthews & Novak PA  
Chason & Chason PC  
Hand Arendall LLC  
Henderson & Associates Court Reporters, Inc.  
Jinks, Crow & Dickson PC  
Lanier Ford Shaver & Payne PC  
Lois Robinson & Associates, Inc.  
Maynard, Cooper & Gale PC  
PEG, Inc.  
Reagan Reporters LLC  
Stone, Granade & Crosby PC  
TTL, Inc.  
Tyler Eaton Morgan Nichols & Pritchett, Inc.  
Vickers, Riis, Murray & Curran LLC  
White Arnold & Dowd PC

Special thanks go to the members of the Sandestin Committee, **Brandon D. Hughey** (chair), **Katie Hammett** (co-chair), **Larkin Peters**, **Brad Hicks**, **Chip Tait**, **Brian Murphy**, **Chris Waller**, **Hal Mooty**, and **Andrew Nix**, who worked hard to make this year's seminar a success.

In addition to the Sandestin CLE, the YLS hosted the spring admissions ceremony May 31<sup>st</sup> at which new lawyers were sworn in to practice before Alabama's state and federal courts. Admissions Ceremony

Committee members **Nathan Dickson**, **Louis Calligas**, **Walton Hickman** and **Bill Robertson** worked hard putting together this year's ceremony!

As my term as YLS president comes to an end, I especially thank ASB President **Alyce Spruell** and President-elect **Jim Pratt** for their assistance and support of the YLS. I am honored to have served as your president during their term, and I know future YLS leaders will receive as much support from future ASB leaders as I did.



## C L E COURSE SEARCH

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a listing of current CLE opportunities, visit the ASB Web site, [www.alabar.org/cle](http://www.alabar.org/cle).



[www.alabar.org/cle](http://www.alabar.org/cle)

UNITED STATES DISTRICT  
COURT FOR THE NORTHERN  
DISTRICT OF ALABAMA  
*Reappointment of  
Paul W. Greene as United  
States Magistrate Judge*

UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN  
DISTRICT OF ALABAMA  
*Reappointment of Sonja F. Bivins  
as United States Magistrate Judge*

BIRMINGHAM BAR  
ASSOCIATION  
*L. Burton Barnes, III  
Public Service Award  
Nominations Being Accepted*

## United States District Court for the Northern District of Alabama

### Reappointment of Paul W. Greene as United States Magistrate Judge

The current term of office of United States Magistrate Judge Paul W. Greene at Birmingham, Alabama is due to expire January 21, 2012. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge in the Northern District of Alabama include:

- The trial and disposition of virtually all categories of civil actions with consent of the parties in accord with 28 U.S.C. § 636(c);
- Pursuant to the Court's General Orders of Reference, presiding over all aspects of civil cases, through the entry of a recommendation for final disposition under 28 U.S.C. § 636(b);
- Ruling on various pretrial matters and holding evidentiary proceedings on references from the district court judges made in addition to the general orders, including discovery issues and other non-dispositive motions;
- Conducting settlement conferences or mediation in civil actions by reference;
- Performing such other duties as set out in LR 72.1 through 73.2, *Rules of the Northern District of Alabama* and the court's General Orders of Reference;
- Conducting preliminary proceedings in felony criminal cases, including initial appearances, bond/detention hearings and arraignments;
- Issuing warrants of arrest, search warrants and warrants in administrative actions;
- Ruling on all non-dispositive motions in felony criminal cases or entering findings and recommendations with respect to dispositive criminal motions such as motions to dismiss or to suppress evidence; and
- Conducting preliminary reviews and making recommendations regarding the disposition of prisoner civil rights complaints and habeas corpus petitions and conducting such evidentiary proceedings as may be required in prisoner and habeas corpus actions.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Sharon N. Harris, clerk of court  
United States District Court  
Northern District of Alabama  
1729 Fifth Avenue North  
Birmingham, Alabama 35203

**Comments must be received by August 31, 2011.**

# IMPORTANT NOTICES

Continued from page 279

## United States District Court for the Southern District of Alabama

### Reappointment of Sonja F. Bivins as United States Magistrate Judge

The current term of office of United States Magistrate Judge Sonja F. Bivins, United States District Court, Southern District of Alabama, is due to expire February 1, 2012. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of the position are demanding and wide-ranging and include the following:

- Conduct of most preliminary proceedings in criminal cases;
- Trial and disposition of misdemeanor cases;
- Conduct of various pretrial matters in civil cases and evidentiary proceedings on delegation from the judges of the District Court;
- Trial and disposition of civil cases upon consent of the litigants; and
- Jury selection in most civil and criminal cases.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be marked "Confidential" and directed to:

Charles R. Diard, Jr., clerk  
U.S. District Court, Southern District of Alabama  
RE: Magistrate Judge Reappointment  
113 St. Joseph Street  
Mobile, AL 36602

**Comments must be received by close of business August 1, 2011.**

## Birmingham Bar Association

### L. Burton Barnes, III Public Service Award Nominations Being Accepted

In 1994, the Birmingham Bar Association established the **L. Burton Barnes, III Public Service Award** to recognize one or more members of the Birmingham Bar Association who have given freely of

their time and energy in public service for the benefit and betterment of the general public. The Public Service Award honors the memory of Burton Barnes, a distinguished member of the Birmingham Bar Association until his untimely death April 30, 1994. Burton was a true champion of public service, serving his community freely and quietly. Burton's commitment to public service establishes a lofty standard of public service and serves as an inspiration for other members of the Birmingham Bar Association.

The Public Service Committee is seeking nominations from the members of the Alabama Bar for the recipient of the 2011 Public Service Award. Any member of the Alabama State Bar may nominate a member of the Birmingham Bar Association for the award. The award is sponsored by the Birmingham Bar Association, Adams & Reese, LLP and Regions Financial Corporation. Former recipients of this annual award are **Frank Dominick; Tim Smith; Duncan Blair; Nina Miglionico; Tom Carruthers; Frank M. Young, III; John L. Cole; Carol H. Stewart; Georgia Sullivan Roberson; Martha Jane Patton; Judge Orson L. Johnson; Kirby Sevier; James Rotch; Cathy Wright; Richard Carmody; John T. Carney, Jr.; and William N. Clark.**

Criteria for evaluating the nominees for the award are that the nominee:

- Must be a member of the Birmingham Bar Association;
- Must have demonstrated exemplary public service to the community through participation in charitable and service organizations;
- Must have demonstrated dedicated sacrifice of time and effort for public service for the betterment of others which is in no way related to personal or professional gain;
- Must possess excellent reputation in the community for honesty and integrity in public and private matters; and
- Must have demonstrated public service without direct or indirect efforts to obtain personal publicity or individual recognition.

The Public Service Committee will narrow candidates for the annual award to three individuals. Those three then will be submitted to the Executive Committee of the Birmingham Bar Association for selection as recipient of the 2011 Public Service Award. It is recommended that candidates be nominated using the official form. Contact John David Gray (205-968-0900, [jdgratty@gmail.com](mailto:jdgratty@gmail.com)) or go to [www.birminghambar.org](http://www.birminghambar.org).

**Completed forms must be received by October 17, 2011 to be considered.**







**1ST PLACE POSTER: GRADES K-3**

**Sophie Dudeck**

Advent Episcopal School/Birmingham

Teacher: Lee Stayer



**2ND PLACE POSTER: GRADES K-3**

**Ella Grier**

Emerald Mountain Christian School

Teacher: Katy Leach



**3RD PLACE POSTER: GRADES K-3**

**Isaac Stubbs**

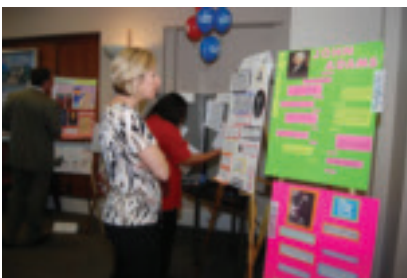
Edgewood Academy/Wetumpka

Teacher: Jackie Steube

# LAW DAY 2011



*Alabama Supreme Court Justice Gorman Houston (ret.) and President-elect Jim Pratt were impressed by the variety and imagination of the essays, posters and social media.*



*A judge closely examines one of the many artistic posters submitted for consideration.*

**A**s the nation celebrated Law Day on May 1st, the national day set aside to honor the rule of law, the Alabama State Bar awarded the winners of this year's Law Day competition for both primary and secondary school students.

The long-standing student competitions of posters and essays were expanded this year to include a "social media" category, including both Facebook and Twitter. Students were asked to honor John Adams by making the connection between the rule of law, the role of a lawyer, the need for an independent judicial system and the effect of all these fundamental American principles on our citizens' daily lives.

ASB President **Alyce Spruell** said, "How exciting it is that more than 200 students from across the state explored the historical and contemporary role of lawyers like our first lawyer president, John Adams. Through essays, designing social media content or art displays, the students gave voice to the 'Life and Legacy of John Adams,' this year's national Law Day theme."

Winning entries in all categories were recognized April 29th in the Alabama Supreme Court chambers. **David E. Rains**, Law Day co-chair, presided over the ceremony, at which he had the special honor of introducing his father, **Judge David A. Rains**, Ninth Judicial Circuit, Ft. Payne, who delivered an inspiring message to the students and presented their well-deserved medallions.

In addition, the first annual Law Day observance for lawyers *and* the judiciary was held that day in the supreme court chambers. Guests were welcomed by President-elect **Jim Pratt** and Law Day Co-Chair **Ashley Swink**, and a special invocation offered to remember the victims and survivors of the tornadoes of April 27<sup>th</sup>. **Professor John Hall** of Auburn University and Troy State University in Montgomery entertained and educated the attendees with a brief historical discussion of the life and times of Adams. Retired Alabama Supreme Court **Justice Gorman Houston, Jr.** reminded Alabama's lawyers, judges and justices of their call to public service and duty to uphold the highest ideals upon which this nation was founded.

The **Law Day Committee**, and ASB staff liaison **Marcia Daniel**, served as an enhanced resource this year to encourage heightened participation and recognition of Law Day in all local bars and judicial circuits, and to provide materials/publications for their use. Participation in Law Day on a local level continues to grow every year, as bar associations throughout the state now administer their own CLEs, mock trials, moot court programs, iCivics/"Lawyers in the Classroom" initiatives, and other programs with a Law Day emphasis.

Begin now making your plans for Law Day 2012, and let the ASB know what we can do to help you begin (or continue, and improve) a Law Day tradition! ▲▼▲

# LAW DAY 2011 PARTICIPANTS

## POSTERS

### K-3

Mina Oates  
Emily Ann Smith  
Gariel Kelly  
Jack Wilks  
Julian Collier  
Farlie Boyd  
Catherine Baker  
Elizabeth DePalma  
Allie Ramonell  
Robin Howie  
Bryce Brown  
Drennen Weems  
Jane Ann Baggett  
Frances Carraway  
Preston Davis  
Dede Driscoll  
Sydney Kessler  
Sophie Dudeck  
Wyatt Trammell  
Anna Kulczyckg  
Ella Hartman  
Dacey Goodwin  
Eva Singleton  
Cole Hall  
Miles Robinson  
Francisco Carnaggio  
Anna Woodall  
Braeden Masters  
Dylan Kyle  
Samantha Teta  
Elizabeth Brennan  
Alek Ledrina  
Anna Grace Dasher  
Annabelle Webber  
Elizabeth Webber  
Jon Coley  
Amber Jean Goolsby  
Katie Stratton  
Alex Lackey  
Alex Sessions  
Sophie Luster

Ethan Niel  
Sydey Kallman  
Joseph Benton  
Caleb Justiss  
Faith Wheat  
Carson Peevy  
Grace Williamson  
Seth Wilkins  
Ben Parker  
Gracie Gray  
Wilson Johnston  
Matt Story  
Jaycie Black  
Hannah Grace Woodall  
Emma Weldon  
Carter Lewis  
Dawson Gray  
Braylin Lewis  
Molly Snow  
Perri Golden  
Trevor Rodie  
Ana Davis  
J. T. Brazell  
Blane Duncan  
Elsa Stubbs  
Ward Golden  
Carter Spears  
Clay Williams  
Brady Lewis  
Jay Kujala  
Sydney Brown  
Kamden Burlison  
Gracie Johnson  
Katie Roberts  
Chandler Allen  
Drew Hansen  
Owen Hughes  
Reese Owen  
Sydney Reeves  
Cooper Gray  
R.J. Sutherland  
Blane Guthrie  
Morgan McVay

Craig Kenady  
Will Parker  
Isaac Stubbs  
Drew Carter  
Sadie Thompson  
Jordan Wilson  
Ella Grier  
Dalton Coleman

### 4-6

Brett Bonikowski  
Collin Lawlor  
Dishan Chandrasoma  
Landon Meadows  
Joshua James  
Anna Moseley  
Kelsey Crotz  
Anna Lee  
Courtney Cotton  
Reagan Harrison  
Conley Griffith  
K. J. Allen  
Alex Folds  
Monty Todd  
Olivia Schaffner  
Corinthian Phillips  
Dawson Locklier  
Bryn Chambless  
Myles Herron  
Banks Mitchell  
Rachel Turner  
Madeline Murray  
Channing Coleman  
Grace Longpre  
Curtis-Oliver Lane  
Cobin Vincent  
Kayla Averett  
Max Bloomer  
Cameryn Akers  
Brandon Lewis  
Elizabeth Clements  
Ashleigh Shanks

Trent VanGilder  
Hazen Finlay  
Daniel Istran  
Raeffh Thrash  
Tionna Taite  
Mary Catherine Hollingshead  
Hunter Atkins  
Destin Williams  
ReNadia Henderson  
Christen Bolling  
Rebecca Chapman  
Tyler Anderson  
Sawyer Pyle  
Dalton McHenry  
Tanner Payton  
Baylee Turner  
Caity Jo Lee  
Morgan Brown  
Emily Shaw  
Grant Williamson  
Kevi Hansen  
Avery Johnston  
Andrew Chancey  
Conner Hughes  
C.J. Weldon  
Turner Payton  
Kenzie Johnston  
Madison Caffee  
Levi Belew  
Hunter Wesson  
Laken Lee  
Harris Woodruff  
Noah Montague  
Dawson Parker  
Avery Roberts  
David Gray  
Tyler Abernathy  
Mason Towne  
Shaela McMahan  
Amber Johnson  
Luke Justiss  
Christian Ivey  
Payton Gray

Jessica Wilson  
Anna Belle McCormick  
Jamey Quillen  
Dakota Coleman

## ESSAYS

### 7-9

Jonathan Hart  
Briana Hardie  
Megan Nussbaum  
Will Purner  
Emily Sims  
Jacob Britnell  
Charlie Cook  
Catherine Butler  
David Eison  
Holly Persell  
Kara Ward  
Samantha Cundiff  
Katie Sexton  
Loren Gilliam  
Katy Payne  
Sara King  
Samantha Robbins  
Mary Dolman  
Katie Mack  
Jordan Roberts  
Patrick Wilson  
Morgan Angelette  
Molly E. Belew  
Hunter Woodruff  
Paige Woodridge  
Mady Weldon  
Austin Brown  
Kristianna Corbin  
Hunter Elliott  
William Carter  
Natalie Garner  
Mary Elmore DeMott  
Charlotte Benedict  
Trey Moss  
Julia Fleisig  
David Fox

Collin Nietfeld  
David Finestein  
Clara Patterson Scott  
Virginia Rieger  
Matt Pham  
Dakota Goff  
Ali Kent  
Sing Chan  
Ivy Buchanan

### 10-12

Brett Taylor  
Michael Bellamy  
Carsen McDonald  
Aubrey Hageewood  
Tara Henson  
Stefanie McClure  
Katharine McGee  
Leah Berkebile  
Bailey Heard  
Laura Picogna  
Jilante Greene  
Juan McFarland  
Wesley Reece

## SOCIAL MEDIA

### 7-9

Takieda McCall  
Lexus James  
Leyden Skipper

### 10-12

Jamal Means  
Austin Johnson  
Eddrick Ward  
Maria Osborne  
Brittany Baldwin

## ESSAY: GRADES 7-9

### 1ST PLACE

**Mary Elmore DeMott**

The Montgomery Academy

Teacher: Susan Riley

### 2ND PLACE

**Julia Fleisig**

Hilltop Montessori School/Birmingham

Teacher: Sherry Cook

### 3RD PLACE

**Jonathan Hart**

Phenix City Intermediate School

Teacher: Barbara Romey



To read the winning essays in their entirety, go to [www.alabar.org/lawday/2011winners.cfm](http://www.alabar.org/lawday/2011winners.cfm).

# 2011 WINNERS



**1ST PLACE POSTER: GRADES 4-6**  
**Miles Herron**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsey Norred



**2ND PLACE POSTER: GRADES 4-6**  
**Alex Folds**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsey Norred



**3RD PLACE POSTER: GRADES 4-6**  
**Grace Longpre**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsey Norred

## ESSAYS

### GRADES 7-9

### GRADES 10-12

#### 1st Place

**Mary Elmore DeMott**  
 The Montgomery Academy  
 Teacher: Susan Riley

**Leah Berkebile**  
 Athens Bible School  
 Teacher: Greg Chandler

#### 2nd Place

**Julia Fleisig**  
 Hilltop Montessori School/Birmingham  
 Teacher: Sherry Cook

**Juan McFarland**  
 B.T. Washington Magnet/Montgomery  
 Teacher: Dr. DeShannon McDonald

#### 3rd Place

**Jonathan Hart**  
 Phenix City Intermediate School  
 Teacher: Barbara Romey

**Tara Henson**  
 Athens Bible School  
 Teacher: Greg Chandler

## POSTERS

### GRADES K-3

### GRADES 4-6

#### 1st Place

**Sophie Dudeck**  
 Advent Episcopal School/Birmingham  
 Teacher: Lee Stayer

**Miles Herron**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsey Norred

#### 2nd Place

**Ella Grier**  
 Emerald Mountain Christian School  
 Teacher: Katy Leach

**Alex Folds**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsey Norred

#### 3rd Place

**Isaac Stubbs**  
 Edgewood Academy/Wetumpka  
 Teacher: Jackie Steube

**Grace Longpre**  
 Bear Exploration Center/Montgomery  
 Teachers: Kris White & Lindsay Norred

## SOCIAL MEDIA

### GRADES 7-9

### GRADES 10-12

#### 1st Place

**Takieda McCall**  
 Dunbar-Ramer School  
 Teacher: LaShundra Carter

**Jamal Means**  
 Brewbaker Technology Magnet/Montgomery  
 Teacher: Sonya Keeton

#### 2nd Place

**Lexus James**  
 Dunbar-Ramer School  
 Teacher: LaShundra Carter

**Austin Johnson**  
 Brewbaker Technology Magnet/Montgomery  
 Teacher: Sonya Keeton

#### 3rd Place

**Leyden Skipper**  
 Hooper Academy/Hope Hull  
 Teacher: Kristi Skipper

**Eddrick Ward**  
 Brewbaker Technology Magnet/Montgomery  
 Teacher: Sonya Keeton

## ESSAY: GRADES 10-12

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 Teacher: Dr. DeShannon McDonald

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# CORPORATE COMPLIANCE



Protocol

Mergers

Corporate Compliance

Reporting

Compliance Audits

Training

Noncompliance

Executives & Employees

Oversight

Employment Relations

High-Level Personnel

Standards of Conduct

Corporate Governance

# Creating an Effective Corporate Compliance Plan:

## Part II

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

*(Part I of this article appeared in the May  
2009 issue of The Alabama Lawyer.)*

**A**n effective corporate compliance plan is essential for every business, large or small, public or private. Here's why: in today's world, businesses are able to significantly limit possible criminal and civil exposure if they have an effective corporate compliance program at the time an offense may occur.<sup>1</sup>

An effective corporate compliance plan consists of steps taken by a business to inform its employees, executives and directors about the laws that apply to them when executing their business duties; to encourage law-abiding behavior by its personnel; to establish protocols for detecting as early as possible any violations of the law committed within the business; and to deal appropriately with any violations that may occur.

The components of an effective corporate compliance plan are: (1) a corporate governance structure sensitive to compliance issues; (2) a general standard of conduct, and specific standards of conduct tailored to employees and their duties; (3) involvement by high-level personnel in corporate compliance issues; (4) an emphasis on corporate compliance when hiring, compensating and disciplining employees; (5) training directors, officers and employees about the laws and rules that apply to them; (6) establishing reporting mechanisms for instances of non-compliance; (7) conducting compliance audits; (8) assessing the "compliance health" of a target business prior to merger or acquisition; (9) protocols for updating a corporate

compliance program; and (10) identifying and responding to instances of non-compliance.<sup>2</sup> This article briefly discusses these components.

## Corporate Governance

The governing board of a company is responsible for ensuring that a company is attentive to compliance issues. This means at least three things.

First, as reflected in the agenda and minutes of board meetings, the board of directors (or an appropriate committee of the board) regularly receives reports on, discusses and reviews compliance issues, including current risk areas and whether new risk areas have arisen, internal training on compliance for all personnel, violations of the law that may have occurred, and the company's response to violations.

