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THE ALABAMA LAWYER



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Calendar



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OCTOBER

- 2 Appellate Practice *Birmingham*
- 9 Administering Decedents Estates *Birmingham*
- 9/10 Family Law Retreat to the Beach *Point Clear*
- 16 Law Practice Management *Birmingham*
- 23 Real Estate Law *Birmingham*
- 30 Trial Skills *Birmingham*

NOVEMBER

- 6 Social Security Disability Law *Birmingham*
- 13 Estate Planning *Birmingham*
- 18 Alabama Update *Mobile*
- 20 Employment Law Update *Birmingham*

DECEMBER

- 4 Bankruptcy Law Update *Birmingham*
- 10 Depositions *Birmingham*
- 11 Tort Law Update *Birmingham*
- 17 Evidence with Charles Gamble *Birmingham*
- 18 Negotiations *Birmingham*
- 21 Alabama Update *Birmingham*



Teleseminars

SEPTEMBER

- 9 2009 Ethics Update, Part 1 - Live Replay
- 10 2009 Ethics Update, Part 2 - Live Replay
- 29 Estate and Gift Tax Audits

OCTOBER

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- 6 2009 Americans with Disabilities Act Update
- 13 Fundamentals of Securities Regulations, Part 1
- 14 Fundamentals of Securities Regulations, Part 2
- 20 Fiduciary Litigation Update

NOVEMBER

- 3 Tax & Non-Tax Aspects of LLC Liquidation
- 17 Tax Planning for Vacation Homes
- 20 Attorney Ethics When Changing Firms

DECEMBER

- 3 Nuts and Bolts of Gift Taxation
- 8 Compensation Issues in LLCs
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ASB President Thomas J. Methvin and family—Pictured are Amy and Tom Methvin, center, and their two sons, Rucker, left, and Slade, right. Tom and Amy met when he was in law school at Cumberland and have been married for over 18 years. Their children attend St. James School in Montgomery, where Rucker is in the 11th grade and on the basketball team, and 8th-grader Slade is on the football and basketball teams.
—Photo by Kenneth Boone Photography

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VLP coordinators Lee Ann Pasker (Madison County VLP), Linda Lund (ASB) and Debra Jenkins (Birmingham Bar Association) at the ASB annual meeting, where the plan to celebrate pro bono week (October 25-31) was unveiled.

Access to Justice— Now More than Ever

Alabama ranks last in the nation in legal aid provided to the poor, even behind the territory of Puerto Rico.¹ Fewer than 20 percent of the civil legal needs of Alabama's poor are being served. I know I am not the only one embarrassed by these statistics.

To address this problem, the Access to Justice Commission was established by order of the Alabama Supreme Court. Its goal is to serve as a coordinating entity for the legally underserved, the legal community, social service providers and the private and public sectors. The Alabama State Bar works in cooperation with the commission to find solutions to meet the legal needs of Alabama's poor. Together, we are looking for creative methods to fund and deliver access to justice.

The goals of the commission include improving and expanding the provision of legal assistance to low-income Alabamians, increasing the participation by attorneys and providing various social agencies with tools to assist those in need of legal services. With the encouragement and active participation of Chief Justice Sue Bell Cobb, and under the leadership of Commission Chair Ted Hosp, the program is enjoying significant success.



THOMAS J. METHVIN

PRESIDENT'S PAGE Continued from page 319

In 2008, the supreme court approved an amendment to Rule 1.15 of the *Code of Professional Responsibility*, which implemented a mandatory Interest on Lawyers' Trust Accounts (IOLTA) plan and comparability rule requiring banks to pay a fair rate of interest on IOLTA accounts. As a result, millions of dollars of funding will be available to help improve our efforts to effectively deliver our pro bono services.

Additional funds for pro bono assistance flow as a result of an increase in the bar's *pro hac vice* fee, which had historically been among the lowest in the southern states. The fee was increased from \$100 to \$300, with the additional \$200 earmarked for use by the Alabama Law Foundation to fund access to justice programs. The commission expects that the change will generate an additional \$125,000 per year.

Also in 2008, the commission approached the legislature to request funding for the Access to Justice initiative and secured a \$200,000 appropriation in a very lean budget year. It is clear that we have made a lot of progress in a very short amount of time.

There is still much to do, though, and Alabama is still at the bottom of the list when it comes to funding access to justice.