Second, board members should be competent to perform their compliance oversight duty. This means that in addition to appropriate credentials and experience, relevant board members receive regular training on compliance oversight, and have adequate time, free from other responsibilities (including service on too many boards), to fully execute their compliance oversight duties.

Third, directors should ensure that executive compensation is tied, at least in part, to achieving specific compliance goals.

## Standards of Conduct

A business should have three different “standards of conduct.” First, every business should have a mission statement that is brief, broadly applicable throughout the company and makes clear that ethical and law-abiding behavior is expected of all employees, executives and directors.

Second, every business should have a comprehensive statement, prepared through a collaborative effort that gathers input throughout the business at all levels, and applies generally to all personnel. Such a statement should cover compliance issues on generic topics, such as expense reimbursement, leave policy, employee harassment and discrimination and dealings with third parties (avoiding bribery, kickbacks, collusion, etc.).

Third, each business should have multiple, short, specific codes of conduct tailored to particular employment duties. Each of these codes should identify current and potential risk areas and provide guidance for dealing with these areas. For example, a hospital should have a specific code of conduct for emergency room patient care employees covering issues unique to the emergency room setting,<sup>3</sup> a separate code of conduct for emergency room billing employees<sup>4</sup> and another code of conduct for hospital employees who negotiate contracts with emergency room physicians.<sup>5</sup>

Most businesses will have dozens of these last, more detailed, codes of conduct. Such codes should be brief, comprehensible to the relevant employees and updated often. In quickly moving and highly regulated areas, quarterly, even monthly, revisions of these codes may be necessary. In other areas, annual reviews may be sufficient. Always, these codes should be specific. For example, instead of prohibiting employees from providing extravagant gifts to vendors, a code should specify that employees should not provide to any vendor (where vendor is defined) gifts, meals, items or services (where services are defined) valued at more than a specified dollar amount, unless the employee obtains a written waiver (where a specific authorizing individual is named).

Employment personnel policies should make clear that all employees, including executives, are subject to discipline if they fail to follow company codes of conduct.

## Oversight by High-Level Personnel

Whether a company’s corporate compliance plan is genuine and operated in good faith, or a sham designed for show, will be judged by the level of involvement by the company’s high-level personnel. The exact role of high-level personnel will vary among businesses. Large companies should have a full-time compliance officer, if not a full compliance department. Small companies should directly involve the president in compliance issues. Whatever is the case, the person(s) performing compliance duties should have: adequate training and stature within the company to command clout; access to every aspect of a business; adequate resources to oversee compliance issues; a direct reporting route to top company executives; and an independent reporting route to the company’s board of directors.

A compliance officer’s job includes: assessing risk areas within the company where violations may occur; updating risk areas; ensuring that compliance training and monitoring is effective in addressing risk areas; ensuring that adequate mechanisms exist within the company for detecting violations of law and company codes of conduct; dealing appropriately with any violations; and documenting all of the above. In addition to maintaining effective corporate compliance, the point of adequate documentation is to demonstrate to regulators, FBI agents or a judge or jury, if the need

arises, that the company has an effective corporate compliance plan even though a violation of the law has occurred.

## Employment Relations

Vetting potential employees should include not only a criminal background check, but also a review of the candidate’s compliance experience. Potential employees should be required to certify that they have no prior compliance violations. The compensation of employees, executives and directors should be tied, in part, to company codes of conduct, including attendance at, and successful completion of, training programs.

Stated employment duties should include the obligation to report internally (following a specified protocol) any known or suspected instances of noncompliance. Internal reporting serves two purposes. First, it gets information about violations or suspected violations to those within the company who can deal appropriately with the problem. Second, internal reporting limits the ability of employees to become “whistleblowers” who create additional liability for businesses by filing their own lawsuits or otherwise reporting their suspicions to authorities.<sup>6</sup>

Employment personnel policies should make clear that all employees, including executives, are subject to discipline if they fail to follow company codes of conduct. Possible sanctions should be specified and should include: publicity within and outside the company; community service; a letter of reprimand; additional compliance training; suspension; loss of pay; and termination.

## Training of Directors, Executives and Employees

Compliance training should be provided for all personnel and, in some instances, third parties who work with a company. Directors and executives should receive training specific to their

obligations, and employees should be instructed on the compliance requirements specific to their duties. Everyone should understand why compliance is important, how to recognize events of non-compliance and what to do if they observe such events.

Because people learn in different ways, effective compliance training should be presented through a variety of methods: oral presentations, written materials, interactive and video sessions, role-playing, demonstrations, and question-and-answer sessions. High-level personnel should be involved in training, even if they only can appear by video. Compliance training should be presented in multiple languages when necessary. Attendance and successful completion of compliance training should be mandatory for all employees, executives and directors. All participants should be tested as part of their training and compensation should be tied, at least in part, to attendance and successful completion of training. All training should be updated regularly as risk areas, laws, regulations and market conditions change.

## Reporting Events of Non-Compliance

The keys to effective mechanisms for reporting suspected events of non-compliance are adequate confidentiality and documentation. Every credible tip should be addressed, not only to deal with the potential problem, but also to avoid the appearance of cover-up or obstruction of justice. A variety of reporting mechanisms should be provided to personnel and third parties who deal with a business. A dedicated phone line, fax number, postal or e-mail address, suggestion box, exit interview, ombudsman, and focus group are all viable reporting options.

## Compliance Audits

Compliance audits should be conducted periodically. They should follow the same

protocol from audit to audit to better identify aberrations. As compared to “internal investigations,” which are conducted when there is a reported problem, compliance audits are not intended to target a specific problem. They are more cursory and routine in nature and likely would not adequately address a reported or suspected problem. Rather, the goal of compliance audits is to assess activity in risk areas, detect possible problems, remind employees of their compliance duties and demonstrate to the outside world that a business is committed to lawful, ethical behavior.

## Mergers and Acquisitions

Because a business acquires compliance problems along with the other assets and liabilities of any business it purchases or with which it merges, an acquiring company’s due diligence should include a “compliance health check” of the target company. This assessment will be relevant to the terms



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of the transaction as well as the future liability of the acquiring company.

## Protocol for Updating a Corporate Compliance Plan

Every component of a corporate compliance plan should be regularly reviewed and revised. What was reviewed, what was changed or not changed, and why should be documented. Revisions to corporate compliance plans should be made when laws or regulations are passed or amended, case law changes, regulators undertake new initiatives, competitors encounter issues which suggest industry-wide problems or which spark attention to the industry as a whole, or an industry experiences events that call into question current “best practices.” Corporate compliance plans also should be revised when “triggering events” occur, such as execution of a search warrant, service of subpoenas, activity by a whistleblower or filing of civil lawsuits.

## Identifying and Responding to Instances of Non-Compliance

### What is a “problem of non-compliance?”

Recognizing that there has been a problem of non-compliance is the first step in appropriately addressing any such problem. Sometimes this is not difficult. The problem is obvious: the FBI arrives to execute a search warrant, or a business is served with a grand jury subpoena and identified as a “target” of the grand jury investigation. Other problems present themselves more subtly: rambling, anonymous tips on the company hotline; a civil lawsuit; regulatory activity directed at

...a company's corporate compliance plan should provide a guidance on which response fits which problem.

competitors; new regulatory initiatives; unusual employee activity; a missing laptop, etc. The point is that a company's corporate compliance plan should provide a guidance on which response fits which problem.

## Responding appropriately

Once a problem of non-compliance has been identified, the goal is to calibrate the response to the seriousness of the problem. Overreaction can be as disruptive and costly as complacency.

Current law enforcement and regulatory expectations should be taken into account when deciding how to respond. Reactions that may have been appropriate in the past may be inappropriate today. For example, historically, companies responded to publicity about a possible violation of law by “circling the wagons” and stonewalling. This made some sense. Such a strategy allowed a company time to assess what was going on, made it more difficult and costly for plaintiffs (or prosecutors) to prove their case, and let publicity subside. Today, especially if the plaintiff or potential plaintiff is a prosecutor, such an approach can be disastrous. Businesses, like individuals, are rewarded by U.S. Department of Justice policy<sup>7</sup> and by U.S. Sentencing Guidelines<sup>8</sup> for cooperating with law enforcement, and they are punished for not cooperating. This “cooperation” almost always includes conducting an internal investigation, and may include disclosing findings to law enforcement, identifying culpable individuals and making victims whole.

When the potential violation of law is serious, the response may need to be immediate, stunningly so. Company leaders and counsel may need to react within hours of learning of the problem. Public companies will need to reassure the market. All companies—public and private—will need to reassure business partners, lenders, employees, clients, customers, insurers, and other key third parties with which it deals.

When addressing problems of non-compliance, especially the more serious problems, the attorney for a business will need to gather as much information as possible, and as quickly as possible. Counsel will need to assess what the business is facing to evaluate conflicts of interest and potential conflicts of interest among the company and its directors, officers and employees. Such conflict information is essential for the company to “lawyer up” its various personnel.<sup>9</sup>

## Specific problems

### 1. Execution of a search warrant

There will be no notice before law enforcement officials show up with a search warrant. Surprise (and preempting possible destruction or alteration of documents) is one of the major reasons law enforcement agents seek a search warrant instead of serving a subpoena for records. To obtain a search warrant, law enforcement officials must demonstrate, under oath to a judicial officer, that probable cause exists to believe that a business has, is currently or is about to commit a crime, and that the records or items listed in the warrant are evidence of the crime.<sup>10</sup>

Service of a search warrant is a scary experience for those who are searched. For safety and practical reasons, a fairly large team of armed law enforcement agents will arrive to execute any search warrant. When a business is searched, employees, customers and clients will be directed to stop their activities and move aside, or assist, as agents search for items, documents and computers listed in the warrant. If computers are listed in the warrant, the law enforcement team will include computer experts, who will shut down or dismantle computers before removing them.



When a business experiences the execution of a search warrant, company officials should immediately contact counsel. Ideally, counsel will be on the premises during the execution of the warrant and can direct the company's response.

Obtaining a copy of the search warrant should be the first step. The warrant will list what the agents are searching for and are authorized to seize. The agents should provide the company and counsel with a copy of the warrant when they arrive.

If possible, counsel should obtain a copy of the affidavit supporting the warrant. The affidavit potentially is one of the few ways a company has to figure out what prosecutors are looking for and is also a great source of information about the company's possible legal vulnerability. Because there is almost no discovery in the criminal justice system (generally no interrogatories or depositions), access to the details in a search warrant affidavit may be the most information a company can get about an investigation until indictment. The affidavit may be under

seal and on file with the court that issued the warrant, and not available to anyone until the seal is lifted. In this situation, counsel should move the court for "partial unsealing," which releases the affidavit only to the company. If the allegations are expected to be damaging to the company, counsel should not seek a complete unsealing of the affidavit since doing so gives the public and press access to all details in the affidavit.

During execution of the search warrant, counsel should also consider permitting non-essential employees to leave for the rest of the day. Law enforcement agents executing a search warrant generally seek to interview any willing employees while they are executing a search warrant. Care should be taken, however, that allowing employees to leave is not viewed as obstruction of justice, or evidence of concealment, or a sign of criminal intent.

During execution of the search warrant, counsel should decide if filming the process is feasible and, if so, appropriate. Knowledge that their behavior is being

memorialized on film may have a calming influence on everyone. However, filming the execution of a search warrant will also document possibly inappropriate behavior by nervous or ill-prepared company personnel. In such instances, filming may not be in a business's best interest. Counsel will have to assess the volatility of a situation when making the decision whether to have the process filmed.

Perhaps most importantly, counsel should seek to negotiate with the agents who are executing the warrant to determine what the agents will actually seize. This is important for two reasons. First, it can facilitate cooperation. The agents may be willing to take less than all items listed on the warrant. They may also be willing, or required, to provide back-up data of computers or documents they are authorized to remove. Company personnel may need to work closely with the agents during the execution of the warrant, perhaps for hours, for this to occur. Second, such interaction may be an opportunity for counsel to learn more



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about the investigation and the company's potential liability. As noted, since discovery in criminal investigations is essentially non-existent, this interaction becomes all the more valuable.

## 2. Receipt of a subpoena

Many businesses regularly receive subpoenas. It is important to understand the difference between subpoenas issued at the request of private parties as part of private lawsuits, and subpoenas issued by grand juries and regulators. If the subpoena is issued by a grand jury, the matter is a criminal investigation. If a subpoena is issued by regulators (an "administrative subpoena"), the matter may be a civil or criminal investigation.<sup>11</sup> Whichever, it should be taken seriously. Grand jury or "administrative" subpoenas are issued to "targets," "subjects" and "witnesses," in official criminal or civil investigations. "Target" means that the investigation has focused on a particular person(s) or entit(ies), that criminal liability is a strong possibility and that an indictment is likely. "Subject" means that one is not yet a target but is a serious focus of the investigation. "Witness" is simply that: a company may have records that are needed by law enforcement to investigate a target or subject. It is essential that counsel determine a company's status upon receipt of a subpoena issued by a grand jury or regulator. Generally, this information may be obtained from the government official authorizing the subpoena or directing the investigation. One's status can and often does change during an investigation, however, so counsel will need to continually assess a company's status. Also, even though a company may be only a "witness," there may be cause for concern. If a company's officers, directors or employees are "targets" or "subjects" of the investigation, their ultimate liability could lead to derivative liability or even criminal liability on the part of the company.<sup>12</sup>

In short, an effective corporate compliance plan should include all details for responding when law enforcement officials arrive at a business's premises ready to execute a search warrant.

## 3. Other problems

Other compliance problems that may arise in a business are as varied as the businesses that experience them. Internal

...an effective corporate compliance plan should include all details for responding when law enforcement officials arrive at a business's premises ready to execute a search warrant.

reporting mechanisms, such as hot lines, ombudsmen, suggestion boxes and the like, will yield information about issues involving every aspect of a business's activity. An effective corporate compliance plan should list possible problems and risk areas, and protocols for dealing with problems. The protocols should include steps for gathering information, for corroborating the information, for addressing the problem, for revising the corporate compliance program in light of this new "risk area," and for raising employment procedures to deal with the individuals who created the problem and those who reported the problem.

## "Lawyering up" personnel

If the problem of non-compliance is one in which company personnel may incur personal civil or criminal liability, a company should move quickly to ensure that its personnel have legal representation. Not only may a company be obligated to provide counsel for various personnel (under bylaws, state incorporation code, employment contracts)<sup>13</sup> but there are strategic reasons to act quickly, and cost is one of them. When there are no conflicts in interest among those to be represented (for example, their status is "witness" only), one attorney may be able to represent a number of individuals. Obviously, this is cheaper than retaining separate counsel for each individual. Counsel will need to assess the facts quickly to determine how many individuals one attorney may represent without a conflict of interest.

The second reason a company should act quickly to ensure that its personnel

have legal representation arises from rules of professional responsibility, in particular, the admonition that lawyers shall not communicate on a matter with individuals they know are represented by counsel in that matter.<sup>14</sup>

## Document issues

There are three key issues to consider regarding documents when a business is facing a problem of non-compliance: (1) preserving records, (2) preserving attorney-client and work product privileges and (3) maintaining required privacy.

The first, immediate task of counsel when it appears there has been a compliance problem is to protect documents, electronic or otherwise, from destruction, or possible alteration. Immediately after becoming aware that there may be a compliance problem, company counsel should notify all company personnel that no records regarding the problem should be destroyed. Among other things, this means that "document retention" policies should be halted since such policies are also, of course, "document destruction" policies which provide a schedule for retaining certain records and destroying others.<sup>15</sup> Given the breadth of federal obstruction of justice statutes,<sup>16</sup> a company, its counsel, the company's leadership and its employees are at peril if any documents relevant or possibly relevant to the compliance issue are destroyed once it can be "contemplated" that an investigation may commence.<sup>17</sup>

In addition, company counsel should ensure that the company's attorney-client and work-product privileges are maintained. Utilizing the *Massachusetts v. Upjohn*<sup>18</sup> test, counsel should determine whose communications within the company are privileged. Privileged documents should be clearly identified as attorney-client communications or attorney work product, and segregated as such. A company ultimately may decide not to invoke attorney client or work-product privileges<sup>19</sup> but steps should be maintained from the beginning of an investigation to keep open the option of invocation.

Lastly, many businesses have obligations to maintain privacy of records in the course of its business, such as health-care data on patients or financial records

for customers. Care should be taken that these records are adequately segregated and protected as required by applicable laws and regulations.<sup>20</sup>

## Conducting an internal investigation

An internal investigation should be undertaken when there is a specific, credible report of non-compliance within the company. The investigation could be short and simple: interviewing one individual. Or it could be extensive, requiring hundreds of interviews with multiple personnel. Whichever the situation, the goals of an internal investigation are to determine if the event of non-compliance occurred; if there are other related, but not yet reported, events of non-compliance; who was involved; what damage, if any, resulted from the event; what response is appropriate; and what steps should be taken to prevent future events of non-compliance.

It is beyond the scope of this article to address the complex issues raised by internal investigations. Briefly, however, there are the three key decisions for a company's counsel. The first decision is whether an internal investigation should be conducted by in-house counsel or outside counsel. It will be more cost-efficient and probably less disruptive to the business for in-house counsel to conduct the investigation. However, if there is a question as to whether in-house counsel may have some involvement, wittingly or unwittingly, in the event of non-compliance, or if the investigation is likely to require considerable time and divert in-house counsel from other duties, a company should retain outside counsel to do the internal investigation.

The second set of decisions concerns how the internal investigation should be conducted. Are interviews necessary? If so, with whom and in what order? What record should be made during the interviews and who should make that record? When company counsel (in-house or outside) interviews company personnel, counsel should inform each person that counsel represents the company and not the individual. If the individual is entitled to counsel according to company policy (or as a matter of strategy if providing

legal assistance is not required), the individual should be informed that the company will provide counsel. Opinions among experts differ as to whether counsel should also give a version of *Miranda*<sup>21</sup> rights informing the individual that the company will decide whether it will disclose the findings of its internal investigation to law enforcement or other regulatory authorities, including the individual's comments during the interview.

The final decision may be the hardest: what to do with the findings of the internal

investigation. Should a written report be made? If so, what level of detail is appropriate? Should the findings be disclosed to relevant regulators? Should the company assert attorney-client or work product privileges? Should the company identify "culpable" individuals? What should the company do with the culpable individuals? What changes in the existing corporate compliance plan, including in the corporate leadership, may be needed? Each situation is different and will require a fresh assessment of these issues.

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## Conclusion

Businesses today have no choice but to develop an effective corporate compliance plan. Such a plan should permeate every aspect of a business. Developing, maintaining and updating an effective corporate compliance plan will require a variety of legal specialties, vigilance in monitoring and updating the plan, and adequate commitment of time and resources. ▲▼▲

## Endnotes

1. See also, Pamela H. Bucy & Anthony A. Joseph, *Conducting Business in the Twenty-First Century: How to Avoid Organizational Suicide*, 70 ALA. LAW. 185 (2009).
2. Excellent resources on the components of corporate compliance plans include: ETHICS AND COMPLIANCE OFFICER ASSOCIATION FOUNDATION, *THE ETHICS AND COMPLIANCE HANDBOOK* (2008); ANTHONY TARANTINO, *THE GOVERNANCE, RISK AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL AND INTERNAL GUIDANCE AND BEST PRACTICES* (2008 John Wiley & Sons, Inc.); MICHAEL G. SILVERMAN, *COMPLIANCE MANAGEMENT FOR PUBLIC, PRIVATE AND NON-PROFIT ORGANIZATIONS* (2008 McGraw-Hill).
3. Such as the Emergency Medical Treatment and Active Labor Law (EMTALA), 42 U.S.C. § 1395dd.
4. Covering issues such as unbundling, secondary insurance fraud, double-billing, inadequate documentation, etc. See PAMELA H. BUCY, *HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE* § 2.02 (co-authors: Robert Fabrikant, Paul E. Kalb, MD, Mark D. Hopson, 2008 Law Journal Seminars Press).
5. Covering issues of STARK, 42 U.S.C. § 1395nn and Anti-kickback, 42 U.S.C. § 1320a-7b; See, e.g. Ala. Code § 22-1-11; D.C. Code Ann. § 4-802; Fla Stat. §§ 395.0185, 456.054.
6. See JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS*, §4.02 (2008); Pamela H. Bucy, *States, Statutes and Fraud*, 80 TUL. L. REV. 465 (2005) (co-authors: James F. Barger, Jr., Melinda M. Eubanks, Marc S. Raspanti).
7. U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations*, U.S. ATTY'S MANUAL § 9.28.000. The United States Department of Justice began developing *Principles of Federal Prosecution of Business Organizations* almost 20 years ago to guide federal prosecutors in determining whether to charge a fictional entity with a crime. Until 2008, the *Principles of Federal Prosecution* instructed federal prosecutors to request in certain circumstances corporate waiver of attorney-client and work product privileges and to consider such waiver favorably when determining whether to indict a company which otherwise met the standard for corporate criminal liability ("McNulty Memorandum").
  8. U.S. Sentencing Comm'n, *Federal Sentencing Guidelines*, Chapter 8 (Sentencing of Organizations).
  9. See Section IV *infra*.
  10. See, e.g., *Spinelli v. United States*, 393 U.S. 410 (1969); *Illinois v. Gates*, 462 U.S. 213 (1983).
  11. For example, "Inspector General" subpoenas are issued by Offices of Inspectors General in federal departments to investigate suspected criminal or civil fraud involving that department. See, e.g. 42 C.F.R. § 1006.1(a). "Certificates of Demand" (CID), also known as "Authorized Investigative Demands" (AID), may be issued by the United States Attorney General, or authorized designee, to investigate suspected violations of specific statutes. See, e.g. 31 U.S.C. § 3733 (regarding the Federal False Claims Act). For a discussion of these types of administrative subpoenas, see PAMELA H. BUCY, *HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE* §§ 6. 04-05.
  12. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (explaining how the standard for imposing criminal liability on corporations is "strict liability:" if an agent of a business commits a crime, the company may be held criminally liable.)
  13. Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes*, 24 IND. L. REV. 279 (1991); IAN YOUNGMAN, *DIRECTORS' AND OFFICERS' LIABILITY INSURANCE: A GUIDE TO INTERNATIONAL PRACTICE*, 2D ED. (1999 Woodhead Publishing Ltd.).
  14. For example, *Alabama Rule of Professional Conduct* 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

15. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
16. See, e.g., 18 U.S.C. §§ 1512, 1519.
17. 18 U.S.C. § 1519 (new obstruction of justice statute, passed as part of SOX, § 802 P.L. 107-204 in 2002).
18. 466 U.S. 727 (1984).
19. In some heavily regulated industries such as health-care or banking, regulators have full access to a provider's records as part of the credentialing process. Also, though not "required," a company may "voluntarily" waive attorney-client and work product privileges if it decides to cooperate under *Principles of Federal Prosecution of Business Organizations*, and federal sentencing guidelines. See Section II *supra*.
20. See, e.g., Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1301 *et seq.*; 45 C.F.R. §§ 160-164 (regarding personal health information); 42 U.S.C. § 290dd-2 (medical records relating to treatment of drug and alcohol abuse).
21. 384 U.S. 436 (1966).



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# Navigating the Honest Services Fraud Statute After *Skilling v. United States*

By J. B. Perrine and Patricia M. Kipnis

Former Alabama Governor Don Siegelman and HealthSouth Corporation founder and former CEO Richard Scrushy were prosecuted for a scheme by which Scrushy contributed \$500,000 to Siegelman's campaign for a statewide lottery referendum in exchange for Siegelman's appointing him to Alabama's Certificate of Need Review Board. In June 2006, Siegelman and Scrushy were convicted of separate counts of federal funds bribery in violation of 18 U.S.C. § 666, four counts of honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, and one count of conspiracy in violation of 18 U.S.C. § 371. Siegelman was also convicted of obstruction of justice in violation of 18 U.S.C. § 1512(b)(3). On direct appeal, the United States Court of Appeals for the Eleventh Circuit affirmed all counts of convictions except that it reversed for insufficiency of the evidence two counts of honest services fraud against Siegelman. *United States v. Siegelman, et al*, 561 F.3d 1215 (11th Cir. 2009). On June 29, 2010, the Supreme Court vacated and remanded Siegelman's and Scrushy's remaining honest services fraud convictions in light of its decision five days earlier in *Skilling v. United States*, 130 S.Ct. 2896 (2010). See *Scrushy v. United States*, No. 09-167, 2010 WL 2571879 (U.S. June 29, 2010); *Siegelman v. United States*, No. 09-182, 2010 WL 2571880 (U.S. June 29, 2010). On remand, the Eleventh Circuit upheld Siegelman's and Scrushy's convictions for federal funds bribery, conspiracy and the honest services fraud counts predicated on their bribery scheme, but held that after *Skilling* it must reverse Scrushy's convictions on two honest services fraud counts because the evidence was insufficient to show that Scrushy bribed another CON board member after Siegelman appointed him to the Certificate of Need Review Board. *United States v. Siegelman*, \_\_\_ F.3d \_\_\_, 2011, No. 07-13163, WL 1753789 at \*\*9, 13 (11th Cir. May 10, 2011). The Court affirmed Siegelman's conviction for obstruction of justice.

In *Skilling v. United States*, 130 S.Ct. 2896 (2010), the United States Supreme Court curtailed the government's ability to prosecute certain fraudulent schemes orchestrated by public officials as well as private employees. The Court shortened the government's prosecutorial reach by narrowing the scope of the honest services fraud statute, codified at Title 18, United States Code, Section 1346. Specifically, the Court held that the honest services fraud statute applied only to bribery and kickback schemes, and no longer covered schemes where the actor only engaged in undisclosed self-dealing. The *Skilling* decision is the latest chapter in the decades-long effort by the courts and Congress to prosecute self-dealing without running afoul of due process. The precise effects of *Skilling* are uncertain, though significant, as shown by the Eleventh Circuit's recent reversal of two counts of convictions for honest services fraud against former HealthSouth CEO Richard Scrushy.<sup>1</sup> Courts have yet to encounter a sufficiently diverse array of factual scenarios to establish the new contours of the statute, while Congress has been busy drafting and debating new legislation that addresses the *Skilling* Court's constitutional concerns. This article discusses the legal context of the honest services fraud statute before and after *Skilling* and provides insights on how to monitor exposure to the honest services fraud statute during this period of uncertainty.

## The Honest Services Fraud Statute Prior to *Skilling v. United States*

The mail and wire fraud statutes, codified at Title 18, United States Code, sections 1341 and 1343, prohibit the use of the mails or interstate wires to execute any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Prosecutors have long used these statutes to hold accountable individuals who deceived others in criminal schemes that used the United States mail or interstate wire communication as a "step in the plot."<sup>2</sup> For at least 70 years, courts have upheld prosecutions under these statutes in "intangible rights" cases,<sup>3</sup> that is, cases which do not involve the typical fraud in which a victim's loss of money provides a defendant's gain; rather, the "offender profit[s], [but] the betrayed party suffer[s] no deprivation of money or property; instead, a third party, who ha[s] not been deceived, provide[s] the enrichment." *Skilling*, 130 S.Ct. at 2926.

Over the years, the Supreme Court expressed constitutional concerns about such prosecutions on the theory that individuals did not have sufficient notice of what conduct constituted a prosecutable crime. The zenith of this concern was reached in the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). There, the Court reversed a conviction where the jury was instructed that a violation of the mail fraud statute could be found when a state Democratic Party chair with control over the selection of insurance agencies by the state directed payments to an agency in which he had an ownership interest without disclosing that interest to those whose actions might have been affected by the disclosure. The Court found that this prosecution was unconstitutional because the wire fraud statute was limited to the protection of property rights, and "does not extend to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356. In so construing the statute, the *McNally* Court instructed that, if "Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

Congress immediately spoke by passing Title 18, United States Code, Section 1346, which provided a "*McNally* fix" by defining a "scheme or artifice to defraud" to include one that "deprive[s] another of the intangible right of honest services." This language once again allowed federal prosecutors to pursue convictions based on defendants' deprivations of others' rights to their "honest services." See Nicholas J. Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States*, 51 S. Tex. L. Rev. 1121, 1135-36 (2010) (describing the government's use of honest services fraud as its "primary weapon against public and private corruption.").

The honest services fraud statute as written after *McNally* was particularly useful in combating public corruption. For example, the United States Court of Appeals for the Eleventh Circuit interpreted the term "honest services" in Section 1346 to mean public officials had a fiduciary duty to the public. *United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007). The Eleventh Circuit's position was that this fiduciary duty and Section 1346 were violated where the public official "secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest." *Walker*, 490 F.3d at 1297 (quoting *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997)).<sup>4</sup> In *Walker*, the court upheld the conviction of Charles Walker, a

Georgia state legislator who misused his position by accepting business favors in return for assistance with legislation. *Id.* at 1296. The court noted that the "scope of conduct covered by the honest services mail fraud statute is extremely broad" but does require that the conduct "actually deprive the public of its right to [an official's] honest services." *Id.* at 1297 (quoting *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996)). In sum, the "breadth and flexibility" of the honest services language made it "extremely useful to prosecutors." Iris E. Bennett *et al.*, *Honest Services after Skilling: Judicial, Prosecutorial and Legislative Responses*, Crim. Litig., Vol. 11, No. 1, ABA Sec. of Litig., Fall 2010 (citing Lynne Marek, *DOJ may rein in use of 'Honest Services' statute*, Natl. L.J., June 15, 2009, at 1, for fact that honest services fraud was the lead charge asserted against 79 defendants in 2007, up from 63 in 2005, and 28 in 2000.)

## The United States Supreme Court Cabins the Honest Services Fraud Statute in *Skilling*

Surprisingly, the fall of the Enron Corporation provided the Supreme Court a rich opportunity to reexamine the honest services fraud statute.<sup>5</sup> In 2001, Enron collapsed, and the government subsequently prosecuted dozens of Enron employees for their participation in a scheme to elevate the company's stock by overstating its true value.<sup>6</sup> Jeffrey Skilling, Enron's CEO in 2001, was indicted as a participant in this scheme.<sup>7</sup> The indictment specifically alleged that Skilling and his co-conspirators had personally benefitted as a result of the scheme through their salaries, bonuses, grants of stock and other profits.<sup>8</sup> Following a four-month trial, the jury found Skilling guilty of 19 counts, including honest services fraud conspiracy.<sup>9</sup> Skilling appealed his conviction on several grounds, including the notion that the honest services fraud statute should be invalidated as unconstitutionally vague. The Fifth Circuit did not address that issue on appeal.<sup>10</sup> Skilling turned to the Supreme Court, which granted certiorari.

In *Skilling*, the Court upheld the constitutionality of Section 1346, but only in a specific context. In particular, the Court noted that the "vast majority of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." 130 S. Ct. at 2930. Accordingly, the Court held that Section 1346 is (1) not unconstitutionally vague, *id.* at 2932, but (2) criminalizes *only* bribery and kickback schemes. *Id.* at 2931. The Court expressly rejected the government's contention that undisclosed self-dealing should be included within the activities proscribed by Section 1346, reasoning that, in "light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced [ . . . ] a reasonable limiting construction of § 1346 must exclude this amorphous category of cases." *Id.* at 2932.

In a footnote, the Court warned Congress that, should it attempt to criminalize undisclosed self-dealing, it must "employ standards of sufficient definiteness and specificity to overcome

... the Court noted that the "vast majority of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."



due process concerns.” *Id.* at 2933 n.44. The Court was troubled by the questions left unanswered by the standard set forth by the government in its brief, that would prohibit the “taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty, so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior.” *Id.* (citations to government brief omitted). The Court wondered how direct the conflicting financial interest would have to be, to what extent the official action would have to further that interest to amount to fraud, to whom the disclosure should be made, and what specific information must be disclosed. *Id.*

In applying its holding to Mr. Skilling, the Court found that he had not committed honest services fraud since the government had not alleged that he solicited or accepted side payments from a third party for making misrepresentations that served to inflate Enron’s stock. *Id.* at 2934. The Court remanded to the Fifth Circuit for a determination of what convictions might stand in light of the reversal of Skilling’s conviction for conspiracy to commit honest services fraud. *Id.* at 2935.

## Congressional and Judicial Response to Skilling

Just as it responded quickly to the *McNally* decision, Congress reacted swiftly to *Skilling* and the Supreme Court’s imposition of limitations on the honest services fraud statute. In particular, on September 28, 2010, Senator Patrick Leahy introduced Senate Bill 3854, the Honest Services Restoration Act, which would amend Section 1346 so that the definition of the term “scheme or artifice” would include both (1) a scheme or artifice by a public official to engage in undisclosed self-dealing; and, (2) a scheme or artifice by officers and directors to engage in undisclosed private self-dealing. Moreover, Representative Anthony Weiner introduced a similar bill to the House of Representatives on September 29, 2010, H.R. 6391, also called the Honest Services Restoration Act, which like the Senate bill sought to prohibit public officials from engaging in undisclosed self-dealing, but unlike the Senate bill, did not extend honest services fraud to private officers and directors. Neither bill was brought to a vote in the 111th Congressional session. On April 8, 2011, Representative Weiner reintroduced his bill to the House as H.R. 1468, which is now being considered by the Committee on the Judiciary.

While Congress considers what action, if any, to take, courts across the nation, including the Eleventh Circuit, are wrestling with *Skilling* and its effect on honest services fraud convictions. For example, five days after *Skilling* was announced, the Supreme Court vacated and remanded *United States v. Siegelman, et al.*, to the Eleventh Circuit. After receiving the parties’ arguments on remand, the Eleventh Circuit, on May 10, 2011, overturned two honest services fraud convictions against Scrusby which pertained to benefits that HealthSouth had bestowed upon another CON Board member after Siegelman had appointed Scrusby to the board. The Court first noted that

*While Congress considers what action, if any, to take, courts across the nation, including the Eleventh Circuit, are wrestling with Skilling and its effect on honest services fraud convictions.*

Skilling precluded Scrusby’s convictions on these counts under a theory of undisclosed self-dealing. *United States v. Siegelman*, No. 07-13163, WL 1753789 at \*11 (11<sup>th</sup> Cir. May 10, 2011). Accordingly, the Court determined whether the evidence was sufficient for a jury to conclude that Scrusby had bribed Tim Adams, a CON board member who had surreptitiously received benefits from HealthSouth and whose attendance at a board meeting ensured a quorum and permitted a vote to be taken to approve an application by HealthSouth to construct a rehabilitation hospital in Phenix City, Alabama. The Court concluded that “the evidence that Scrusby bribed Adams [was] insufficient.” *Id.* at \*12. Accordingly, the Court reversed Scrusby’s convictions on counts 8 and 9—the honest services fraud charges encompassing Scrusby’s conduct involving Adams. *Id.* at \*13. The Court upheld Siegelman’s and Scrusby’s convictions on all other counts, including the honest services fraud charges predicated on the defendants’ bribery scheme. *Id.* at \*26

The Court’s decision in *Siegelman* comports with other appellate and district court decisions that have reversed honest services fraud convictions which were premised solely on undisclosed conflict of interests without sufficient proof of any accompanying bribes or kickbacks.<sup>11</sup> These cases include situations where the instructions to the jury did not reflect the law as later announced in *Skilling*. For example, in *Stayton v. United States*, No. 11913-002, 2011 U.S. Dist. LEXIS 20314 (M.D. Ala. Feb. 28, 2011), the United States District Court for the Middle District of Alabama vacated the honest services fraud convictions

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## Navigating the Honest Services Fraud Statute after *Skilling*

Despite reports that the Supreme Court “gutted and eviscerated one of federal prosecutors’ favorite weapons,”<sup>12</sup> *Skilling* does not provide either public or private officials with carte blanche to dishonestly conduct their affairs. As discussed *supra*, a “congressional fix” to the honest services fraud statute is a real possibility. Further, regardless of any congressional action, prosecutors have tools other than the honest services fraud statute to combat self-dealing so that potential defendants and their counsel should not naively believe that this conduct is now sheltered from prosecution. First, as the *Stayton* court indicated, much of the self-dealing and undisclosed conflict of interest conduct formerly prosecuted as such under the honest services statute might still be legitimately characterized as bribery or kickbacks, and thus still within the honest services fraud statute as prescribed in *Skilling*. Similarly, prosecutors may target self-dealing conduct under the “ordinary” mail and wire fraud statutes, sections 1341 and 1343, respectively. *Skilling* has no impact on these statutes. The pecuniary fraud language remains intact so that the obtaining of money or property via a “scheme or artifice to defraud” or “by means of false or fraudulent pretenses, representations, or promises” is still a prosecutable offense, and covers a great deal of self-dealing behavior. Under well-settled law, the omission of a material fact where one has a duty to disclose is equivalent to a false misrepresentation under the mail and wire fraud statutes.<sup>13</sup> Accordingly, a defendant’s failure to disclose the material fact of an undisclosed conflict of interest may provide the fraudulent conduct needed to satisfy a conviction under the mail or wire fraud statutes. Finally, as to private employees, some commentators have suggested that prosecutors might revive an old theory that an employee who breaches a fiduciary duty to his employer is essentially stealing his own salary, “thus recasting a theft of honest services as a theft of property.” See Bennett, *supra*, at 3.

Despite the availability of criminal offenses other than honest services fraud, the Supreme Court in *Skilling* may have insulated certain conduct from prosecution by federal authorities. An area of particular interest is a public official’s receipt of a campaign contribution that is temporally followed by his appointment of the donor to a public position. In the context of a prosecution under the Hobbs Act, 18 U.S.C. § 1951, the Supreme Court has required proof of an explicit *quid pro quo* to justify a conviction where a public official made an appointment in exchange for a campaign contribution. *McCormick v. United States*, 500 U.S. 257, 272 (1991). In *Siegelman*, the Eleventh Circuit noted that whether the honest services statute also requires proof of an explicit *quid pro quo* to justify a conviction in the campaign contribution/appointment context is an open question. *Siegelman*, 2011 WL 1753789 at \*9 & n.21. The Court, however, expressly stated that if proof of a *quid pro quo* is required under Section 1346, the instruction given to the jury in *Siegelman* was “deficient.” *Id.* at \*13 n.26.<sup>14</sup> The instruction did not adequately link the “*quid*” (i.e., the campaign contribution) to the “*quo*” (i.e., the appointment) to require the jury to find proof of a corrupt agreement for the specific

of Jeffrey Stayton and William “Curt” Childree. The facts were not uncommon of many honest services fraud cases. Stayton and Childree were good friends. Stayton was the aviation officer for the Army Test and Evaluation Command in Alexandria, Virginia, and was responsible for acquiring foreign aircraft; Childree was the principal of an aviation business. Stayton played a “significant part” in awarding Childree a \$5 million contract to deliver two helicopters to the government. After receiving \$1 million from the government pursuant to the helicopter transaction, Childree had the government escrow agent wire a portion of these funds to pay off the second mortgage on Stayton’s home in Virginia. Neither man disclosed the arrangement to the government during a subsequent investigation. Stayton and Childree were both indicted for honest services fraud and bribery (Stayton was also indicted for obstruction of justice for evasive and self-contradictory grand jury testimony). *Id.* at \*5-10 (citing facts). After the trial, the Court instructed the jury it could find them guilty of honest services fraud for “accepting a bribe, taking a kickback, or receiving a personal benefit from an undisclosed conflict of interest.” *Id.* at \*11. Both defendants were convicted of honest services fraud, and Stayton was also convicted for obstruction of justice.

In considering the defendants’ petition for habeas relief, the Court set aside their honest services fraud convictions based on *Skilling*. In particular, the Court deemed the honest services fraud instruction to be “overbroad” because the jury was not asked “to specify the basis on which it found Stayton and Childree guilty of honest-services fraud.” More specifically, the Court noted that “[w]hile the jury might have concluded that the \$61,071.75 pay-off of Stayton’s second mortgage by Childree amounted to a kickback, it might also have convicted Childree and Stayton for receiving a personal benefit from an undisclosed conflict of interest.” *Id.* at \*24. The Court discounted that the defendants’ honest services fraud convictions were based on bribery because the jury acquitted both men on the stand-alone bribery offenses. *Id.* at \*24 n.9. Notably, the Court also mentioned that its ruling did not mean that either man was “actually innocent” of honest services fraud, and that the government could elect to retry one or both men for honest services fraud. *Id.* at \*25 n.10.

exchange. *Id.* Certainly, proof of a corrupt agreement would violate the honest services statute because it “would amount to the official’s ‘selling’ to the appointee the official’s duty and authority to make appointments.” *Id.* at \*9 n.21. Though the question may still be technically open, after *Skilling* and *Siegelman*, prosecutors should charge and present, and defense attorneys should demand, proof of an express *quid pro quo* to support any honest services fraud charge in the campaign contribution/appointment context.

Another area of uncertainty is where the alleged wrongdoer has not received any additional money or property in the course of his dishonest dealings. For example, suppose a city councilman is a silent partner in a closely held corporation that owns undeveloped properties in a blighted area of the city. Suppose further that the city councilman has fully complied with his ethical disclosures about income received from this closely held corporation, which is miniscule because the corporation’s holdings consist only of undeveloped properties. Now suppose that the city councilman votes in favor of spending millions of tax dollars to permit developers to construct a major housing and entertainment development which promises to make the corporation’s properties much more valuable. The councilman votes for the development, not because he believes the project is best for his constituents, but because he wants the corporation’s properties to increase in value. He receives no bribes or kickbacks for his vote, but has voted for the development for the sole purpose of reaping financial gain from an increase in property values. After two years of construction and the expenditure of millions of tax dollars, the downtown development is operational, the city councilman does not seek reelection, and the closely held corporation sells its properties for sizeable sums only made possible by the development. The city councilman retires to a life of relaxation while the city files for bankruptcy after the development flops. Whether the local United States Attorney’s Office can bring any federal charges against this city councilman is now unclear after *Skilling*, though such conduct was most likely covered by Section 1346 prior to this decision. State law may provide an avenue of recourse for prosecution,<sup>15</sup> but federal charges may not be available.