It is estimated that about 25 percent of Alabama's population, or about one million people, live in poverty. In the current economic climate, it is likely that these numbers may grow. Research indicates low-income Alabama households experience more than 700,000 legal issues on average per year. Common civil problems include consumer issues like creditor harassment and bankruptcy, as well as issues involving family law, housing, health and unemployment.

Even if we double our current funding, we're not even close to providing true, "full access" to justice for a person living in poverty.

So, what can we do to help?

We must increase existing funding sources for Legal Services Alabama (LSA) and must raise money for it to employ more lawyers. We also need to increase awareness of the need for civil justice funding among the public, the members of the bar and the court system.



Tom Methvin with the gavel and case he had just been given by Immediate Past President Mark White at the Grand Convocation, continuing an ASB tradition. Inset: Former presidents White and Sam Crosby share a lighter moment.

The bar also operates a Volunteer Lawyers Program (VLP). Your participation in this program can help fill the gap to provide free legal services to poor and disadvantaged Alabamians seeking access to justice in civil matters. Participation also allows us to fulfill our professional responsibility to make legal counsel available to indigents, consistent with a true sense of professionalism and Rule 6.1 of the *Alabama Rules of Professional Conduct*. Our firm has 100 percent participation in this program by our lawyers. Will you and your firm do the same?

For now, let me leave you with this challenge regarding Access to Justice. Our intention is not to reach the national average, or fall somewhere in the middle. Our goal is to create the *best* access to justice system in the country for the provision of civil legal assistance to the poor. It's going to take all of us, working together, to accomplish this. It is our opportunity, and our responsibility, to raise money for Legal Services Alabama, enlist more volunteer lawyers and to be a part of making Alabama a leader in ensuring true access to justice for all. ▲▼▲

Endnotes

1. This is according to statistics as of 2008. New numbers are not available and we hope we have moved up slightly.



Judy Keegan, Alabama Center for Dispute Resolution director, explains the principles behind dispute resolution to visitors from 10 African nations, as part of a professional exchange program sponsored by the U.S. State Department.



KEITH B. NORMAN

Rendering Service to Those from Another Continent

In June, the Alabama State Bar hosted representatives from 10 African nations who were guests of the Alabama Center for Dispute Resolution ("Center"). These guests were participants in the International Visitor Leadership Program (IVLP) sponsored by the United States Department of State's Bureau of Educational and Cultural Affairs. The IVLP, one of the Bureau's premier professional exchange programs, is designed to build mutual understanding between the U.S. and other countries through carefully planned visits that reflect the participants' professional interests and support U.S. foreign policy goals. Selected by American embassies abroad, these international visitors come to the U.S. to meet and confer with their professional counterparts.

Our guests represented the African nations of Benin, Cameroon, Central African Republic, Comoros, Democratic Republic of Congo, Mali, Mauritania, Niger, Rwanda, and Togo. They came here to learn specifically about conflict resolution and will be visiting local programs, as well as other state programs, while they are in the U.S. Nearly a third of Africa is engulfed in intractable violent conflicts, which have resulted in massive loss of life and human rights abuses, caused the collapse of state institutions, exacerbated corruption, aggravated the HIV/AIDS pandemic, and destroyed infrastructure.

EXECUTIVE DIRECTOR'S REPORT

Continued from page 321

The State Department has outlined several specific themes for this particular visit:

To enhance participants' understanding of U.S. perspectives on the use of dispute resolution and/or preventative diplomacy in domestic and international situations;

To familiarize participants with the diverse perspectives of public and private organizations active in alternative diplomacy and conflict resolution;

To provide an understanding of various techniques for mitigating or resolving a variety of conflicts and/or disputes resulting from ethnic, religious, socioeconomic and regional differences; and