## Conclusion

The exact contours of the honest services fraud statute are presently unknown, but the federal offense certainly encompasses a smaller scope of conduct than it did before the Supreme Court’s decision in *Skilling*, as shown in *Siegelman*. Clients facing exposure to the honest services fraud statute should remember that *Skilling* had no effect on traditional mail and wire fraud statutes, which may indeed cover self-dealing schemes irrespective of the applicability of the honest services fraud statute. Of course, counseling clients to be more concerned with moving away as far as possible from any “line of illegality” rather than trying to get as close to the line as possible without crossing it remains good advice, especially in this current period of uncertainty as to what conduct is particularly covered by the honest services fraud statute. ▲▼▲

## Endnotes

1. *United States v. Siegelman*, \_\_\_ F.3d \_\_\_, 2011 WL 1753789 at \*\*9, 13 (11th Cir. May 10, 2011).

2. *Schmuck v. United States*, 489 U.S. 705, 742-43 (1989); *United States v. Hasson*, 333 F.3d 1264, 1273 (11th Cir. 2003).
3. The Fifth Circuit’s decision in *Shushan v. United States*, 117 F.2d 110 (1941), which concerned the prosecution of a public official for accepting bribes in exchange for urging city action for the bribe-payers’ benefit, is generally acknowledged as the first presentation of the “intangible rights” theory.
4. The Eleventh Circuit repeatedly rejected constitutional challenges to § 1346 during the period between the enactment of Section 1346 and the Supreme Court’s decision in *Skilling*. See, e.g. *United States v. Hasner*, 340 F.3d 1261, 1268-69 (11th Cir. 2003), cert. denied, 543 U.S. 810 (2004); *United States v. Paradies*, 98 F.3d 1266, 1282-83 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); *United States v. Waymer*, 55 F.3d 564, 568-69 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).
5. Justice Scalia was particularly determined to revisit the constitutionality of Section 1346, and, in fact, expressed grave doubts that Congress’s “McNally fix” could survive constitutional scrutiny. See *Sorich v. United States*, 129 S. Ct. 1308 (2009) (Scalia, J.) (dissenting from denial of certiorari in case challenging constitutionality of § 1346, citing “conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies.”)
6. *Skilling*, 130 S.Ct. at 2907.
7. *Id.*
8. *Id.* at 2908.
9. *Id.* at 2911.
10. See *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009); see also *Skilling*, 130 S.Ct. at 2912 (noting Fifth Circuit’s failure to address claim).
11. See, e.g., *United States v. Davidson*, No. 09-13388, 2010 U.S. App. LEXIS 20966 (11th Cir. Oct. 8, 2010) (reversing conviction because conduct forming basis of conviction was solely undisclosed conflict of interest); *United States v. Lopez-Lukis*, 2:95-cr-4-FtM-29DNF, 2011 U.S. Dist. LEXIS 14609 (M.D. Fla. Feb. 14, 2011) (reversing conviction based upon honest services theory of prosecution which did not involve bribery or kickbacks).
12. See *Wagoner*, at 1163 (citing *Wall Street Journal* articles about the decision).
13. See *United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995).
14. The instruction permitted conviction for honest services fraud if the jury found that the public official “intended to alter [his] official action[] as a result of the receipt of campaign contributions or other benefits.” *Siegelman*, 2011 WL 1753789 at \*13 & n.26.
15. See, e.g. Ala. Code § 36-25-1(20) (discussed in Edward A. Hosp, *The 2010 Changes to Alabama’s Ethics Law*, *The Alabama Lawyer*, (March 2011)).



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# Why and How Alabama Courts Should Use Parenting Coordination in Divorce Cases

By **Joi T. Montiel**

The most dominant factor in a child's psychological and social adjustment after a divorce is not necessarily the divorce itself; instead, it likely is the frequency and intensity of the parental conflict prior, during and after the divorce.<sup>1</sup> The child's exposure to parental conflict may cause depression, substance abuse, educational failure and "perpetual emotional turmoil."<sup>2</sup> Thus, in the best interest of the children of divorced couples, courts and practitioners should turn to mechanisms for resolving conflicts in ways that minimize the degree and frequency of parental conflict.<sup>3</sup> A relatively new and unfamiliar mechanism that accomplishes those goals is Parenting Coordination.

Parenting Coordination does not fit into a category of familiar extra-judicial roles, such as arbitration, mediation or reference. Thus, it has been challenged as an improper delegation of judicial authority, particularly in the absence of a statute or court rule specific to Parenting Coordination.<sup>4</sup> Alabama does not have a statute or court rule specific to Parenting Coordination, yet some Alabama courts are using it. No Alabama appellate court has addressed the question of whether and how this mechanism may be used in Alabama. This article proposes that, because an Alabama court has inherent authority to ensure the best interest of the children, an Alabama court has the authority to appoint a Parenting Coordinator even without a statute or court rule. The appointment is justifiable where the parents will otherwise be engaged in frequent conflict, and the appointment is in the best interest of the

children involved because of the unique benefits that a qualified Parenting Coordinator can provide. This is true, however, only when appointment is crafted in such a way that the coordinator can provide the full benefits without usurping judicial authority. This article offers a paradigm for constructing such an appointment.

## What Parenting Coordination Is and Is Not

A Parenting Coordinator assists high-conflict parents in resolving disputes that arise in the parents' efforts to jointly parent their children after a divorce. Although Parenting Coordination is an "alternative" means of dispute resolution, it is not mediation or arbitration. Nor is a Parenting Coordinator a special master or a guardian ad litem. Parenting Coordination cannot be understood as anything other than a "legal-psychological hybrid."<sup>5</sup>

Parenting Coordination is different from other dispute resolution mechanisms in that, in addition to resolving the instant conflict, the coordinator simultaneously *educates*<sup>6</sup> the high-conflict parents to minimize the degree and frequency of *future* conflict.<sup>7</sup> Parenting Coordination incorporates elements of "parent education and coaching, mediation, arbitration, judicial reference and child custody evaluation."<sup>8</sup> The teaching component of Parenting Coordination provides benefits that other alternative dispute resolution processes

and extra-judicial roles do not. The theory of Parenting Coordination is summed up by the adage: “Give a man a fish and he will eat for a day. But, teach him to fish, he will eat for a lifetime.”<sup>9</sup>

## Why Alabama Courts Should Use Parenting Coordination

Ideally, a parenting plan incorporated into a divorce judgment will specify in detail the terms governing the post-divorce relationship so as to avoid opportunities for frequent conflict. However, often a parenting plan is not sufficiently specific, thus allowing for frequent opportunities for conflict. And even the most detailed parenting plan cannot contemplate every situation that will arise. Children’s ages, interests and activities change; parents remarry and relocate. A parenting plan that appeared to contemplate and address every opportunity for conflict when the children were three and five years old will not necessarily contemplate and resolve every conflict that will arise when those same children are 13 and 15. If the divorced parents do not have the ability to resolve the conflicts that arise during that period, they likely will be back in court. The “teaching” component of Parenting Coordination that distinguishes it from other dispute resolution processes reduces the frequency and degree of these conflicts to the benefit of the court system, the children of divorce and the high-conflict parents.

Parenting Coordination benefits the court system. High-conflict parents use a disproportionate amount of the court’s time and resources, converting the judicial system into a type of “social service agency.”<sup>10</sup> One study has shown that family courts and associated professionals spend approximately 90 percent of their time on about 10 percent of parents.<sup>11</sup> Use of a Parenting Coordinator can mitigate this impact on the court system. In the short term, a coordinator will assist the parents in mutually resolving a given conflict or, if necessary, make a decision<sup>12</sup> that will resolve the instant conflict without court involvement. There are also long-term benefits of Parenting Coordination. In assisting the parents in resolving a given conflict, the coordinator will equip the parents with the



The use of a coordinator can allow for a more harmonious—or at least a less hostile—environment for the children.

skills to resolve future conflict on their own. Thus, when future conflicts arise, the parents may not need to resort to the courts—or even a Parenting Coordinator. One study showed a reduction in approximately 75 percent of child-related court filings after Parenting Coordination was implemented.<sup>13</sup>

Additionally, Parenting Coordination benefits the children of divorced parents. The use of a coordinator can allow for a more harmonious—or at least a less hostile—environment for the children. Parental conflict is detrimental to the children of divorce.<sup>14</sup> If, instead of using a Parenting Coordinator to resolve conflict, the parents turn to the adversarial environment of the court system every time they have a conflict, then they are unlikely to develop the skills and abilities to resolve the conflict on their own. In the meantime, that litigious environment in the respective households works to the detriment of the children; it is in the best interest of the children for their divorced parents to amicably and quickly resolve conflicts as they arise.

Parenting Coordination also benefits the high-conflict parents. As a practical matter, when small conflicts arise between parents post-divorce, the parents may need a speedy resolution. The court often cannot hear the case soon enough to meaningfully resolve the conflict.<sup>15</sup> In contrast, a Parenting Coordinator is much more accessible than a judge, and a coordinator can help the parents solve the problem expeditiously when the parents are unable to do so. The parents also benefit from the

process in that the coordinator should equip them with the ability to resolve future conflicts on their own. Thus, in the long run, the process will be less expensive for the parents than the adversarial system. Although the parents will pay the Parenting Coordinator, if they instead seek to resolve their dispute in the adversarial environment of the court, they would have to pay their own attorneys. Further, by using the adversarial system rather than a coordinator, they would also be more likely to return to court again and again, paying their lawyers again and again. In contrast, where Parenting Coordination is successful, future litigation and parental conflict will dramatically decrease.

## Alabama Courts Have Authority to Use Parenting Coordination

Because Parenting Coordination does not fit into a category of familiar extra-judicial roles, opponents have challenged it as being an improper delegation of judicial authority,<sup>16</sup> particularly where no statute or court rule specifically authorizes the appointment of a coordinator. Although 13 states have adopted court rules or statutes authorizing the appointment of a Parenting Coordinator,<sup>17</sup> courts in many states are appointing coordinators without express authority from a statute or court rule.<sup>18</sup> Some courts in Alabama are doing so.<sup>19</sup> Where, as in Alabama, the Parenting Coordinator’s role is dependent on a court order—that is, where there is no statute or rule that provides for its appointment—the question arises whether the court has the authority to order the appointment. Can that authority be based on existing laws permitting a court to send a matter to mediation or arbitration or to appoint a special master? Can that authority be based on a court’s inherent authority? Even without an authorizing statute or court rule, Alabama courts do have the authority to appoint a Parenting Coordinator. However, that authority cannot depend upon statutes and rules authorizing other alternative dispute mechanisms or appointments such as that for a special master or guardian ad litem.

Parenting Coordination borrows aspects of several different extra-judicial devices that courts are authorized to use.

For example, a coordinator acts as a mediator when he assists the parents in resolving a dispute. When he makes a decision or recommendation, he acts as an arbitrator or special master. However, a Parenting Coordinator differs from a mediator, arbitrator and special master in fundamental ways.<sup>20</sup> Nevertheless, statutes and rules that authorize a court's use of those alternative devices do not necessarily authorize a court's use of Parenting Coordination.<sup>21</sup>

If a coordinator is appointed under a statute or court rule authorizing some other process such as mediation or reference, the coordinator will be limited by the procedures prescribed by the authorizing statute or rule. If he operates outside those limits, he is subject to allegations that he has violated the statute or rule that was the ostensible basis for the appointment.<sup>22</sup> At the same time, if the coordinator does adhere to the procedures prescribed by a statute that authorizes mediation or arbitration, for example, he is not conducting Parenting Coordination with all of its benefits. To maximize the potential of a Parenting Coordinator, the court's appointment should not rest on statutes or court rules authorizing a court to utilize other processes, such as mediation, arbitration or reference to a special master. Instead, the court should look to other potential sources of authority that support the appointment of a coordinator in Alabama.

For example, an Alabama court's authority to enter orders regarding custody and visitation of children is based on a court's general equity powers.<sup>23</sup> As an equity court, an Alabama court has "broad judicial discretion" in its role as "protector of the welfare of minor children," and its discretion is subject only to the limitation that the court "may not act contrary to the best interest of the child."<sup>24</sup> The Alabama Court of Civil Appeals has stated that there is "no wider area for the exercise of judicial discretion than that of providing for and protecting the best interests of children."<sup>25</sup> And the court's power is "without limit so long as it serves the best interests of the children."<sup>26</sup> Thus, the appointment of a Parenting Coordinator is allowed under the court's broad inherent equity powers, acting as *parens patriae* in the best interest of the children.<sup>27</sup> The appointment of a coordinator could be upheld pursuant to the court's inherent authority to enforce its orders and judgments.<sup>28</sup> Thus,

even without an authorizing statute or court rule, Alabama courts have the authority to appoint a Parenting Coordinator.

## How Alabama Courts Should Use Parenting Coordination

Of course, even with a basis for authority to make the appointment, a court cannot make an appointment that constitutes an improper delegation of judicial authority.<sup>29</sup> Thus, the role of the coordinator should be appropriately limited so as not to usurp the court's judicial authority, and the parameters of the role should be set out in advance.<sup>30</sup> Below are some limitations that a court should impose on the appointment of a coordinator in its order of appointment. These limitations will allow Parenting Coordination to provide all the benefits it has to offer without usurping the court's judicial authority.

### A court must appoint only a qualified Parenting Coordinator.

A Parenting Coordinator must be adequately qualified to serve in this legal-psychological hybrid role. One of the fundamental aspects of Parenting Coordination is that it provides high-conflict parents with the skills to avoid or resolve future conflict *independently* of the court system, their lawyers and even the coordinator. Parenting Coordination can be justified only if the individual appointed to serve as the coordinator is qualified to equip the parents with those skills. Because Parenting Coordination is "practicing at the interface of the legal/psychological fields,"<sup>31</sup> a coordinator must have adequate training in both fields to fulfill the demands of this role.

Thus, the typical psychologist and the typical practicing attorney—even the typical family lawyer—is probably not qualified to serve as a Parenting Coordinator. A coordinator should have additional qualifications for practicing at the interface of the fields of law and psychology, such as certification as a family law mediator. In addition, the coordinator should be trained specifically in the particularities of Parenting Coordination.<sup>32</sup>

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The Association of Family and Conciliation Courts (“AFCC”) Task Force on Parenting Coordination specifies that a Parenting Coordinator:

... shall be required to have training and experience in family mediation. The PC should become a certified/qualified mediator under the rules or laws of the jurisdiction in which he or she practices, if such certification is available[;]

... shall be a licensed mental health or legal professional in an area relating to families, or a certified family mediator under the rules or laws of the jurisdiction with a master’s degree in a mental health field[;]

... should have extensive practical experience in the profession with high conflict or litigating parents [;and]

... shall have training in the parenting coordination process, family dynamics in separation and divorce, parenting coordination techniques, domestic violence and child maltreatment, and court specific parenting coordination procedures.<sup>33</sup>

There is little to no legal or practical justification for the appointment of a Parenting Coordinator if the individual appointed to serve is not adequately qualified. The teaching component of Parenting Coordination is what broadcasts the benefits of Parenting Coordination into the future in the best interest of the children. The teaching component is also an element that judges, mediators, arbitrators and special masters cannot provide. Appointment of a coordinator can be justified only where the full benefits of Parenting Coordination can be bestowed, and the full benefits of Parenting Coordination can be bestowed only where a properly qualified coordinator is appointed. Thus, courts must limit the appointments to only individuals uniquely qualified to serve in the role of Parenting Coordinator.

### An Alabama court should appoint a Parenting Coordinator only after entering an order.

A coordinator should be appointed after a court has entered a pendente lite order establishing visitation during the pendency of the divorce proceeding or


has entered a judgment of divorce that includes a final custody determination and a parenting plan. Limiting the appointment only after the court has entered an order, and thus limiting the coordinator’s role to implementing the pre-existing court order, ensures that Parenting Coordination is lawful.

Where conflicts arise between the divorced parents, the coordinator should first assist the parents in reaching an agreement. If this is not possible, the coordinator should<sup>34</sup> make a decision that is consistent with the court’s order. The coordinator is not free to take independent action but is always bound by the terms of the court’s order in the case. Boiled down to its essence, the Parenting Coordinator simply assists the parents in their attempt to comply with the court order.<sup>35</sup> Limiting the coordinator’s role to implementing the pre-existing court order, while counseling and educating along the way, allows the coordinator to address the problems that it was designed to remedy without usurping the court’s judicial authority.<sup>36</sup>

### A court should appoint a Parenting Coordinator only upon findings that the case is a “high-conflict” case and the appointment is in the best interest of the children.

A court should appoint a Parenting Coordinator only when it has determined that those children would otherwise be exposed to persistent post-divorce parental conflict. More specifically, the court should find (1) that the case is a “high-conflict” case, and, (2) that the appointment of the Parenting Coordinator is in the best interest of the children. For example, the State of Oklahoma has had a Parenting Coordinator statute longer than any other state. The Oklahoma statute requires these findings for appointment of a coordinator without consent of the parents.<sup>37</sup> A “high-conflict case” under the Oklahoma Parenting Coordinator Act is a case involving minor children where

the parties demonstrate a pattern of ongoing litigation, anger and distrust, verbal abuse, physical aggression or threats of physical aggression, difficulty



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in communicating about and cooperating in the care of their children . . . .<sup>38</sup>

An Alabama court should make similar findings about the case to justify the appointment of a coordinator, as well as a finding that the appointment would be in the best interest of the children.

Allowing the appointment of a Parenting Coordinator only when the case is high-conflict and when the appointment is in the best interest of the children provide justification for the appointment.

### **The Parenting Coordinator's decision must be subject to review by the appointing court, and procedures for review must be established by the order of appointment.**

A court's order of appointment should establish that any decision by the Parenting Coordinator is binding pending review. In addition, the order should set out procedures and deadlines for objecting to any decisions of the coordinator.

To maximize the benefits of Parenting Coordination, the coordinator should have some degree of decision-making authority.<sup>39</sup> On the other hand, there must be adequate opportunity for review of that decision by the court. Delegation of *final* decision-making authority to a Parenting Coordinator is an improper delegation of judicial authority.<sup>40</sup> At the same time, if the coordinator's decision is subject to a lengthy and tedious review process, one of the primary benefits of Parenting Coordination—expeditious resolution of conflict—is sacrificed. Thus, a legal and effective Parenting Coordination appointment must strike a balance between review that is adequate but is not so burdensome as to render Parenting Coordination futile.

A coordinator's reviewable decision should be immediately effective. "Staying" the effectiveness of a coordinator's decision until the parents can get before the court for approval undermines the goal of the coordinator to facilitate expedient resolution of conflicts. The foregoing is justifiable if the court finds that the case is a high-conflict case, that the appointment is in the best interest of the children and that the coordinator is simply making a decision that is consistent with a pre-existing order of the court.



Appointment of a Parenting Coordinator is advantageous in high-conflict divorce cases, which are a burden on the court system and have a detrimental impact on the children of the divorced parents.