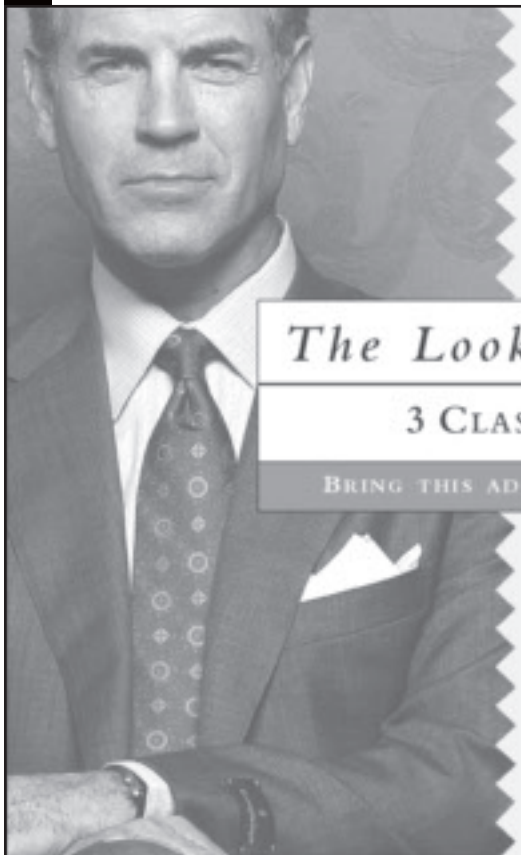
To introduce participants to the training of conflict resolution specialists by universities and professional organizations.

Judy Keegan, the center's director, organized this conflict resolution briefing for our international visitors. Their



ASB Executive Director Keith B. Norman outlines the structure of the bar for the visiting guests as part of a discussion of how our legal profession is regulated.

professional backgrounds were varied: lawyers, judges, government officials, representatives of non-governmental organizations, municipal leaders, the military, and representatives of human rights organizations. Topics for the center's briefing were: *Mediation of General and Civil Commercial Disputes*; the *Appellate Mediation Program*;



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Visitors included lawyers, judges, government officials, municipal leaders, military leaders, representatives of non-governmental organizations, and human rights groups.

How it Works; Mediation and the Alabama Supreme Court; and Mediation of Family/ Domestic Disputes Including Divorce, Post-Divorce, Custody and the Elderly. Assisting with the center's briefing were: **Robert Ward**, attorney and member of the Alabama Supreme Court Commission on Dispute Resolution; **Rebecca Oats**, assistant clerk, Alabama Court of Civil Appeals, and liaison member to the Alabama Supreme Court Commission

on Dispute Resolution; **Justice Harold See**, former supreme court justice and member of the Alabama Supreme Court Commission on Dispute Resolution; and **Cheryl Leatherwood**, mediator, Administrative Office of Courts, and member of the Alabama Supreme Court Commission on Dispute Resolution.

Our visitors from these African nations are the latest group of international visitors hosted by the Alabama State Bar. Past guests have been from Russia, Kazakhstan (but not Borat!), the Bahamas and Brazil. Although it was necessary to use translators on this occasion, as on past occasions, our African visitors seemed to have gotten a very clear picture of the benefits of incorporating dispute resolution with governmental institutions. In the process, we gained a broader perspective of those nations represented, as well as learned about some of their problems and needs. It is hoped that through such visits, not only have we imparted concepts and ideas that our guests can put to good use in their countries, but, in the process, we have witnessed the world become a little smaller. ▲▼▲

Check your calendar, mark the date, plan to attend, and look for the program brochure six weeks prior to the seminar.



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September

- 11 Developments and Trends in Health Care Law 2009 13
co-sponsored with the Healthcare Financial Management Association and the Health Law Section of the Alabama State Bar 20
- 25 Legal Writing/Appellate Practice

October

- 2 20th Annual Bankruptcy Law Seminar
- 29-30 Southeastern Business Law Institute 2009

November

- 6 Class Action Litigation

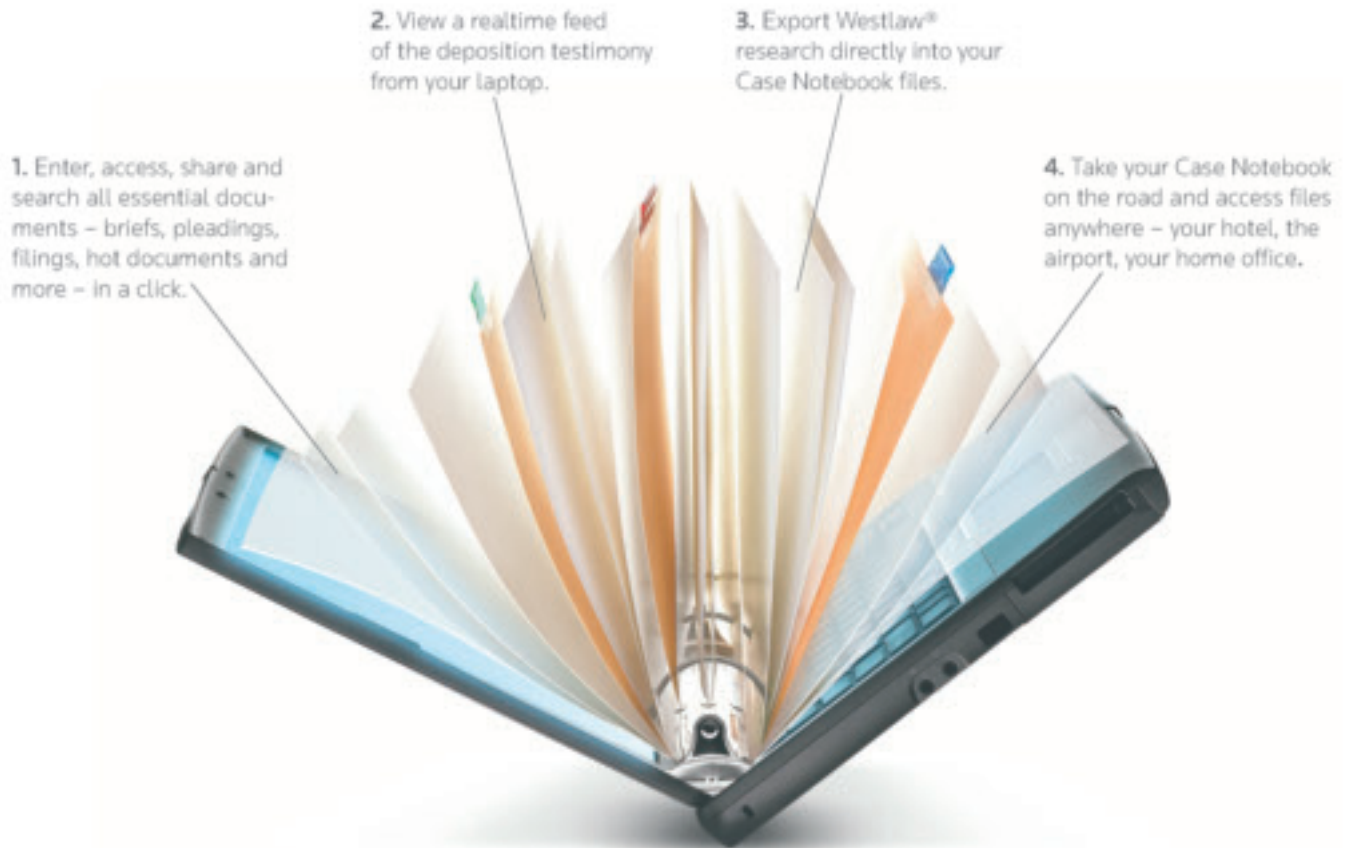
December

- 4 23rd Annual Workers' Compensation Seminar
- 11 Commercial Real Estate Law Seminar
co-sponsored with the Real Property, Probate & Trust Law Section of the Alabama State Bar
- 16th Annual Employment Law Update
- 11 Recent Developments
Choose live seminar or a 3 hour live webcast
- 18 Negotiation Strategies in a Tough Economy
featuring Martin Latz, national negotiation expert
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Marion Howard Haygood

Marion Howard Haygood was born in Greenville, Alabama on May 31, 1914 and died in Birmingham on April 21, 2009. Throughout his nearly 95 years, he was a model of faith, integrity and principle who was devoted to his family and friends. He loved the practice of law, often referring to himself as “just a country lawyer,” and was a credit to the legal profession and a hero and role model to many. He is sorely missed.



Howard lived most of his life in Greenville. He was a graduate of Butler County High School and Bob Jones College and was graduated from the University of Alabama School of Law in 1938. After law school, due to the hard economic times, he took a job on a surveying crew as the only member with a high school diploma. That job ultimately led to his becoming the manager of the newly-formed Wiregrass Rural Electrification Cooperative in Hartford during the ground-breaking times of bringing electricity to the rural areas of America. While working there, he met and married Katharine Liddon Smith of Dothan. After Pearl Harbor, he volunteered for the U.S. Navy and achieved the rank of lieutenant. He served in the Atlantic and Pacific theatres, the Mediterranean and North Africa, and was at sea for most of the war. During his time in the Navy, one of his fellow officers from Vermont, himself a practicing lawyer, urged Howard to practice law; and at least partly based on that urging, after the war, he and his wife moved to Greenville where he opened a law practice. He practiced there for over 50 years, well into his 80s. For many years he was judge of the Inferior Court, a position which included being juvenile judge. When the Alabama court system was revamped, he decided not to continue as a judge because it would have meant giving up the law practice he loved. He was also a longtime chairman of the Butler County Democratic Committee and president of the Greenville/Butler County Bar Association. In the late 1950s, he served on the Alabama State Democratic Executive Committee and was instrumental in having the symbol of segregation removed from the ballots used in the state.