### **Conclusion**

Appointment of a Parenting Coordinator is advantageous in high-conflict divorce cases, which are a burden on the court system and have a detrimental impact on the children of the divorced parents. A qualified coordinator can provide substantial benefits to parents, children and the court system. Because an Alabama court has inherent authority to ensure the best interest of the children even without a Parenting Coordination statute or court rule, the court has the authority to appoint a coordinator. The appointment is justifiable where the parents will otherwise be engaged in frequent conflict and the appointment is in the best interest of the children of the divorce because of the substantial benefits that a qualified coordinator can provide. This is true, however, only when appointment is crafted in such a way that the coordinator can provide the full benefits of Parenting Coordination without usurping the judicial authority. Where the benefits of and limitations on the role are properly balanced, Parenting Coordination can relieve the burden on the court system and the detrimental impact on children caused by these high-conflict divorces. ▲▼▲

### **Endnotes**

1. See, e.g., John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005).
2. Linda D. Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 497 (2001).
3. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002) ("the adversarial divorce process exacerbates the conditions that create risk for children").
4. See e.g. AFCC, *Parenting Coordination: Implementation Issues*, 41 FAM. CT. REV. 533 (October 2003) [hereinafter AFCC, *Implementation Issues*]; Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 249-50 (2004).
5. Karl Kirkland & Matthew J. Sullivan, *Parenting Coordination (PC) Practice: A Survey of Experienced Professionals*, 46 FAM. CT. REV. 622, 633 (October 2008) (noting also that Parenting Coordination "is not therapy").
6. Karl Kirkland, *Positive Coping among Experienced Parenting Coordinators: A Recipe for Success*, 7 J. OF CHILD CUSTODY 61, 62 (2010) ("Parenting coordinators attempt to teach divorced parents how to function independently of the court to resolve conflicts and implement their own parenting plans.").
7. The Association of Family and Conciliation Courts ("AFCC") defines Parenting Coordination as:  
A child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about their children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.
- AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164, 165 (2006) [hereinafter AFCC, *Guidelines*].
8. Leslie Ellen Shear, *In Search for Statutory Authority for Parenting Coordination Orders in California: Using a Grass-roots, Hybrid Model Without an Enabling Statute*, 5 J. OF CHILD CUSTODY 88, 90 (2008).
9. Elayne E. Greenberg, *Fine Tuning the Branding of Parenting Coordination: ". . . You May Get What You Need,"* 48 FAM. CT. REV. 206, 206 (Jan. 2010).
10. See Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240, 243 (2005).
11. Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 682-83 (October 2009).
12. A Parenting Coordinator should have decision-making authority that he may exercise when the parents cannot reach an agreement with his help. Where the Parenting Coordinator does not have decision-making authority but Parenting Coordination is simply a "hoop" through which the parents must jump before going to court, with their lawyers in tow, the benefits of Parenting Coordination are eroded. See Shear, *supra*

- note viii, at 90 n.4 (stating that although the AFCC Guidelines treat decision-making authority as an optional component of Parenting Coordination, California's family court community, who has experimented with Parenting Coordination for more than a decade, has seen Parenting Coordination decision-making authority as "essential to deterring re-litigation").
13. Henry, *supra* note xi, at 682. In another study, psychologist and Parenting Coordinator Terry Johnston, Ph. D., analyzed 166 cases over a two-year period. In the year before appointment of a Parenting Coordinator, those 166 cases had 993 court appearances among them, an average of six court appearances per case. In contrast, in the year after appointment, those cases had only 37 court appearances among them, an average of .22 court appearances per case. AFCC, *Implementation Issues*, *supra* note iv, at 534 (citing Johnston, T., *Cost Effectiveness of Special Master Use*, unpublished report, 1994).
  14. See *supra* notes i, ii and iii.
  15. For example, assume that a parenting plan prescribes that the father shall have visitation with the children on alternating weekends. The parenting plan also provides that the mother shall have the children on Mother's Day weekend. The parenting plan does not, however, address what will happen when there is a conflict between alternating weekend visitation and Mother's Day weekend visitations. Four weeks from Mother's Day weekend, the parents realize there is a conflict and cannot resolve it. The likelihood of presenting the issue to the court before Mother's Day is slim.
  16. See AFCC, *Implementation Issues*, *supra* note iv, at 533; Coates, *supra* note iv, at 249-50.
  17. For in-depth discussion of other states' approaches to this issue, see Joi T. Montiel, *Is Parenting Coordination a Usurpation of Judicial Authority: Harmonizing Authority for, Benefits of, and Limitations on this Legal-Psychological Hybrid*, 7.2 TENN. J. OF LAW & POL'Y (forthcoming Fall 2011).
  18. See Montiel, *supra* note 17. Precisely how many states are using Parenting Coordination without statutory or rule-based authority is difficult to ascertain. Although the role of a Parenting Coordinator is somewhat similar across jurisdictions, the nomenclature used in the various jurisdictions has "almost been one for each different jurisdiction." Karl Kirkland, *Parenting Coordination (PC) Laws, Rules, and Regulations: A Jurisdictional Comparison*, 5 J. OF CHILD CUSTODY 25, 28 (2008). For example, a Parenting Coordinator may be called a "special master" in California, a "med-arbiter" in Colorado or a "wise-person" in New Mexico. AFCC, *Implementation Issues*, *supra* note iv, at 534 n.3. The AFCC Parenting Coordination study group has recommended the use of the term "Parenting Coordinator." *Id.*
  19. See, e.g., *Cochran v. Cochran*, 5 So. 3d 1220, 1223 (Ala. 2008); *G.R.V. v. M.V.*, 825 So. 2d 116, 118 (Ala. Civ. App. 2001).
  20. See, e.g., *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 774 (Cal. Ct. App. 1997) (holding that Parenting Coordination was not authorized by the statute authorizing reference to a special master because the statute did not give the court authority to refer questions of law, that may include interpretation of existing orders, or to refer unknown future disputes, both characteristics of Parenting Coordination).
  21. Shear, *supra* note viii (explaining statutory schemes such as those for mediation, child custody evaluation, child custody counseling and judicial reference have specific and mutually exclusive requirements, and, therefore, cannot be merged to create the Parenting Coordination model).
  22. Shear, *supra* note viii, at 92 (explaining that invoking laws governing processes such as mediation as the basis for authority for Parenting Coordination "opens the door to court challenges on the grounds of non-compliance with the governing law for each of those models"); see, e.g., *Heinonen v. Heinonen*, 14 P.3d 96, 98-99 (Or. Ct. App. 2000) (determining that the delegation of authority to the Parenting Coordinator was not a permissible form of mediation because the mediation statute did not authorize a court to delegate authority to a mediator to make a binding ruling "against the wishes of one of the parties").
  23. See, e.g., *Stallworth v. Stallworth*, 131 So. 2d 867, 869-70 (Ala. 1961) (explaining that, although the jurisdiction to grant a divorce is statutory and limited, "regardless of the statute, 'whenever the welfare of the children is concerned and the jurisdiction of the court is invoked, the court has an inherent power to enter a decree for their custody and support'").
  24. *Thorne v. Thorne*, 344 So. 2d 165, 168 (Ala. Civ. App. 1977).
  25. *McDaniel v. McDaniel*, 621 So. 2d 1328 (Ala. Civ. App. 1993) (citing *Ex parte Handley*, 460 So. 2d 167 (Ala. 1984)).
  26. *Id.*
  27. See, e.g., *Wise v. Watson*, 236 So. 2d 681, 684 (Ala. 1970) (stating that "equity courts have inherent power to protect the welfare of the minor children born of the broken marriage and to make appropriate allowances for them"); *Clark v. Clark*, 682 So. 2d 1051, 1054-1055 (Ala. Civ. App. 1996) (stating that a court has "wide discretion" to "make such orders in respect to the custody of the children as their safety and well-being may require"); *Cooley v. Cooley*, 284 So. 2d 729, 731 (Ala. Civ. App. 1973) (stating that courts have "the inherent power to fulfill its obligations as *parens patriae* of children brought within its jurisdiction").
  28. See, e.g., ALA. CODE § 12-1-7 (current through end of 2010 special session) ("Every court shall have power . . . [t]o compel obedience to its judgments, orders and process. . . ."); *McMorrough v. McMorrough*, 930 So. 2d 511, 516 (Ala. Civ. App. 2005) ("Alabama law is well established that a trial court has the power to enforce its judgment and to enter such orders as may be necessary to render a judgment effective.").
  29. "As stated by Chancellor Kent, 'The general rule is that judicial offices must be exercised in person, and that a judge cannot delegate his authority to another.'" Opinion of the justices No. 187, 280 Ala. 653, 658, 197 So. 2d 456, 461 (1967) (citing 3 Kent Com. 12th ed. 457) (internal citations omitted). For example, "a court may not delegate a judicial function [to a special master]." *Ex parte Alabama State Personnel Bd.*, 54 So. 3d 886, 894 (Ala. 2010) (quoting *Ex parte Mid-Continent Sys., Inc.*, 447 So. 2d 717, 720 (Ala. 1984)).
  30. "Litigation and appeals to resolve ambiguities, inconsistencies and uncertainties about the scope of the PC's authority . . . will defeat the purposes of the appointment." Shear, *supra* note viii, at 92.
  31. Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576, 581 (July 2004).
  32. A model training curriculum incorporating four modules is included in the AFCC Guidelines. See AFCC, *Guidelines*, *supra* note vii. For an example of training program offerings, see AFCC, <http://www.afccnet.org/training/index.asp> (last visited April 28, 2011).
  33. AFCC, *Guidelines*, *supra* note vii, at 166.
  34. *Id.* at 171 ("A PC should attempt to facilitate agreement between the parties in a timely manner on all disputes regarding their children as they arise. When parents are unable to reach agreement, and if it has been ordered by the court, or authorized by consent, the PC shall decide the disputed issues.").
  35. See, e.g., *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky. App. April 2, 2010) (holding that Parenting Coordination was not an improper delegation of judicial authority because, among other reasons, the Parenting Coordinator was "simply supervising the court's orders" to ensure that the terms of its orders were carried out).
  36. See, e.g., *Yates v. Yates*, 963 A.2d 535, 540-41 (Pa. Super. Ct. 2008) (holding that the court had not improperly delegated its judicial authority because the court had resolved the primary issues regarding custody and visitation and the third-party's role involved "merely the coordination of family therapy," that the court viewed as "ancillary" to custody and visitation).
  37. OKLA. STAT. ANN. TIT. 43, § 120.3(A). Oklahoma allows appointment *with* consent of the parents without any findings by the court. *Id.* However, appointment based only on consent of the parents may be problematic in Alabama. Without a finding by the court that the appointment is in the best interest of the children, the justification for the appointment, even with consent of the parents, is perhaps lacking.
  38. OKLA. STAT. ANN. TIT. 43, § 120.2(2).
  39. See discussion at *supra* note xii.
  40. See *supra* note xxix; see, e.g., *Heinonen v. Heinonen*, 14 P.3d 96 (Or. Ct. App. 2000) (holding that a court cannot delegate final decision-making authority to a Parenting Coordinator even with consent of the parents).



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# Settling the Claims of a Minor

By William E. Shreve, Jr.

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*Editor's Note: An earlier version of this article was published in the October 1993 edition of the Alabama Defense Lawyers Association Journal. The author has revised and updated the 1993 article for publication in The Alabama Lawyer.*

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Lawyers often settle claims of plaintiffs who have yet to reach the age of majority (19)<sup>1</sup> and whose disabilities of nonage have not been otherwise removed.<sup>2</sup> These are commonly known as “pro-ami settlements,” in reference to the *prochein ami* or next friend who brings suit on the minor’s behalf. They involve more than merely paying an agreed amount and obtaining a release. This article will attempt to summarize the case law on pro-ami settlements and serve as a guide for attorneys by answering some basic questions about the process of settling a minor’s claim.

## Why is settling the claim of a minor different than settling the claim of an adult?

A minor lacks capacity to contract. *See S.B. v. Saint James School*, 959 So. 2d 72, 96 (Ala. 2006). Therefore, a minor cannot enter into a binding settlement. *See Hines v. Seibels*, 204 Ala. 382, 86 So. 43, 44 (1920); *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978); 42 Am. Jur. 2d *Infants* § 58 (Westlaw 2010). The contract of a minor is voidable at his election during minority or within a reasonable time thereafter, and once disaffirmed is “void ab initio.” *Standard Motors, Inc. v. Raue*, 37 Ala. App. 211, 65 So. 2d 829, 830 (1953). Settlement agreements and releases are no exception; they are subject to disaffirmance like any other contract. *See Hines*, 86 So. at 44; *Dacanay*, 573 F.2d at 1080; 42 Am. Jur. 2d *Infants* § 58. Furthermore, since *Ala. Code* § 6-2-8 tolls the statute of limitations during minority and allows the minor a period of time after reaching majority to file suit, the minor may disaffirm a settlement and reassert the “settled” claim long after the statute would have otherwise expired.

Thus, a settlement agreement or release executed by a minor is of little or no value, as it leaves the defendant vulnerable to reassertion of the claim whenever the minor chooses.

## Can a minor’s next friend, parent, attorney or guardian ad litem bind the minor to a settlement and release his claims?

No. While a minor “may sue by [his or her] next friend” under *Ala. R. Civ. P.* 17(c), the minor is still “the real party to the suit; his rights are those litigated, and [the] recovery belongs to him” and to no one else. *Maples v. Chinese Palace*, 389 So. 2d 120, 123 (Ala. 1980). Neither the next friend, the minor’s parent, the minor’s attorney nor a guardian ad litem has authority to bind the minor to a settlement or to release the minor’s

claim. *See Abernathy v. Colbert County Hospital*, 388 So. 2d 1207, 1208-1209 (Ala. 1980); *Mudd v. Lanier*, 247 Ala. 363, 24 So. 2d 550, 558 (1946); *Alabama Power Co. v. Hamilton*, 201 Ala. 62, 77 So. 356, 360 (1917); *Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 So. 98, 102-103 (1892); *Collins v. Gillespy*, 148 Ala. 558, 41 So. 930 (1906); *Isaacs v. Boyd*, 5 Port. 388, 392-93 (Ala. 1837).

## How can a defendant settle a minor’s claim and be protected from disaffirmance of the settlement and reassertion of the claim?

This can be done by reaching agreement on settlement with the minor’s next friend, notifying the court of the proposed settlement and asking the court to approve the settlement after a hearing. Where a court, after hearing the facts, determines that a proposed settlement is in the minor’s best interest and enters judgment approving the settlement, the settlement is binding and enforceable and bars future claims for the same injury. *See Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988); *Large v. Hayes*, 534 So. 2d 1101, 1105 (Ala. 1988); *Chambers County Comm’rs v. Walker*, 459 So. 2d 861, 866-68 (Ala. 1984); *Tennessee Coal, Iron & R. Co.*, 12 So. at 103; 43 C.J.S. *Infants* § 335 (Westlaw 2009).

## What kind of hearing and determination are necessary for valid court approval?

Minors are said to be “wards of the court,” entitled to the court’s protection. *See Stone v. Gulf Am. Fire & Cas. Co.*, 554 So. 2d 346, 361 (Ala. 1989). Courts have the power and duty to determine that any settlement of a minor’s claims is in the minor’s best interest. *See Large*, 534 So. 2d at 1105; *Abernathy*, 388 So. 2d at 1208-09; *Tennessee Coal, Iron & R. Co.*, 12 So. at 103. More than mere pro-forma approval of the settlement is necessary: “Before [a pro-ami] settlement can be approved, there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor.” *Large*, 534 So. 2d at 1105. If the required hearing is not conducted, the settlement is subject to being set aside in an independent action or on a motion under *Ala. R. Civ. P.* 60(b). *See id.*; *Abernathy*, 388 So. 2d at 1208-09; *Burke v. Smith*, 252 F.3d 1260, 1263, 1265-66 (11th Cir. 2001).

*Large v. Hayes*, 534 So. 2d 1101 (Ala. 1988) illustrates a settlement properly approved after a hearing. The suit was a medical-malpractice case involving injuries to a minor causing brain damage and total disability. The trial court heard testimony by the minor’s parents, observed the minor in court, viewed a “day in the life” videotape and reviewed the depositions of the minor’s parents and five physicians. After considering the evidence

regarding the minor's injuries and the dispute as to liability, the court determined the proposed settlement was in the minor's best interest, approved the settlement and entered judgment for the minor based on the terms of the settlement. When the minor's guardian ad litem later challenged the attorney's-fee provisions of the settlement in a collateral proceeding, the Alabama Supreme Court held that since the trial court approved the settlement, including the attorney's fees, after a hearing, the judgment was immune from collateral attack. *Id.* at 1105-07.

*Abernathy v. Colbert County Hospital*, 388 So. 2d 1207 (Ala. 1980) and *Burlington Northern Railroad Co. v. Warren*, 574 So. 2d 758 (Ala. 1990) are examples of cases where parties failed to obtain valid court approval. In *Abernathy*, the purported settlement was "summarily approved without a hearing" and a consent judgment entered in favor of the minor for the settlement amount. *Id.*, 388 So. 2d at 1208. The supreme court held the trial court erred in denying the minor's motion to vacate the judgment. *Id.* at 1209. In *Burlington Northern*, a death case under the Federal Employers Liability Act, the trial court held a hearing in chambers at which the mother of the minor beneficiaries of the decedent's estate testified concerning her understanding and approval of the settlement, but the court "did not focus on whether the proposed settlement would be in the best interest of the children." *Id.*, 574 So. 2d at 762. The supreme court, in *dicta*, stated this was insufficient to approve the settlement. *Id.* at 761-62.

The supreme court has emphasized that the trial court must make the final determination as to whether the settlement is in the minor's best interest, regardless of any agreement by the minor's next friend. In *Tennessee Coal, Iron & Railroad Co. v. Hayes*, 97 Ala. 201, 12 So. 98 (1892), the court stated:

[The next friend's] mere consent is nugatory. It is as if it were not, and had never been. The court may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon; but this is not because of the agreement at all—that should exert no influence—but because it appears from the evidence that the amount is just and fair, and a judgment therefore will be conservative of the minor's interests.

*Tennessee Coal, Iron & R. Co.*, 12 So. at 103. Since the next friend's consent is "nugatory," a court could conceivably approve a defendant's offer of settlement over the next friend's objection if it found the terms proposed to be in the minor's best interest. See *Dacanay*, 573 F.2d at 1080; 42 Am. Jur. 2d *Infants* § 188 (Westlaw 2010). The *Tennessee Coal* case in effect makes the defendant the offeror and the court the offeree as to the settlement, since it is the court that must "accept" the offer of settlement.

## What is the effect of settlement approved after a hearing?

"A compromise approved by the court is valid and binding, and an approved settlement of a claim...bars a subsequent action...to

# A next friend who is not an attorney lacks authority to "practice law on behalf of [the] minor."

recover for the same injuries." 43 C.J.S. *Infants* § 335 (Westlaw 2009). See *Chambers County Comm'rs*, 459 So. 2d at 864-66. The judgment approving the settlement is immune from collateral attack. See *Large*, 534 So. 2d at 1105. "[A] minor fully represented in court...is bound by a valid judgment in the same manner as any other party." *Wheeler v. First Ala. Bank*, 364 So. 2d 1190, 1200 (Ala. 1978).

## Is it necessary for the court to appoint a guardian ad litem to represent the minor's interest?

No, it is not, as long as the minor has a lawyer, and as long as the next friend has no conflict of interest and is adequately representing the minor's interest. But the

parties may wish to have a guardian ad litem appointed, or the court may decide to appoint one, even though not required.

A guardian ad litem is "a special guardian appointed by the court in which the particular litigation is pending to represent an infant, ward or unborn person in that particular litigation." *Sharp v. Hanceville Nursing Home, Inc.*, 719 So. 2d 243, 244 (Ala. Civ. App.), *cert. denied* (Ala. 1998) (quoting from *Black's Law Dictionary* 706 (6<sup>th</sup> ed. 1990)). Rule 17(c) of the *Alabama Rules of Civil Procedure* requires appointment of a guardian ad litem for "a minor defendant," and further provides that a court may appoint a guardian ad litem to represent the interest of "an infant unborn or unconceived." Neither Rule 17(c) nor any other provision of Alabama law requires appointment of a guardian ad litem for a minor plaintiff in order to effect a pro-ami settlement. Since the next friend has fiduciary duties to the minor, and since the function of a guardian ad litem is similar to that of a next friend, a guardian ad litem is generally not required where the minor already has a next friend. See *Burke*, 252 F.3d at 1264; *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Pate v. Perry's Pride, Inc.*, 348 So. 2d 1038, 1040 (Ala. 1977); 43 C.J.S. *Infants* § 321 (Westlaw 2009).

A next friend who is not an attorney lacks authority to "practice law on behalf of [the] minor." See *Chambers v. Tibbs*, 980 So. 2d 1010, 1013 (Ala. Civ. App. 2007). Consequently, a non-attorney next friend must hire a lawyer in order to institute and prosecute a lawsuit on the minor's behalf. See *id.* at 1012-15. A non-attorney next friend's *pro se* action is subject to dismissal, *see id.*, but the court may choose to rectify the situation by giving the next friend an opportunity to seek counsel or by appointing an attorney as the minor's guardian ad litem. See *Berrios v. New York City Housing Auth.*, 564 F.3d 130, 134-35 (2d Cir. 2009); *K.D.H. v. T.L.H. III*, 3 So. 3d 894, 899 (Ala. Civ. App. 2008) ("A guardian ad litem is an attorney entitled to argue his or her client's case to the court as is any other attorney").

In all cases where a next friend brings suit for a minor, courts have a duty to make sure that the next friend "is present and acting in the [minor's] behalf." *Pate*, 348 So. 2d at 1040. It may appear that the next friend has a conflict of interest or for some other reason is not adequately representing the minor's interest. See *id.*; *Malone v. Malone*, 491 So. 2d 932, 933 (Ala. 1986). For example, courts have recognized a conflict where the next friend, usually

one of the minor's parents, has a claim being settled along with the minor's claim, since it is in the next friend's interest that more of the settlement proceeds be apportioned to his claim than to the minor's. *See Pate*, 348 So. 2d at 1040; *Hoffert v. General Motors Corp.*, 656 F.2d 161, 162 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *In re Richardson*, 2010 WL 877558, \*2 (Tex. Ct. App. March 11, 2010); *cf. Malone*, 491 So. 2d at 933. In the event of a conflict, the court should appoint a guardian ad litem who can represent the minor with undivided loyalty. *See Gunter v. Gunter*, 911 So. 2d 704, 709 (Ala. Civ. App. 2005); *Hoffert*, 656 F.2d at 164.

The parties may decide to have a guardian ad litem appointed even where it is not required, because approval of the settlement by a guardian is additional evidence the settlement is in the minor's best interest, helps avoid any appearance of impropriety and may strengthen the perceived *bona fides* of the settlement if later challenged. The court may also want to appoint a guardian ad litem though not required, because a guardian assists the court in determining whether the settlement is in the minor's interest. *See M.C. ex rel. Tatum v. Pactiv Corp.*, 2008 WL 4493312, \*2-3 (M.D. Ala. Oct. 3, 2008) (approving settlement, noting that guardian ad litem determined settlement was in minors' best interest). The court may feel more comfortable approving a settlement if a guardian ad litem has reviewed the case and formed an opinion that the compromise is in the minor's interest.