He was deeply involved in the communities in which he lived. In Greenville, he was active in the affairs of the First United Methodist Church, serving as chairman of the Official Board and the Pastoral Relations Committee, superintendent of the Sunday School and teacher of many Sunday School classes. He was a member of the Rotary Club, serving in several positions, including president, Gideon's International and a founding director and counsel for The Greenville Bank. In recent years, he resided in Birmingham at Galleria Woods Retirement Community where he continued to be active, serving on the residents' advisory board, attending Bible studies and church services, and, in general, keeping up on current events. In 2008,

**MARION HOWARD
HAYGOOD**

MATTHEW LEE HUFFAKER

NINA MIGLIONICO

MAURY DRANE SMITH

MEMORIALS Continued from page 325

based on his longtime involvement, first as manager of Wiregrass Cooperative and later as counsel for Pioneer Cooperative, he was honored with a Pathfinder award by the Alabama Rural Electric Association of Cooperatives. Among the things he loved were reading, especially history, hearing and telling a good story, the color red, sweets, and the Crimson Tide.

He is survived by two daughters, Marion Haygood Threadcraft of Birmingham and Katharine Hamilton Haygood of Falls Church, Virginia; three grandchildren, Joshua Howard Threadcraft of Birmingham, John Caleb Threadcraft of Fort Campbell, Kentucky and Anna Threadcraft Leiper of Halifax, Nova Scotia, Canada; and two great-grandchildren, Lynley Freeman Threadcraft and Kathryn Law Threadcraft of Birmingham. Following his example, his daughter, Kathy, and his grandson, Joshua, became attorneys and are members of the Alabama State Bar.

—Calvin Poole III, Greenville

Matthew Lee Huffaker

Lee Huffaker, age 33, a man of extraordinary talent, wit and breadth of interest, passed away unexpectedly and tragically on August 16, 2009.

Despite his quiet nature and palpable humility, Lee was a renaissance man.

He was a lawyer's lawyer—a patent attorney, a skillful litigator, an intellectual property expert, a corporate lawyer, and a committed pro bono practitioner. In fact, Lee's legal accomplishments in the course of his short eight-year career were truly exceptional. Lee had successfully litigated multi-million dollar copyright, trade secret and patent cases. In 2005, he won a \$27 million jury verdict in a trade secrets case, one of the largest verdicts ever obtained in Jefferson County and one of the top 100 verdicts nationwide for the year. Lee was a member of the United States Patent and Trademark Office Bar and, at the time of his passing, was spearheading the effort to rewrite and modernize Alabama's state trademark act. He had been recognized by the Alabama State Bar in April 2006 for his outstanding



work through the Birmingham Volunteer Lawyers Program. In one of many examples, Lee took on the cause of an indigent prisoner sentenced to life without parole, obtaining a reduced sentence and, eventually, parole. Similar to Atticus Finch, Lee was paid by a gift membership in the Cake-of-the-Month Club, all his client's family was able to afford.

Lee's scope of interests and breadth of expertise on matters outside the law were equally remarkable. He was an expert in computers, televisions, antique cameras, vintage watches, cars, clothes, home-remodeling, fountain pens, Italian road-racing bikes, power tools, grass seeds, grills, E-Bay, and Internet discount coupons just for starters. Lee's expertise was widely accepted and renowned by all who came in contact with him. Lee took great pleasure in responding in comprehensive detail to continual inquiries on all of these subjects from his family, friends and law partners. Lee never wavered in making time for any friend or acquaintance in need of help or information, and he met all situations with a quiet chuckle, a twinkle in his eye and a good measure of ironic humor.

Raised in Montgomery, Lee was graduated from the Montgomery Academy and then from Vanderbilt University, *cum laude*, with a degree in chemical engineering. He received his J.D. from the University of Alabama School of Law in 2001, graduating *magna cum laude*, receiving the Dean M. Leigh Harrison Award, serving on the *Alabama Law Review* and being inducted into the Order of the Coif.

Lee leaves behind a devoted wife, Caroline; two children, Ann Katherine, three, and Matthew Lee, Jr., one; his parents, Robert and Kitty; and his brother, Austin.

Lee was fascinating, brilliant and loving. Lee was unique and special. Above all, though, he was a kind and gentle soul. He will be greatly missed.

—Thomas W. Thagard, III, Birmingham

Nina Miglionico

Nina Miglionico passed away May 6, 2009 at the age of 95. She had been a lawyer for 73 years and practiced law longer than any woman in the history of Alabama. Besides the sermon at her funeral mass, two eulogies

were delivered in her honor. One was on Miss Nina—The Public Servant. The other had as its theme Miss Nina—The Lawyer and was delivered by her law partner of 35 years, Sam Rumore. The following is that address from her funeral.



I want to briefly tell you some things about “Miss Nina”—the lawyer. Her career in the law covers 73 years and parts of eight different decades. It is a record that she is the longest practicing woman lawyer in the history of the state of Alabama. What was it like when she began? Let’s go back to 1936. Our country was still in the depths of the Depression. There had never been many women lawyers in Alabama up until that time. The University (of Alabama) Law School Class of 1936 had a bumper crop—five women in a class of approximately 80. Miss Nina estimated that there may have been 25 women lawyers admitted to practice before her admission, but the records are not clear. At any rate, the supreme court was not accustomed to granting law licenses to women. For those of you who have seen Miss Nina’s law license, and a copy of it is in the Birmingham city archives at the library, she would point with pride to the pronouns on the pre-printed license. The word “he” was physically scratched out and the word “she” was written in. And the word “him” was crossed out and replaced by the penciled-in word “her.” In reviewing my own law license, the court in later years had removed all gender specific pronouns. But, in 1936, the women licensees received certificates with neatly crossed-out and replaced pronouns. That was the situation when Miss Nina became a lawyer.

What about job opportunities? Miss Nina was short, young (22 years old), Italian, Catholic, and she had a pronunciation-challenged last name which is still mispronounced today. The only job she was offered was one as a secretary for \$15 per week if she could type and take shorthand. She refused the offer and started her own practice.

What did she do? Her practice consisted of criminal cases, divorces, title searches, deeds, wills, taxes, probate, and all manner of other services that people needed to be done. She lived at home with her parents. She taught piano to make extra money. She was frugal. She often stated that she was Scotch-Italian. But she developed a loyal following and a reputation for honesty,

competence, tenacity, compassion, and fearlessness. When she would go to the jail to interview a criminal client her mother would say, “Nina, a lady doesn’t go to the jailhouse.” And Miss Nina would answer, “Mother, I’m not a lady, I’m a lawyer.” Well, I am here to tell you that she was wrong. She was a lady, a very dignified lady, and she proved to be a very good lawyer.

Miss Nina had practiced law 36 years before I met her in 1972. I had just finished my first year of law school. She had a successful practice. She had been the president of the National Association of Women Lawyers. She had served in the American Bar Association House of Delegates. She had already been elected to the Birmingham City Council three times. But I had the boldness to ask her for a summer clerkship. She agreed and we began our association in the law that extended for the next 37 years.

In my first year of practice, she told me to sign up for all of the appointment lists—criminal court, probate court, state court, federal court, all of them. Within six months of becoming a lawyer I was appointed to handle a murder case. That was in 1975. It doesn’t happen that way today. There are minimum standards for experience now before you receive such an appointment. Anyway, I asked her what I should do. She said to take a week off and sit in criminal court. Watch the lawyers. Talk to them. Take notes. You can do it. And I did. Her advice gave me confidence, but the experience taught me that I did not want to do criminal law.

In those early days together I would sit in on client consultations. I attended court sessions with her. He probably does not remember this, but the first time I met Mayor Langford was when he was Miss Nina’s client. And I remember when the case was over, he hugged her in court. Miss Nina and I discussed cases and prepared cases together. I can’t help but think that having a young lawyer around kept up her interest in the law and contributed to her great record of 73 years of service. So the lesson here is that older lawyers should associate with younger lawyers. It can be a mutually beneficial relationship. It certainly was for me.