There is authority that a court cannot appoint a guardian ad litem where the minor is already adequately represented, *see T.W. v. Brophy*, 124 F.3d 893, 895-96 (7th Cir. 1997), or where the guardian will provide services already being performed, *see Blocton v. McNair*, 675 So. 2d 452, 454 (Ala. Civ. App. 1996).

Parties rarely oppose appointment of a guardian ad litem, so the court's authority to make the appointment is usually not an issue.


## What steps need to be taken to get a settlement approved by the court?

One of the parties, or the parties jointly, should file a motion that notifies the court of the proposed settlement and asks the court to set the matter for hearing and approve the settlement. Once a hearing date is set, the defense attorney should make arrangements to have a court reporter present. If the settlement is ever challenged, a transcript provides evidence that the trial court conducted a substantive hearing and examined the facts to ensure that the settlement was in the minor's best interest. *See Large*, 534 So. 2d at 1104; *Burlington N.R. Co.*, 574 So. 2d at 762. The defense lawyer should also prepare a proposed order approving the settlement and submit it to the court after the hearing.

If there is no lawsuit pending, a complaint must be filed to get the claim before the court. The defense attorney usually prepares a complaint for execution by the minor's attorney, and then files the complaint along with the defendant's answer and a motion to approve the settlement.

## What testimony and evidence should be introduced at the hearing?

The hearing should focus on whether the settlement is in the minor's best interest in view of the evidence of injury and liability. *See Large*, 534 So. 2d at 1105. Other factors bearing on the



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merits of the settlement, such as “the financial responsibility of the defendant [including available insurance coverage], the expenses incident to the procurement of testimony, [and] the delay of judicial proceedings,” may also be considered. *Rafferty v. Rainey*, 292 F. Supp. 152, 154 (E.D. Tenn. 1968) (internal quotation marks omitted).

The next friend, guardian ad litem (if one is appointed) and the minor (if capable) should all testify. The next friend and guardian ad litem should testify concerning the minor’s injuries, medical treatment and current status, and their understanding and approval of the settlement as in the minor’s best interest. The minor should be present so the court can see him in person and examine his injuries if the court wishes to do so. The minor may testify concerning how he was injured, the extent of his injuries, his recovery from the injuries and, if old enough to do so, his understanding and approval of the settlement. The minor’s medical records, depositions taken in the case and any other testimony or evidence relevant to the minor’s injuries or the dispute as to liability should also be introduced.

Attorney’s fees are subject to approval like all other aspects of a pro-ami settlement. See *Madison County Dep’t of Human Resources v. T.S.*, 2009 WL 3415290 (Ala. Oct. 23, 2009); *Peck*, 581 So. 2d at 802; *Ex parte Peck*, 572 So. 2d 427, 428-29 (Ala. 1990); *Large*, 534 So. 2d at 1104-07; *Hoffert*, 656 F.2d at 164-65; *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 673 (6th Cir. 1988). Accordingly, the minor’s attorney should offer testimony or an affidavit concerning the attorney’s representation and fee arrangement, sufficient for the court to decide whether the fee is

reasonable. The reasonableness of an attorney’s fee is determined under the criteria set forth in *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983), which are as follows: (1) “the nature and value of the subject-matter of the employment”; (2) “the learning, skill, and labor requisite to its proper discharge”; (3) “the time consumed”; (4) “the professional experience and reputation of the attorney”; (5) “the weight of his responsibility”; (6) “the measure of success achieved”; (7) “the reasonable expenses incurred by the attorney”; (8) “whether a fee is fixed or contingent”; (9) “the nature and length of a professional relationship”; (10) “the fee customarily charged in the locality for similar legal services”; (11) “the likelihood that a particular employment may preclude other employment”; and (12) “the time limitations imposed by the client or by the circumstances.” *Id.* at 140-41. See also *Van Schaack v. AmSouth Bank*, 530 So. 2d 740, 749 (Ala. 1988). The supreme court has stated that while “all of these criteria need not support the amount awarded—indeed, rarely would all 12 criteria be applicable in a case,” they are “available for the trial court to consider” in awarding fees. *Knox Kershaw, Inc. v. Kershaw*, 598 So. 2d 1372, 1374-75 (Ala. 1992). If the fee provisions of the settlement are ever challenged, “[a] reviewing court should be able to ascertain from the record what factors the trial court considered in awarding the attorney fee.” *Peck*, 572 So. 2d at 429.

The guardian ad litem’s fee is discretionary with the court. See *Englund v. First Nat’l Bank*, 381 So. 2d 8, 12 (Ala. 1980). The guardian should also offer testimony or an affidavit concerning his services so the court will have a basis for determining the fee under the *Peebles* criteria.

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As noted above, the hearing should be transcribed by a court reporter. The goal is to make sure that if the settlement is ever challenged, the record will be sufficient to show that the trial court conducted a meaningful hearing and considered substantial relevant evidence as to whether the settlement was in the minor's best interest before approving the settlement. *See Large*, 534 So. 2d at 1104-06.

### What should be included in the order approving the settlement?

The defense lawyer should prepare an order that includes a description of the minor's claim and the facts of the case, the terms of the proposed settlement and a specific finding that the settlement is in the minor's best interest. The order should enter judgment for the minor in the amount of the settlement. *See Chambers County Comm'rs*, 459 So. 2d at 866; *Large*, 534 So. 2d at 1104-1105; *Parker v. Dallas County Bd. of Educ.*, 2005 WL 2456981, \*2 (S.D. Ala. Oct. 5, 2005).

If an attorney's fee is to be paid out of the settlement, the order should specify the fee, determine that it is reasonable and direct the clerk of court to pay the fee out of the settlement proceeds. The order, insofar as it concerns the attorney's fee, "must allow for meaningful appellate review by articulating the decisions made, the reasons supporting those decisions, and how [the court] calculated the attorney fee." *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 553 (Ala. 2004). *See also Madison County Dep't of Human Resources*, 2009 WL 3415290, \*4-5. If a guardian ad litem was appointed, the order should include a space for the court to specify the guardian's fee and tax it as costs against the defendant or as the court otherwise finds appropriate. *See Ala. R. Civ. P.* 17(d) and 54(d); *Englund*, 381 So. 2d at 12; *M.C. ex rel. Tatum*, 2008 WL 4493312, \*3. If the parties anticipate that the amount of the guardian's fee may be an issue, the order should also explain how the court calculated this fee, so that an appellate court can review it. *See Reynolds v. First Ala. Bank*, 471 So. 2d 1238, 1244-45 (Ala. 1985).

The order should also include an accurate account of what occurred at the hearing, including a description of the testimony and evidence presented. This description should contain enough detail so that if the hearing is not reported or a transcript is unavailable, the order itself will provide a record that the court conducted a hearing involving an extensive examination of the facts to determine whether the settlement was in the minor's interest, sufficient to uphold the settlement if later challenged.

For example, in an automobile-accident case, the order approving a pro-ami settlement might state as follows:

This cause came before the court on the defendant's motion for approval of pro-ami settlement. The plaintiff is John Doe, a minor age 16, suing by and through his mother and next friend, Jane Doe. The defendant is ABC Co.

The plaintiff's claim arises out of a vehicular accident that occurred on or about January 1, 2010, on Highway 90 in

The goal is to make sure that if the settlement is ever challenged, the record will be sufficient to show that the trial court conducted a meaningful hearing and considered substantial relevant evidence as to whether the settlement was in the minor's best interest before approving the settlement.

Mobile County, Alabama. The complaint alleges that an employee of ABC Co., operating an ABC vehicle within the line and scope of his employment, negligently caused or allowed the vehicle to strike the plaintiff's vehicle, proximately resulting in personal injuries to the plaintiff. The plaintiff filed this action against ABC by and through his next friend to recover damages for his injuries. The defendant denies liability and has asserted affirmative defenses including contributory negligence.

The plaintiff is represented by an attorney, Richard Roe, retained by plaintiff's next friend. The court has also appointed a guardian ad litem to represent the plaintiff's interest.

The parties propose to settle this case based on payment by the defendant of

\$15,000 in full satisfaction of all claims of the plaintiff arising out of the accident. Thirty-three and one-third (33 1/3 percent) of the settlement proceeds, or \$5,000, is to be paid to the plaintiff's attorney as his attorney's fee. In addition, \$1,500 of the settlement proceeds is to be paid to the attorney as reimbursement for expenses incurred in filing and prosecuting this action.

The court conducted an evidentiary hearing on June 1, 2010. The plaintiff was present in court, along with his next friend, guardian ad litem and attorney. The plaintiff testified concerning the facts surrounding the accident, the extent of his injuries, his current condition and his understanding and approval of the settlement. The plaintiff testified that the ABC driver ran a stop sign and struck the passenger side of the vehicle the plaintiff was driving, that the plaintiff sustained cuts and bruises and painful neck and back strains that required medical treatment, that the plaintiff missed a week from school, and that the plaintiff has now fully recovered. The ABC driver denies running the stop sign and testified at his deposition that the plaintiff pulled out in front of him. The next friend and guardian ad litem testified concerning the plaintiff's injuries and medical treatment and their understanding and approval of the settlement. Both expressed an opinion that the settlement is in the plaintiff's best interest. The plaintiff's attorney testified concerning his representation of the plaintiff, the terms of his contingency-fee arrangement and his costs incurred in prosecuting this action. The attorney's testimony addressed the factors set forth in *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983) for determining the reasonableness of an attorney's fee. The court also admitted into evidence the depositions of the ABC driver and the plaintiff's physicians, and also the plaintiff's medical records. The court understands from the pleadings, evidence and representations of counsel for the parties that there is a substantial dispute as to liability.

Upon consideration of the testimony and other evidence introduced at the hearing, the court finds and determines

that the proposed settlement is fair, reasonable and just and is in the best interest of the minor plaintiff and should be approved by the court. It is accordingly ORDERED, ADJUDGED, and DECREED as follows:

- (1) The settlement proposed by the parties is approved.
- (2) Judgment is entered in favor of the plaintiff and against the defendant in the amount of \$15,000.
- (3) The plaintiff's attorney, Richard Roe, is entitled to an attorney's fee in the amount of \$5,000 and costs in the amount of \$1,500, which shall be satisfied out of the said judgment awarded the plaintiff. The court finds that the attorney's fee is reasonable under the factors set forth in *Peebles*, 439 So. 2d 137, and has been duly earned by plaintiff's counsel. The attorney represented the minor plaintiff for personal injuries sustained in a car accident; the representation required significant learning, skill and labor for its proper discharge; the attorney spent 40 hours on the case; the attorney has 10 years' experience practicing law and has a very good reputation; the attorney achieved a successful result, i.e., a favorable settlement considering the injuries and the significant dispute as to liability; the attorney incurred \$1,500 in expenses; the attorney and the next friend agreed on a one-third contingency fee, which is customary for such cases in this county; and the attorney devoted time to this case that could have been profitably spent on other matters. This evidence supports the reasonableness of the attorney's one-third contingency fee.
- (4) Upon payment by defendant of the judgment amount to the clerk of the court, the clerk shall pay the sum of \$6,500 to Richard Roe for his attorney's fee and expenses. The clerk shall hold and invest the remainder of the judgment amount for the benefit of the plaintiff until such time as a conservator is appointed for the plaintiff by the probate court or until such time as the plaintiff reaches the age of majority if no conservator is appointed.
- (5) A guardian ad litem fee of \$650 is hereby awarded and taxed as costs against the defendant. The court finds that the guardian's fee is reasonable under the factors set forth in *Peebles*, 439 So. 2d 137, and has been duly earned by the guardian ad litem. The guardian represented the minor plaintiff's interest for personal injuries sustained in a car accident; the representation required significant learning, skill and labor for its proper discharge; the guardian spent

four hours on the case; the guardian has 15 years' experience practicing law and has an excellent reputation; the result for the minor is a favorable settlement considering the injuries and the significant dispute as to liability; the guardian incurred \$50 in expenses; a guardian ad litem fee of \$150 per hour is customary for such cases in this county; and the guardian devoted time to this case that could have been profitably spent on other matters. This evidence supports the reasonableness of the guardian ad litem fee.

- (6) Upon payment of the judgment to the clerk of the court, the defendant shall have discharged its obligations under the settlement and shall be discharged and released from any further liability to the plaintiff arising out of the accident made the basis of this lawsuit, and all claims that were or possibly could have been asserted in this action by the plaintiff against the defendant are hereby merged in this judgment and forever barred.

For other examples of orders approving pro-ami settlements, see *Chambers County Comm'rs*, 459 So. 2d at 866; *Moton v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 3757157 (M.D. Ala. Nov. 6, 2009); *Kilpatrick v. Walgreen Co.*, 2008 WL 2874697 (M.D. Ala. July 24, 2008); *M.C. ex rel. Tatum*, 2008 WL 4493312; *Brown v. Cemex, Inc.*, 2006 WL 2460911 (S.D. Ala. Aug. 23, 2006); *Griffith v. Springhill Servs., Inc.*, 2006 WL 1537287 (M.D. Ala. May 31, 2006); *Roby v. Benton Express, Inc.*, 2006 WL 1375949 (M.D. Ala. May 19, 2006); *Parker*, 2005 WL 2456981; *Watson v. Agerton*, 2000 WL 829366 (S.D. Ala. May 26, 2000); *In re See N Ski Tours, Inc.*, 2000 WL 284265 (S.D. Ala. Feb. 25, 2000).

### Once the settlement is approved, to whom should the defendant pay the settlement proceeds?

They should be paid to the clerk of the court, to a conservator if one has been appointed or in cases where the settlement does not exceed certain amounts, to a custodian, a guardian or the probate judge.

The defendant can always satisfy its obligation by paying the proceeds to the clerk of the court, regardless of the amount of the settlement or whether the minor has a conservator. The clerk has authority to accept payments in satisfaction of a judgment. See *Ala. Code* § 12-17-93(3). The supreme court has specifically noted the propriety of paying a judgment in favor of a minor to the clerk of the court. See *Smith v. Redus*, 9 Ala. 99, 102 (1846). Unless otherwise specified in the order approving the settlement or other court order, the clerk will hold the settlement proceeds for the minor until the minor reaches majority or until a conservator is appointed who can receive the proceeds for the minor.

If a court has appointed a conservator for the minor under the Alabama Uniform Guardianship and Protective Proceedings Act ("AUGPPA"), *Ala. Code* §§ 26-2A-1 through 26-2A-160, the defendant may pay the settlement proceeds to the conservator. The AUGPPA gives conservators broad powers over the estate and affairs of a minor, including authority to "[c]ollect...assets of the estate" and "[r]eceive additions to the estate," and provides protection for persons dealing in good faith with conservators. *Ala. Code* § 26-2A-151, 26-2A-152(c)(1), (c)(2).

The AUGPPA also provides that if the minor has no conservator, and the settlement does not exceed (a) \$5,000 if payable in a lump sum, or (b) a total of \$25,000 in payments of not more

## **MEDIATION SERVICES** **Appellate – General Civil** **Domestic Relations** **Domestic & Family Violence**

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than \$3,000 per year if payable in installments, the defendant can pay the settlement proceeds to:

- (1) Any person having the care and custody of the minor and with whom the minor resides;
- (2) A guardian of the minor; or
- (3) The judge of probate of the county in which the minor resides, if a resident of this state, or, if a non-resident, to the judge of probate or like officer of the county in which the debtor or creditor resides.

*Ala. Code* § 26-2A-6(a). If payment is made under this provision, the defendant must file a notice of payment with the probate court. *See id.*

If the minor has no conservator and the settlement does not exceed \$10,000, the defendant may create a custodianship and pay the proceeds to the custodian for the benefit of the minor under the Alabama Uniform Transfers to Minors Act (“AUTMA”), *Ala. Code* §§ 35-5A-1 through 35-5A-24. *See Ala. Code* § 35-5A-8(a). The Comment to § 35-5A-8 specifically notes that “a tort judgment debtor of a minor...may create a custodianship under this section.”

The defendant should *not* pay the settlement proceeds to anyone other than the clerk of the court, a conservator or, if the settlement does not exceed the amounts referenced above, to a custodian, a guardian or the probate judge. Unless he or she also happens to be a conservator, or a custodian or guardian with limited authority to accept payments for the minor under the AUGPPA or AUTMA, neither the minor’s parent, next friend, attorney nor guardian ad litem has any right or power to accept the settlement proceeds on behalf of the minor. *See Alabama Power Co.*, 77 So. at 360; *Collins*, 41 So. 930; *Glass v. Glass*, 76 Ala. 368, 371 (1884); *Issacs*, 5 Port. at 392-93. Payment of the judgment “to any person not authorized to receive it will not operate as a satisfaction thereof, and it will not be binding on the infant.” 43 C.J.S. *Infants* § 361 (Westlaw 2010).

## Does a conservator have authority to settle a minor’s claim without court approval?

The AUGPPA gives conservators broad powers over the estate and affairs of a minor. Section 26-2A-152 (“Powers of conservator in administration”) includes the following:

A conservator, acting as a fiduciary in efforts to accomplish the purpose of the appointment, may act *without court authorization or confirmation*, to \*\*\* (19) Pay or contest any claim; *settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise*; and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible.

*Ala. Code* § 26-2A-152(c)(19). “Court” is defined elsewhere in the AUGPPA as “[a] probate court of this state.” § 26-2A-20(3).

Under this statute, is a conservator authorized to settle a minor’s claim independent of any judicial determination that the settlement is in the minor’s best interest? Probably not. At present, there is no Alabama Supreme Court or Court of Civil Appeals decision construing § 26-2A-152(c)(19) or holding that a conservator can settle a minor’s claim with no judicial

approval. The AUGPPA definition of “court” as “a probate court” limits the statute’s effect. If “court” meant courts in general, rather than “a probate court,” the statute would likely empower conservators to settle claims without “authorization or confirmation” by any court. As it is, however, the statute only permits conservators to settle claims without probate court approval, leaving in place Alabama case law requiring other courts’ approval to settle a minor’s claim.

In the author’s opinion, in the absence of a pronouncement by an Alabama appellate court on the issue, attorneys would be well advised to request a hearing and obtain court approval for any settlement of a minor’s claim, even if the minor has a conservator.

## Is court approval required to settle a wrongful-death case where a minor is a distributee of the settlement proceeds?

Approval is probably not required, though the parties may wish to have the settlement approved out of an abundance of caution. There is an exception, however: If the decedent was covered by workers’ compensation and the minor is a plaintiff in the wrongful-death case, then a court must approve the settlement.

*Ala. Code* § 6-5-410(a) provides that “[a] personal representative may commence an action and recover such damages as the jury may assess...for the wrongful act...whereby the death of his testator or intestate was caused...” The term “personal representative” means the executor or administrator of the decedent’s estate. *See Hatas v. Partin*, 278 Ala. 65, 175 So. 2d 759, 761 (1965). Section 6-5-410(c) states that the damages recovered “must be distributed according to the statute of distributions,” i.e., the statutes prescribing the distribution of property of a decedent who died without a will. *See Steele v. Steele*, 623 So. 2d 1140, 1141 (Ala. 1993); *Ala. Code* § 43-8-40, *et seq.*

In death cases filed by a personal representative under § 6-5-410, court approval of settlement is probably not necessary even though a minor is a statutory distributee of the recovery. The minor should not be named as a party, the cause of action is not for any injury to the minor and the damages recoverable are not to compensate for any such injury. *See Maryland Casualty Co.*, 537 So. 2d at 471. Rather, “[t]he Wrongful Death Act...creates the right in the personal representative...to act as agent by legislative appointment for the effectuation of a legislative policy of the prevention of homicides through the deterrent value of the infliction of punitive damages.” *Steele*, 623 So. 2d at 1141. *See also Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986) (only punitive damages are recoverable for wrongful death). The right of action is vested solely in the personal representative. *See Bonner v. Williams*, 370 F.2d 301, 303 (5th Cir. 1966); *Holt v. Stollenwerck*, 174 Ala. 213, 56 So. 912, 913 (1911). The personal representative has the power and authority to settle the claim and to execute a release in favor of the defendant. *See Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612, 615 (1952); *Steenhuis v. Holland*, 217 Ala. 105, 115 So. 2, 3-4 (1927); *Logan v. Central Iron & Coal Co.*, 139 Ala. 548, 36 So. 729, 732 (1904). As a result, the minor’s lack of capacity to contract is not an issue. All of this indicates that court approval is not required.

On the other hand, before a personal representative is appointed, the distributees have the right to settle a wrongful-death claim themselves. *See Hampton v. Roberson*, 231 Ala. 55, 163 So. 644, 645-46 (1935); *Fischer v. Pope*, 229 Ala. 170, 155 So. 579, 580

(1934). In that case, if one of the distributees is a minor, his lack of capacity to contract would be an issue. *See Hines*, 86 So. at 43-44. Also, once a personal representative is appointed and files suit, the representative is said to be “only [a] nominal or formal party” bringing the action “as statutory trustee for the benefit of the [distributees], who are the real parties in interest.” *Board of Trustees of Univ. of Ala. v. Harrell*, 43 Ala. App. 258, 188 So. 2d 555, 557 (1965), cert. denied, 279 Ala. 685, 188 So. 2d 558 (1966). *See also Ex parte Blansit*, 380 So. 2d 859, 861 (Ala. 1980); *Drummond v. Drummond*, 212 Ala. 242, 102 So. 112, 114 (1924); *Kennedy v. Davis*, 171 Ala. 609, 55 So. 104, 105 (1911). A federal judge in the Middle District of Alabama has issued an unpublished decision approving the settlement of a wrongful-death case, stating that “[t]his court’s approval is necessary because the decedent...left surviving him minor children...who will receive a portion of the settlement.” *Roby*, 2006 WL 1375949, \*1. The opinion contains no analysis of the issue, and it is likely that no party opposed having a hearing to approve the settlement. Based on this authority, however, and since a distributee has been described as a “real party in interest,” litigants may wish to obtain court approval out of an abundance of caution.