One of the most enjoyable pastimes for Miss Nina was her weekly barbecue lunches with the boys. For more than 35 years we would go on Tuesdays for a barbecue lunch at Ollie’s Barbecue, and later at Carlile’s, Costa’s or Golden Rule. In fact, in honor of Miss Nina, my wife, Pat, and I went to Carlile’s yesterday and sat at

MEMORIALS Continued from page 327

our booth—a booth that had Miss Nina’s photo with our lawyer gang in it overlooking the table. It was certainly fortuitous to find that booth open. We saw a number of lawyer friends there, as we always did, and we commenced telling Miss Nina stories. She loved the barbecue and the conversations on politics, legal issues, books and whatever problem the city was facing that day. The reason we went out for barbecue on Tuesdays was because that was the day that the City Council met. She always said that she needed to meet with her lawyer friends to get her sanity back. I know that we helped her.

I was proud to be associated with Miss Nina over the years as she gained her well-deserved recognitions. Her alma mater, the University of Alabama, named her as one of the 31 top women graduates during the first 100 years of co-education at that school. The law school alumni association gave her its award of the year. The Alabama State Bar’s Women’s Section bestowed on her the Maud McLure Kelly award named in honor of the first woman lawyer in Alabama. And she was most proud to have received the Margaret Brent Award from the American Bar Association. This award was named for the first woman lawyer in America, dating back to the 1600s, and it honors the five outstanding women lawyers in the country for a particular year.

Miss Nina was also a role model and mentor to younger lawyers, both men and women. The Birmingham Bar’s Women’s Section named its annual award the Nina Miglionico Paving the Way Award. It honors a lawyer who helped pave the way for women in the profession. The recipients to date have included Federal Judge Inge Johnson, attorneys Ann Huckstep and Ed Elliott and Professor Pam Bucy. Miss Nina was most appreciative of this recognition. The Birmingham Bar also gave her its Burton Barnes Community Service Award. Her recognitions and achievements in the legal profession were many.

Up until the year 2009 the Alabama State Bar has never had a woman president. I was so happy that Miss Nina lived long enough to see that a woman—Alyce Manley Spruell—was selected as president-elect designate of our state bar in March. Miss Nina knew her mother and, of course, her father, Rick Manley. She was

most pleased that this barrier to women in the law in Alabama was finally broken.

There is only one honor that the Alabama State Bar bestows on its members posthumously. That is induction into the Alabama Lawyers’ Hall of Fame. The philosophy behind that policy is that the jury is still out until a lawyer reaches the pearly gates. Miss Nina has now been welcomed by St. Peter. For many years she has been qualified for the Hall of Fame, she was just not eligible. I know of no lawyer who deserves this recognition more than Miss Nina. I hope that when the two-year period passes before a lawyer can be considered, she will receive this last great honor from the peers of her profession.

In conclusion, Miss Nina, we loved you in life. We will miss you now. But your memory as a public servant, dedicated citizen and, yes, great lawyer will live on. Be sure to save us some barbecue in heaven. Until then, we say goodbye.

—Samuel A. Rumore, Birmingham

Maury Drane Smith

The Alabama State Bar and the legal community lost one of their most able and respected members, Maury Drane Smith, on May 24, 2009. A member of the Alabama Law Institute, a member of the original advisory committee on the *Alabama Criminal Code*, a fellow of the Alabama Law Foundation, an original member of the Hugh Maddox Chapter of the American Inns of Court, and a past president of the Montgomery County Bar Association, Maury served his profession—and served it well—throughout his 57-year legal career. In addition to serving in these professional roles, Maury served as a mentor to many young lawyers and as an advisor to the judiciary and the state bar on issues important to the bench and bar, including monitoring judicial campaign ethics compliance as chairman of the Judicial Oversight Committee and enhancing professionalism among lawyers.

Maury was born in Samson on February 2, 1927, one of six children of Abb Jackson Smith and Rose Drane



Sellers Smith. He attended Auburn University, and after military service during World War II, entered his beloved University of Alabama, where he earned B.S. and L.L.B. degrees and was an active member of Sigma Nu Fraternity. He later served the University of Alabama as a member of its board of trustees.