In death cases brought by a personal representative under § 6-5-410, where minors are statutory distributees and the court has approved a settlement, the defendant can pay the proceeds to one of the persons listed in part 10 of this article, but it should also be sufficient to pay the proceeds to the personal representative. The personal representative has a right or duty to maintain the suit, collect the damages and pay them to the statutory distributees, *see Hatas*, 175 So. 2d at 761; acts as “quasi-trustee” for the distributees, *United States Fidelity & Guaranty Co. v. Birmingham Oxygen Serv., Inc.*, 290 Ala. 149, 274 So. 2d 615, 621 (1973); and holds the proceeds “as a special trust fund” for the distributees, *Board of Trustees of Univ. of Ala.*, 188 So. 2d at 557. Thus, it appears the personal representative has legal authority to accept the proceeds on behalf of all distributees, including minors.

As mentioned above, the situation is different where workers’ compensation is involved. *Ala. Code* § 25-5-11(a) provides that if an employee’s death “for which [workers’] compensation is payable...was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer...[the employee’s] dependents...may bring an action against the other party to recover damages” for the death.<sup>3</sup> Hence, this statute vests the right to bring a wrongful-death case in the employee’s dependents. *See Alabama Power Co. v. White*, 377 So. 2d 930, 932-33 (Ala. 1979). The action is still “deemed to arise under” § 6-5-410, however. *Id.* at 933. *See also Nicholson v. Lockwood Green Eng’rs, Inc.*, 278 Ala. 497, 179 So. 2d 76, 78 (1965).

In death cases brought by minors as dependents under § 25-5-11(a), the minors are parties to the lawsuit. Therefore, a court must approve any settlement of the minors’ claims. *See Maryland Casualty Co.*, 537 So. 2d at 470-71; *Burke*, 252 F.3d at 1262-63 & n.2, 1265-66. Upon approval, the defendant should pay the proceeds to one of the persons listed in part 10 of this article.

## Is the procedure for settlement approval any different in federal court than in state court?

No. Alabama law requiring a hearing to approve the settlement of a minor’s claim applies in diversity cases in federal court. *See Burke*, 252 F.3d at 1264. Moreover, federal courts, like state

courts, have the power and duty to ensure that any settlement proposed is in the minor’s best interest and “are vested with broad authority to inquire into the whole range of issues bearing upon the [minor’s] recovery in order to guarantee that the settlement...[is] in accord with [the minor’s] interests.” *Hoffert*, 656 F.2d at 164. *See also Dacanay*, 573 F.2d at 1079-80; *Dean*, 860 F.2d at 673; *Mealy v. Quality Constr. Co.*, 448 F. Supp. 238, 239 (E.D. Va. 1978); *Hartsfield v. Seafarers Int’l Union*, 427 F. Supp. 264, 266-67 (S.D. Ala. 1977); *Rafferty*, 292 F. Supp. at 154-55. Once approved, the settlement is binding and enforceable as in state court. *See Dacanay*, 573 F.2d at 1080.

Rule 17(c) of the *Federal Rules of Civil Procedure*, which is somewhat different than the corresponding Alabama rule, governs appointment of a guardian ad litem in federal court. *See Burke*, 252 F.3d at 1264; *Roberts v. Ohio Cas. Co.*, 256 F.2d 35, 38 (5th Cir. 1958). There is no requirement that a guardian ad litem be appointed as long as the minor has an attorney and the next friend has no conflict of interest. *See Berrios*, 564 F.3d at 132-35; *Burke*, 252 F.3d at 1264. For the reasons discussed in part 6 of this article, the parties may want to have a guardian ad litem appointed, or the court may decide to appoint one, even though not required.

## Conclusion

A hearing and subsequent approval of a settlement by a court with jurisdiction “cures” the defect of the minor’s incapacity to contract and makes the settlement binding and enforceable. The same defect, lack of capacity to contract, exists in persons mentally incapacitated, and many of the principles discussed in this article apply to settlements with *non compos mentis* plaintiffs as well as minors. *See McAlister v. Deatherage*, 523 So. 2d 387, 388 (Ala. 1988); *Williamson v. Matthews*, 379 So. 2d 1245, 1247 (Ala. 1980); *Emerson v. Southern Railway Co.*, 361 So. 2d 1011, 1012-13 (Ala. 1978).

Make sure that a substantive hearing is conducted, prepare an order approving all aspects of the settlement that will withstand later scrutiny and pay the judgment to someone competent to receive it. The minor’s claim then will be extinguished and the defendant protected from any subsequent action for the same injury. ▲▼▲

## Endnotes

1. *Ala. Code* § 26-1-1(a).
2. *See Ala. Code* §§ 26-13-1 through 26-13-8, permitting removal of disabilities of nonage for minors over 18 by petition filed with a juvenile court, and § 30-4-15 and 30-4-16, providing that marriage removes the disabilities of nonage for minors over 18.
3. *Ala. Code* § 25-5-11(d) states that if the employee has no dependents, the personal representative can bring the action.



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# New MCLE Rule for Inactive and Special Members to Take Effect Next Year

By H. Harold Stephens

In 2010, ASB President Alyce Spruell appointed a task force to evaluate whether a rule change should be proposed to require a bar member returning from an inactive or special member status, or from a suspension or a disbarment, to obtain a minimum number of Mandatory Continuing Legal Education hours, in order to assure, to the extent possible, that such attorney's professional skills and knowledge are current.

The task force noted these two significant issues:

1. As the MCLE Rules are currently written, attorneys returning to the active practice of law are not required to obtain any MCLE hours for the period during which they were inactive, regardless of the length of inactivity, and are required only to pay the fee for their occupational license in order to be immediately reinstated.
2. Twenty-six other states require attorneys to obtain additional MCLE hours prior to or shortly after their return to the active practice of law.

In response to the task force's stated goal of ensuring, to the extent possible, that an attorney is able to provide competent and professional legal services upon his or her return to the active practice of law, the ASB Board of Bar Commissioners adopted the following rule on March 25, 2011:

**2.C. An attorney who has not engaged in the private practice of law, or who has held a Special**

**Membership, for a period in excess of one (1) year, shall be required to complete an equivalent number of MCLE hours, up to a maximum of 24 MCLE hours, prior to being authorized to resume the active practice of law.**

This proposed new rule is pending before the Alabama Supreme Court and passage is expected in the very near future.

Before any panic sets in, please note that this new rule will not affect special members who are subject to the existing exemptions set forth in MCLE Rule 2 (law clerks, attorneys holding public office and members of the military) or special members who are able to claim the exemption provided under MCLE Regulation 2.7 (out-of-state attorneys who are in MCLE compliance in their home state).

To ease into compliance with this new rule, a notice will be accompanying the 2011-2012 Annual Licensing Invoice advising all ASB members of the change and allowing them to change their status before enforcement of the new rule begins in 2012. ▲▼▲



**H. Harold Stephens** is a partner with Bradley Arant Boult & Cummings LLP in Huntsville and serves as chair of the MCLE Commission. He is also a member of the Board of Bar Commissioners (23rd Circuit, place no. 1).



Lake Martin, April 2011—photo by Noelle Buchannon

# Collaborative Effort Brings Legal Support to Tornado Survivors

By Kimberly L. Wright

**A**s storm survivors struggled to pick up the pieces of their shattered lives in the days following the deadly April 27<sup>th</sup> tornadoes that devastated northern Alabama, a team of community-minded lawyers collaborated to help their neighbors by establishing free legal clinics in Jefferson County.

The Birmingham Volunteer Lawyers Program (BVLV)—a charitable arm of the Birmingham Bar Association—recently spearheaded an effort to hold six legal clinics in the areas affected by the tornadoes. “Our bar association was really fantastic and pulled together very quickly to address needs and decide how best to help,” noted **Kelli Hogue Mauro**, executive director of the BVLV.

**Ginger Busby**, a partner at Burr & Forman and chair of the ABA’s **Tort, Trial & Insurance Practice Section (TIPS)**, provided insights and experience from similar clinics hosted by TIPS in Louisiana in the aftermath of Hurricane Katrina. Building on the section’s experience, Birmingham’s VLP collaborated with the Alabama State Bar and the Bessemer Bar

Association, as well as other nonprofits to offer pro bono legal advice to hundreds of people. More than 200 Birmingham lawyers, as well as many legal assistants, attended a 3.5 hour CLE program and also volunteered at the various clinics.

Mauro identified six to eight categories of greatest need for storm survivors, including replacing critical documents lost in the storms, such as divorce decrees; birth, marriage and death certificates; documents related to housing issues; FEMA application protocols; contracts; and insurance policies. The selection of pressing categories was based on the calls received at the BVLV’s office in the Birmingham Bar Center and at the Alabama State Bar disaster assistance hotline.

This year the Birmingham Bar Association formed a task force on disaster relief, but it quickly transitioned into a full-blown committee with **Robert Methvin** as chair. Methvin said his largest task early on was “going to the affected areas right after the tornado to find a free-standing building to house a legal clinic—not an easy task in an area ravaged by a tornado.”



*Matthew Penfield helps a survivor with paperwork during one of six legal clinics in the Birmingham area.*

The BVLVP program provided hands-on support at the clinics, as well as two sessions of training, which armed lawyers with a binder of relevant information on matters critical to disaster survivors. The training session at the Birmingham Bar Center was videotaped (thanks to **Freedom Court Reporting**) and incorporated into a CD for future use by other bar associations who may want to create similar clinics.

Technical assistance and equipment were provided to the clinics by the BVLVP, as well as flyers and other materials that were distributed to survivors to inform them of the resources available.

For the convenience of storm survivors with limited means of transportation, the BVLVP held clinics at sites near the affected areas, utilizing “the model we use for our regularly scheduled clinics and taking it up a notch,” said Mauro.

The first clinic, held May 12<sup>th</sup> at the Faith Chapel Christian Center in Birmingham, was targeted to residents in Pleasant Grove and Pratt City. About 40 attorneys, paralegals, legal assistants and law students volunteered to assist. Mount Moriah Baptist Church in Pratt City hosted the second clinic May 24<sup>th</sup>, where 68 lawyers volunteered to help, including one woman who appeared to be the victim of a predatory contractor. About 60 volunteers participated in a third clinic at Pleasant Grove United Methodist Church May 26<sup>th</sup>.

Through the efforts of **Doug Burns**, president of the Bessemer Bar Association, and with the strong support of **Presiding Judge Teresa Petelos** and **Circuit judges Eugene and Annetta Verin**, three half-day clinics were held at the Bessemer Justice Center in late June. Additional clinics were scheduled at Scott Elementary School in the Concord community and in the McDonalds Chapel community.

According to BVLVP board **Chair Ted Hosp**, one of the learning experiences from the disaster was that Alabama attorneys expanded their frame of reference and learned more about their neighbors and their legal needs. “Obviously, in a disaster situation, people realize there’s a larger need than they first assume,” Hosp said. “They quickly become aware of their expanded community and how they can help.”

Mauro said she was impressed with the way local attorneys stepped up to the challenge of helping the ravaged communities. “Lawyers wanted to help, and there are only so many bottles of water you can donate,” she said. “They knew there would be things only they could help with.”

**Sam Franklin**, immediate past chair of the BVLVP, said the attorneys’ response to the situation was overwhelming. “We didn’t have enough spots for everyone who wanted to help,” he said. “We had to turn away some volunteers.”

The legal assistance was a “lifeline” to a population described by long-serving board member **LaVeeda Battle** as “awestruck and vulnerable” in the wake of such staggering losses. “The



Taking a quick break during one of the legal clinics are Elizabeth Clark, Birmingham Volunteer Lawyers Program communications coordinator; Stephen Hudgens, law student, Cumberland School of Law, and the 2011 State Bar Pro Bono Law Student Award winner; and Libby Pilgrim, BVLP deputy director.



Duncan Manley and LaVeeda Battle work to help a storm survivor fill out necessary forms for assistance.

environment was really ripe for people to be taken advantage of. They needed legal assistance.”

The BVLP typically serves those who are at 125 percent of the poverty line or lower, and many of those who came to the clinics were either at that level before the tornado or because of the storm. “Losing your house and all your belongings quickly puts you in that bracket,” Mauro said. However, the BVLP services also assisted those who did not meet the income criteria. “Early on, we made a decision to help everyone, no matter what, due to the enormity of the situation,” she said.

As time has passed, the crucial issues have changed, Mauro explained. “Now there is a growing focus on debt collections—for instance, companies seeking payment on a vehicle that no longer exists. The BVLP works hard to keep attorneys abreast of the changing issues and how this affects Alabama citizens.”

Methvin noted that storm survivors appreciated more than just the legal advice. In addition to the expected questions about FEMA forms, identification and insurance claims, “they just needed somebody to listen to them,” he said. “They were so traumatized.” In support of these shell-shocked people, Methvin said he fielded a number of non-legal questions, such as, “I’ve got a hole in the roof of my house. What do I do about it?”

BVLP board member **Ramsay Duck** spent several days at the clinics. He was struck by the massive damage that he saw during visits to the affected areas. “The pictures shown in the media don’t do the devastation justice. I was shocked,” he remarked.

In addition, the BVLP held a phone clinic broadcast on ABC 33/40 where six lawyers fielded 75-100 calls, Mauro said.

**Alabama Appleseed**, a nonprofit legal advocacy organization, was also among the coalition of support that made the clinics as successful as they were. They presented information on a number of issues at the training sessions for attorney volunteers, including heir property and immigration issues, said **Craig Baab**, senior fellow of policy and development at Alabama Appleseed. Because heir property often has very little in the way of documentation, it “makes it almost impossible to qualify” for aid, he said.

**Alabama Appleseed Executive Director John Pickens** and other staff members participated in the clinics. They also provided bilingual attorneys to aid translation and interpretation for the Spanish-speaking population and handout materials on various legal issues.

**Zane Smith**, the group’s immigration policy fellow, advised volunteer attorneys about immigration issues in the wake of a disaster. The difficulties a person faces after a disaster are multiplied when that person is of a special citizenship status, she said. When citizens lose their identification, “we just go to the nearest driver’s license office.” Immigrants have to go through the federal government, and it takes “six to eight weeks to receive replacement documents so they appear to be undocumented. It creates a big problem for these people,” she said.

Smith also shared details on “what disaster relief options are available” for immigrants, including FEMA assistance and medical care for legal and undocumented immigrants. Those in the U. S. on a visa or temporary status can apply for FEMA disaster assistance, she said. Mixed-status families, where the children are U. S. citizens and the parents are not, can also apply for assistance. “Parents are allowed to apply for relief through the children,” she said.

Doug Burns summed up the experience for all lawyers, saying that he was touched to be able to help those who had lost so much, so quickly—“family members, homes, all sources of ID. We had to help them rebuild their lives. It really was an amazing experience for our bench and bar.” ▲▼▲



A longtime journalist, **Kimberly L. Wright** is an editor at the Maxwell-Gunter Dispatch, a freelance writer and a poet in her spare time. She resides in Prattville.





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**MEMORANDUM**

**TO:** All Judges and Attorneys  
**FROM:** Thomas L. White, Jr.  
State Comptroller   
**DATE:** June 16, 2011  
**RE:** Act 2011-678 – Provisions relating to Appointed Counsel

On June 14, 2011, Governor Robert Bentley signed Act 2011-678 into law. This Act represents a major change to the administration of the program that reimburses attorneys who provide indigent defense services. The Act amends *Code of Alabama*, 1975, Title 12, Chapter 19—Court Finances and Title 15, Chapter 12—Criminal Procedure Defense of Indigents, and creates the Office of Indigent Defense Services. A copy of the Act is available for review through the website of the Office of the State Comptroller, <http://comptroller.alabama.gov/naees/indigentdefense.aspx>. This memo addresses those provisions, which relate to “Appointed Counsel” and are effective immediately. A summary of other key changes is below.

- Rate changes are effective for all appointments made on or after June 14, 2011. The new billing rate for appointed counsel is \$70 per hour for time reasonably expended in court and out of court on criminal and juvenile proceedings in the trial or appellate courts.
  - Previous billing rates were \$60 per hour for in-court and \$40 per hour for out-of-court time.
- Overhead will no longer be reimbursed.
  - Previously reimbursed office overhead expenses included professional license fees; malpractice, casualty, health, general disability, and workers’ compensation insurance; office salaries; ad valorem taxes; supplies; rent; depreciation of equipment and furniture; continuing legal education expenses, including travel and lodging; utilities; bank fees and interest on loans; and other professional fees.
- Non-overhead reasonably incurred expenses of \$300 or less will be reimbursed without prior approval, provided that they are within the program standards, including being substantiated by original invoice/receipt.
  - Examples of reimbursable non-overhead expenses include mileage, postage and reasonable costs of photocopying.
- Non-overhead reimbursable expenses above \$300 must have advance approval of the trial court “as necessary for

the indigent defense services and as a reasonable cost or expense.” 515-12-21(d)

- Expert fees shall remain reimbursable, if reasonable and approved in advance by the trial court as necessary.
- Statutory per-case fee limits increased by \$500 for each case type.
  - New per-case maximums: Class A Felony—\$4,000; Class B Felony—\$3,000; Class C Felony—\$2,000; Juvenile—\$2,500; Other Cases—\$1,500; Appeals—\$2,500
  - Maximum amounts may be waived by the trial court and the director for good cause shown in appeals.
- Interim payments for attorney fees and/or expenses may be authorized by the director of Indigent Defense Services.
- A judge must certify the fee declaration and submit to the Office of Indigent Defense Services for review and approval.
- Fees for appeals may exceed the statutory limit if “waived by the appropriate appellate court and the Director for good cause shown.” 515-12-22(c)(2)
- Fees for post-conviction proceedings may exceed the statutory limit “for good cause shown.” 515-12-23(d)

Additional billing and declaration forms, policies and procedures are currently under revision and will be posted once finalized on ALACOURT at <http://eforms.alacourt.gov>. If you have any questions or need additional clarification, contact my office at 334-242-7050.

CC: Mr. David Perry, director, Alabama Department of Finance  
Mr. Clinton Carter, deputy finance director  
Mr. Bill Newton, assistant finance director  
Ms. Janice A. Hamm, deputy state comptroller  
Ms. Ellen M. Eggers, accounting manager  
File



J. ANTHONY MCLAIN

## Rule 4.2—Contact with Non-Managerial Employees of Opposing Party

### QUESTION

“I have a slip-and-fall case in a retail store and I would like an opinion as to whether I can directly contact some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

“I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing.”

### ANSWER

Pursuant to Rule 4.2 of the *Rules of Professional Conduct* of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a “person . . . whose statement may constitute an admission on the part of the organization” should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

# OPINIONS OF THE GENERAL COUNSEL Continued from page 323

## DISCUSSION

Communication with persons represented by counsel is governed by Rule 4.2 of the *Rules of Professional Conduct*, which provides as follows:

“Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”


When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.<sup>1</sup>

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

“In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.”

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

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The Just One Look link can be accessed from the Administrative Office of Courts website at [www.AlaCourt.gov](http://www.AlaCourt.gov) or directly at [www.AlacourtAccess.com](http://www.AlacourtAccess.com).

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the *Rules of Evidence*. Still others have interpreted the Rule narrowly to prohibit contact with only a "control group," which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The supreme judicial court reversed concluding, in pertinent part, as follows:

"The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

\* \* \*

However, other jurisdictions that have adopted the same or similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

\* \* \*

Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case.

(citations omitted) Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to *Fed. R. Evid.* 801(d)(2)(D) and any corresponding State rule of evidence. Id. This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'

\* \* \*

At the other end of the spectrum, a small number of jurisdictions have interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the uppermost echelon of the organization's management.

\* \* \*

Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization's employees, still maintains some protection of the organization.

\* \* \*

Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to *Fed. R. Evid.* 801(d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the

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## OPINIONS OF THE GENERAL COUNSEL Continued from page 325

organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

\* \* \*

We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'

\* \* \*

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees

who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

\* \* \*

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with

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those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The superior court's interpretation of the rule would grant an advantage to corporate litigants over non-organizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an

organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better

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## OPINIONS OF THE GENERAL COUNSEL Continued from page 327

advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence.”

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not “have authority on behalf of the corporation to make decisions about the course of the litigation,” you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1

and Rule 4.3 of the *Rules of Professional Conduct*. Those rules provide, respectively, as follows:

“Rule 4.1 Truthfulness in Statements to Others  
In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

\* \* \*

“Rule 4.3 Dealing with Unrepresented Person  
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier’s employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier’s wishes and immediately discontinue any further attempt at communication.

[RO-02-03]



### Endnotes

1. Obviously, communication is also prohibited with any employee who is individually represented.

Employment Discrimination Law — NOTATED

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*For the first time in ALI history, the future of the Institute became a news story due to budget reductions.*

## ALI Background

The Alabama Law Institute, a nonpartisan legislative agency created in 1967 by the legislature, provides volunteer assistance and expert legal services for law revision that the state cannot otherwise afford. The Institute also conducts long-term studies, leading to more than 90 major code revisions in the past 40 years, including the Criminal Code, Election Code, Business Entities Code and Probate Code.

The ALI has offices at the University of Alabama and the state house in Montgomery. The Institute will reorganize the two offices to meet the needs of both the ALI and the legislature.

In the 2011 fiscal year the Institute was appropriated \$965,414. The new 2012 budget reduces the Institute's funding to \$766,957. If all funds are received this will be a 21 percent reduction of funding from the current year.

In addition to the 11 active Institute committees this year, the ALI has been asked to revise, article by article, the Alabama Constitution of 1901. And with the new ethics reform laws being implemented, now more than ever, the legislature needs independent counsel as it studies hundreds of bills.

During the first half of this fiscal year, 311 lawyers and professionals contributed nearly *one million dollars* of volunteer time and service. Each year, the lawyers of Alabama contribute between two and three times more for major law revisions than the State of Alabama.



**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 329

## What we do and how we do it

With so many new legislators and only a few of them lawyers, many legislators did not know what we do and how we do it. For the experienced legislators who are now in leadership positions as chairs of committees, they found they had no professional committee staff upon whom to call.

## Assistance for the Senate

**Senate President Pro Tem Del Marsh** let each senate committee chair know that if a lawyer or intern was needed, the Law Institute would provide one and the Pro Tem's office would provide compensation. **LaVeeda Battle** from Birmingham is the attorney working with the Senate Judiciary Committee. Interns now working with various senate committees are Mimi Williams,

Andrew Mackey, Morgan Stewart, Raquel Whitehead, Clay Loftin, and Trace Zarr.

## Help for the House of Representatives

In the house of representatives, lawyers provided by the Law Institute to serve as committee counsel include: **Bill Messer**, Montgomery, Judiciary Committee; **Sam Rumore**, Birmingham, Boards and Commissions Committee; **Brandi Williams**, Leeds, Jefferson County Delegation; **Al Agricola**, Montgomery, Constitution and Elections Committee; and **Sandra Lewis**, Montgomery, Commerce Committee.

Each house committee is staffed by an intern, again provided by the Law Institute, and includes Katie Egan, Phee Friend, Bain Hanning, Jerome Jackson, Dontrel Mosely, Cole Muzio, Erica C. Thomas, and Walker Watson.

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**Speaker Mike Hubbard** budgeted funds for the Institute to provide lawyers and interns to committees of the house of representatives.

For more than 30 years, both the House and Senate Judiciary committees, as well as all 17 committees of the house, have received the benefit of the Institute's counsel and expertise.

### **Interns, publications and education**

Since 1979, the Law Institute has conducted the Capitol Intern Program for the legislature. Approximately 165 college students, from almost every four-year college in Alabama, have served as interns.

The ALI has developed and written more than 225 publications to assist public officials, including: *Alabama Legislation Cases and Statutes* (seven editions); *The Legislative Process* (10 editions); *Alabama Government Manual* (13 editions); *The Election Handbook* (14 editions); and handbooks for local officials, including probate judges, sheriffs, county commissioners, and local taxation and revenue officials (revised every four years).

Since 1976, once the legislative session is over, the Law Institute has conducted yearly seminars to educate

elected officials, including probate judges and sheriffs, on changes in the law. The Institute staff also coordinates a program for Alabama's smaller cities to help them keep their ordinances up to date. With budget cuts, our staff also serves as reporters on various projects, including the Alabama Criminal Rules Committee and the Alabama Electronic Recording Commission.

The bills discussed in this article, including Law Institute bills, are pending in the legislature. All have passed at least one house and are on the calendar in the second house awaiting passage:

#### **Unsworn Foreign Declarations**

Sponsor: HB 24—Representative Marcel Black

Sponsor: SB 44—Senator Cam Ward

#### **Alabama Revised Notarial Act** (*passed*)

Sponsor: SB 54—Senator Tammy Irons and Representative Paul DeMarco

#### **Uniform Power of Attorney Act**

Sponsor: HB 26—Representative Bill Poole

Sponsor: SB 53—Senator Arthur Orr

#### **Uniform Rule against Perpetuities**

Sponsor: HB 28—Representative Demetrius Newton

Sponsor: SB 105—Senator Ben Brooks



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## Reinstatements

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating **John David Floyd** to the practice of law in Alabama, effective March 22, 2011. Floyd's reinstatement is probationary for three years. Conditions of probation are that (1) Floyd shall, during the first year of probation, file monthly reports with the Alabama State Bar Office of General Counsel concerning his law practice; in the second year of probation, Floyd shall file such reports quarterly, and, in the third year of probation, reports shall be filed semi-annually; (2) Floyd shall obtain a mentor, approved by the Office of General Counsel, to submit reports to the Office of General Counsel concerning Floyd's practice of law and conduct; (3) Floyd shall take and pass, prior to March 1, 2012, the Supplemental Multi-State Bar Examination offered by the National Conference of Bar Examiners; (4) Floyd shall take and pass, prior to March 1, 2012, the Multi-State Professional Responsibility examination; (5) prior to March 1, 2012, Floyd must attend the professionalism course as required by Rule 9, *Rules for Mandatory Continuing Legal Education*; (6) Floyd must meet his continuing legal education requirements for 2011 and subsequent years; (7) subsequent to the effective date of Floyd's reinstatement, he must perform 100 hours of pro bono legal service per year during the term of his probation and shall provide an annual report to the Office of General Counsel detailing such services; and (8) Floyd's conviction of any disciplinary offense during the term of probation shall automatically result in the revocation of his probation and the revocation of his reinstatement. [Rule 28, Pet. No. 10-1786]
- The supreme court entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating **Vinson Wilson Jaye** to the practice of law in Alabama, effective April 12, 2011, with the condition that Jaye must complete an additional 36 hours of continuing legal education within 18 months from the date of the order, six of which must be in ethics. Upon completion of this probationary requirement, the probationary term shall end. [Rule 28, Pet. No. 11-124]
- On January 12, 2011, the Supreme Court of Alabama entered an order reinstating Birmingham attorney **Millard Lynn Jones** to the practice of law in Alabama based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Jones had been on disability inactive status since October 6, 1994. [Pet. No. 2010-1204]

## Transfer to Disability Inactive Status

- Bay Minette attorney **John Barry Gamble** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective April 6, 2011. [Rule 27(c), Pet. No. 11-631]

## Disbarment

- Jasper attorney **Garfield Woodrow Ivey, Jr.** was disbarred from the practice of law in Alabama, effective March 14, 2011, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the March 14, 2011 order of consent to disbarment of Panel II of the Disciplinary Board of the Alabama State Bar. Ivey consented to disbarment based on two investigations concerning the misappropriation of third-party and client funds from Ivey's trust account. [Rule 23(a), Pet. No. 2011-546; CSP nos. 2008-346(A) and 2010-104]

## Suspensions

- On September 30, 2010, the Disciplinary Board of the Alabama State Bar, Panel I, entered an order accepting the conditional guilty plea of Mobile attorney **Christopher Lee George** for violations of rules 1.15(a), 1.15(b), 1.15(c) and 8.1(b), *Ala. R. Prof. C.* George failed to timely remit funds to a third party and co-mingled client funds with his personal funds. George was suspended for a period of 180 days, said suspension to be held in abeyance. He was also placed on probation for two years. Upon completion of the probation, the suspension will be dissolved. George was also instructed to immediately pay restitution in the amount of \$5,201.68 to Blue Cross/Blue Shield of Alabama. [ASB No. 06-131(A)]
- On April 21, 2011, the Disciplinary Board of the Alabama State Bar, Panel I, entered an order suspending Cullman attorney **Victor Benjamin Griffin** for three years, effective June 8, 2000, the date Griffin was placed on disability inactive status. Should Griffin's license to practice law be reinstated, he will be placed on probation for two years and required to make restitution in certain named cases. The suspension was based upon Griffin's conditional guilty plea to violations of rules 1.3, 1.4(a), 1.16(d) and 8.4(g), *Ala. R. Prof. C.*, in ASB nos. 98-207(A), 98-306(A), 99-111(A), 99-112(A), 00-257(A), 00-258(A), 00-259(A), 00-

283(A), 00-299(A), 00-300(A), 01-42(A), and 01-212(A); and violations of rules 1.3, 1.4(a), 1.16(d), 8.1(b), and 8.4(g), *Ala. R. Prof. C.*, in ASB nos. 98-80(A), 98-229(A), 98-80(A), 98-207(A), 98-229(A), 98-306(A), 99-111(A), 99-112(A), 00-257(A), 00-258(A), 00-259(A), 00-283(A), 00-299(A), 00-300(A), 01-42(A), and 01-212(A).

- Huntsville attorney **Nakia Faith Hundley** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective April 14, 2011. The order was based on a petition filed by the Office of General Counsel evidencing that Hundley had failed to respond to repeated requests for information from a disciplinary authority during the course of a disciplinary investigation. After receiving a copy of the suspension order, Hundley submitted her response on April 15, 2011. On April 19, 2011, Hundley filed a petition to dissolve the summary suspension. On April 20, 2011, the Disciplinary Commission entered an order dissolving the summary suspension. [Rule 20(a), Pet. No. 2011-707]
- Effective March 7, 2011, attorney **Ray Lynn Huffstutler** of Trussville has been suspended from the practice of law in Alabama for noncompliance with the 2009 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 10-696]
- Anniston attorney **Renee Denise Kirby** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective February 15, 2011. The supreme court entered its order in accord with the provisions of an order of the Disciplinary Commission of the Alabama State Bar revoking Kirby's probation in ASB nos. 09-1267(A), 09-1751(A), 09-2236(A) and 09-2736(A). Kirby previously pled guilty to multiple violations of the *Alabama Rules of Professional Conduct* and had been issued a 91-day suspension. The suspension was held in abeyance and Kirby was placed on probation for two years. As part of her probation, Kirby was

ordered to refund \$1,500 to the complainant in ASB No. 09-2236(A). Thereafter, Kirby failed to make restitution in a timely manner. On or about August 20, 2010, the Office of General Counsel filed a motion to revoke probation and impose a 91-day suspension based on Kirby's failure to make restitution. Kirby responded to the motion to revoke probation by proposing a payment schedule which was approved by the Disciplinary Commission. Kirby failed to provide proof that she had made the ordered restitution. On January 14, 2011, the Disciplinary Commission issued a show cause order to Kirby requiring her to show why her probation should not be revoked for failure to make restitution. Kirby failed to respond to the order to show cause. As such, on February 15, 2011, the Disciplinary Commission revoked Kirby's probation and imposed the 91-day suspension. [ASB nos. 09-1267(A), 09-1751(A), 09-2236(A) and 09-2736(A)]

- Daphne attorney **Daryl Keith Landers** was suspended from the practice of law in Alabama for 91 days, effective March 25, 2011, with said suspension being deferred pending successful completion of a two-year period of probation. Upon successful completion of probation, the suspension will be abated. Landers admitted that he negotiated a \$300 check, which he claimed was for fees due, but the check was not signed by the client and Landers could not produce other evidence of authority to negotiate the check. Landers acknowledged that he was required to hold the unsigned check, which was the property of his client, in trust and that his failure to do so was a violation of Rule 1.15, *Ala. R. Prof. C.* [ASB No. 10-632]
- On April 14, 2011, Huntsville attorney **Barbara Currie Miller** was interimsly 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. The Disciplinary Commission found that Miller's continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a), Pet. No. 2010-556]
- On February 16, 2011, Jasper attorney **Joseph Matthew Poe** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a),

*Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Poe'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. 2011-381]

- Mobile attorney **Barry Carlton Prine** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 180 days, effective April 22, 2011. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Prine's conditional guilty plea in which Prine pled guilty to violations of rules 1.15(a), 8.4(a) and 8.4(g), *Alabama Rules of Professional Conduct*. A review of Prine's trust account records demonstrated that he made repeated personal payments from the trust account. In addition, on at least two occasions, Prine misappropriated client funds deposited in his trust account. However, all clients eventually received any monies owed to them. [ASB No. 2010-1881]
- Birmingham attorney **Carey Wayne Spencer** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective April 14, 2011. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Spencer had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 2011-706]
- Montgomery attorney **Gatewood Andrew Walden** was interimsly 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 April 15, 2011. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing Walden was engaging in activities that were prejudicial to the administration of justice and that his continued practice of law was likely to cause substantial, immediate and serious harm to a client or to the public. [Rule 20(a), Pet. No. 2011-704]

## Public Reprimands

- Florence attorney **Damon Quinn Smith** received a public reprimand without general publication on March 25, 2011 for violations of rules 1.4(a) and 1.16(d), *Alabama Rules of Professional Conduct*. Smith was hired to represent a client in a bankruptcy and was paid a \$750 fee. At the time, the client was on work-release and explained that he could possibly be returned to prison. Smith's secretary told the client that Smith would refund the fee if he was transferred to prison. The client was subsequently transferred to prison and requested a refund on more than one occasion. Smith did not respond to his requests. Although Smith claimed that he did work on the matter and earned a portion of the fee, he did not respond to the client's reasonable requests for information, nor did he take the steps reasonably necessary to protect the client's interests upon termination of the representation, such as refunding the unearned portion of the fee paid. It was not until the complaint had been filed that Smith acknowledged the client in any way. Smith subsequently refunded the fee. [ASB No. 09-2219(A)]
- Montgomery attorney **Johnnie Lynn Branham Smith** was ordered to receive a public reprimand without general publication for violations of rules 1.3 and 1.4(a), *Ala. R. Prof. C.* In March 2008, Smith was retained by a client to probate her deceased husband's estate. Smith filed a proof of claim with the court for payments the client made on behalf of the estate. The court denied the claim. In March 2008, Smith filed an appeal but the client did not pay the filing fee. In July or August 2008, the clerk's office contacted Smith about the necessity of paying the filing fee. Smith had not followed up on the matter until that time. Smith subsequently prepared an affidavit of substantial hardship which was filed with the clerk's office in August 2008. In September 2008, the clerk's office returned the probate file to the probate office. Smith did not learn the appeal had not been filed until she was notified by the client in March 2009. Smith willfully neglected a matter entrusted to her and failed to keep the client reasonably informed about her case. [ASB No. 08-187(A)]
- On March 25, 2011, Birmingham attorney **Charlene Irvette Stovall** received a public reprimand without general publication for violations of rules 1.3 and 1.4(a), *Ala. R. Prof. C.* On or about November 19, 2001, Stovall was retained to probate the estate of an individual who died in September 2001. The parties, including the complainant, entered into a contract with Stovall and on November 14, 2001 paid Stovall a retainer fee of \$500. On or about December 22, 2001, Stovall was paid \$1,500 in additional attorney's fees as full payment for services to be performed. Stovall claimed that the estate consisted of numerous assets and a great deal of time was expended in an attempt to determine the assets of the estate. The complainant documented telephone calls to Stovall's office over a period of three years. She stated that she was only able to communicate with the office assistant and was unable to speak with Stovall. As of April 11, 2006, the estate had not been probated. Stovall did not adequately explain the reasons for the delays in the probate of the estate because she simply failed to communicate with the complainant. Stovall relied on her office staff to return calls to the client and, as a result, the complainant was not properly informed about the status of the estate and the reasons for the delay. The complainant eventually sued Stovall in small claims court and obtained a default judgment in the amount of \$2,155. Stovall attempted to set aside the default but her motion was denied. Stovall then filed a pro se Chapter 7 Bankruptcy Petition in the Northern District of Alabama, Western Division, on October 16, 2005, listing the complainant as a creditor. Stovall did not act with diligence and did not communicate with the complainant. [ASB No. 05-24(A)]





# About Members

**Mary Ellen King** announces the opening of **King Litigation Group PLLC**, 106 E. 6<sup>th</sup> St., Austin, Texas 78701.

**Charles Miller** announces the opening of **Charles L. Miller, Jr. PC** at 204 S. Royal St., Mobile 36602. Phone (251) 445-0992.

**D. Brian Murphy** announces the opening of **DB Murphy LLC** at 209 N. Joachim St., Mobile 36603. Phone (251) 300-2503.

**Brian Thomas Pugh** announces the opening of **The Pugh Law Firm LLC** at 150 Government St., Ste. 1000-A, Mobile 36602. Phone (251) 654-2640.

After 37 years with the **Alabama League of Municipalities**, **Perry Roquemore** announces his retirement.

**Joseph P. Schilleci, Jr.** announces the opening of **The Schilleci Law Firm LLC** at 2323 Second Ave., N., Birmingham 35203. Phone (205) 327-8340.

## Among Firms

**Matt Abbott** announces the opening of **Abbott Law Firm LLC** at 308 Martin St., N., Ste. 200, Pell City 35125. Phone (205) 338-7800.

**Andrew Moak** joined the firm.

**Helen Johnson Alford**, **Christina May Bolin** and **Mark A. Dowdy** announce the opening of



PLEASE E-MAIL ANNOUNCEMENTS TO **MARCIA DANIEL**  
[marcia.daniel@alabar.org](mailto:marcia.daniel@alabar.org)

**REMINDER:** Due to space constraints, *The Alabama Lawyer* no longer publishes changes of address unless it relates to the opening of a new firm (not a branch office) or a solo practice.

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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
30	\$385	\$414	\$609	\$985	\$1,524	\$2,960	

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# ABOUT MEMBERS AMONG FIRMS

Continued from page 337

**Alford Bolin Dowdy LLC** at One St. Louis Centre, Ste. 3100, Mobile 36602. Phone (251) 432-1600.

**Badham & Buck LLC** announces that **Richard Dorman** joined of counsel.

**Baker, Donelson, Bearman, Caldwell & Berkowitz PC** announces that **Dennis Nabors** joined as a shareholder, and **Luther P. Crull, III** and **Sara M. Turner** were elected shareholders.

**Beasley, Allen, Crow, Methvin, Portis & Miles PC** announces that **H. Clay Barnett, III** is now a shareholder.

**Boteler & Wolfe PC** announces that **Karlos F. Finley** joined as a partner and the firm's name is now **Boteler, Finley & Wolfe PC**.

**Burr & Forman LLP** announces that **E. Erich Bergdolt** joined as counsel.

**Carr Allison** announces that **J. Bart McNeil** joined as a shareholder.

**Clark, James, Hanlin & Hunt LLC** announces that **Raymond M. Lykins** joined as an associate.

**Couch, Conville & Blitt LLC** announces that **Marshall A. Hollis** and **W. James Sears, IV** are associated with the firm.

**Donovan Fingar LLC** announces that **Aaron D. Vansant** is now a partner.

**Dorroh & Associates PC** announces that **Bryan Wallace** joined as an associate.

**Fees & Burgess PC** announces that **Lauren A. Smith** and **Allison B. Chandler** are associated with the firm.

**Ray D. Gibbons** and **Christina A. Graham** announce the opening of **Gibbons Graham LLC** at 100 Corporate Parkway, Ste. 125, Birmingham 35242. Phone (205) 437-1331.

**Sandi Eubank Gregory, Laura Susan Burns** and **Keith E. Brashier** announce the formation of **Gregory, Burns & Brashier LLC**.

**Edward P. Hudson** announces the formation of **Hudson, Nicolson & Ray LLC** and that **D. Nicholas Stutzman** is associated with the firm.

**Jones Walker** announces that **David A. Lester** joined as an associate.

The **Kirby Law Firm** announces that **Erin L. Kline** joined as an associate.

**Kopesky, Britt & Norton LLC** announces that **Brantley T. Richerson** joined as an associate.

**Munsch Hardt Kopf & Harr PC** announces that **Zachery Z. Annable** joined the firm.

**Ogletree, Deakins, Nash, Smoak & Stewart PC**

announces that **Lauren Shine** joined of counsel.

**Patrick, Beard, Schulman & Jacoway PC** announces that **Michael A. Anderson** joined as a shareholder.

**Phelps Dunbar LLP** announces that **Bradley E. Dean** joined as an associate.

**Pritchett Law Firm LLC** announces that **Joan McLendon Budd** joined of counsel and the firm's name is now **Pritchett Environmental & Property Law**.

**Proctor & Vaughn LLC** announces that **Sarah Clark Bowers** joined of counsel.

**Rushton, Stakely, Johnston & Garrett PA** announces that **R. Brett Garrett** is now a shareholder.

**Satterwhite, Buffalow, Compton & Tyler LLC** announces that **Gregory C. Buffalow** joined as a member and **L. Hunter Compton, Jr.** and **Deena R. Tyler** became members.

**Starnes Davis Florie LLP** announces that **William S. Starnes, Jr.** joined as an associate.

**Zieman, Speegle, Jackson & Hoffman** announces that **Lester Bridgeman** and **Ben Broadwater** are of counsel. ▲▼▲

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