Upon graduation from law school in 1952, Maury joined the Alabama Attorney General's Office. In 1954, he participated in the investigation of the murder of Attorney General candidate Albert Patterson. In 1955, Maury served as a part-time assistant district attorney for Montgomery County District Attorney William Thetford, and entered private practice in Montgomery with the late Senator Joe Goodwyn. Subsequently, the firm became Smith, Bowman, Thagard, Crook & Culpepper, which, in 1983, merged with what is now known as Balch & Bingham LLP. Maury worked with Balch & Bingham LLP until his death.

Maury was a gifted trial lawyer. He was known for his enthusiasm, positive attitude and great trial instincts. Lawyers who tried cases with him will recall the numerous occasions on which, when confronted with challenging evidence presented by opposing counsel, he stuck out his jaw and dared jurors not to believe the evidence that he had presented in support of his client. His confidence was contagious and often convinced jurors that his client was in the right. Maury was recognized for his achievements as a trial lawyer by the American College

of Trial Lawyers, which named him a fellow in 1977.

Maury also contributed significantly to his state and to his community. Governors, mayors and top business executives frequently sought his counsel. As Montgomery Mayor Todd Strange observed, "[Maury] was involved in most everything good about Montgomery for so many years." Maury served as chairman of the Montgomery Area Chamber of Commerce, a member of the Montgomery Committee of 100, president of the Board of Directors of the Alabama Heritage Foundation and a member of the Board of Directors of the Alabama Department of Archives and History. In addition, he served his church, First United Methodist in Montgomery, in many leadership positions.

Above all, Maury was devoted to his family. He and his wife, Cile, the former Lucile Martin of Clayton, raised three wonderful children: Martha Vandervoort, who lives in Anniston with her husband, Kenneth, and their two sons, Kenneth and William; Sally Legg, who lives in Birmingham with her husband, Will, and their two daughters, Martha and Elizabeth; and Dr. Maury Drane Smith, Jr., who lives with his wife, Adele, and their daughter, Cecile, and son, Maury, III, in Randolph, Vermont.

Maury will be greatly missed, by his family, friends, law partners, colleagues, clients, and many people who never knew him but who have been the beneficiaries of his years of service.

—Sterling G. Culpepper, Jr., Montgomery

Amos, Mary Riseling

Birmingham
Admitted: 1990
Died: May 24, 2009

Blackburn, John Gilmer

Auburn
Admitted: 1954
Died: May 31, 2009

Colvin, Serena B.

Jasper
Admitted: 1950
Died: June 7, 2009

De Laney, Christopher Columbus, Jr.

Mobile
Admitted: 1948
Died: June 8, 2009

Huffaker, Matthew Lee

Birmingham
Admitted: 2001
Died: August 16, 2009

Jones, A. Gary

Dothan
Admitted: 1996
Died: April 24, 2009

Marks, Alex Andrews

Montgomery
Admitted: 1935
Died: June 9, 2009

McCoy, Albert Lee

Alabaster
Admitted: 1997
Died: May 11, 2009

Morgan, Charles, Jr.

Destin, FL
Admitted: 1955
Died: January 9, 2009

Seale, James Hezekiah, III

Greensboro
Admitted: 1982
Died: June 21, 2009

Southerland, Henry deLeon, Jr.

Birmingham
Admitted: 1949
Died: April 26, 2009

Alabama State Bar Publications Order Form

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



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Abogados Y Honorarios Legales Un resumen de procedimientos legales básicos y preguntas legales comunes del gran público.	\$10.00 per 100	Qty _____	\$ _____
Last Will & Testament Aspects of estate planning and the importance of having a will.	\$10.00 per 100	Qty _____	\$ _____
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		Shipping & Handling	\$ <u>5.00</u>
		TOTAL	\$ _____

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YLS members and family enjoy the Bayside Beer Party during this year's annual meeting.



ROBERT N. BAILEY, II

rnb@lanierford.com

Sign Up, Join In

I am honored to be serving this year as president of the Alabama State Bar Young Lawyers' Section. If you are 36 years old or under or if you are over 36 but you've been admitted to the bar for three years or less, then guess what? You're a member of the Young Lawyers' Section. No charge, no form to fill out, no hassle. You're in, and your membership provides you with a number of great opportunities to meet new people, develop your practice and serve our state bar.

Your YLS recently concluded a great year under the leadership of **Past President Jimbo Terrell**. Jimbo was a fantastic president, and he leaves big shoes to fill. I certainly appreciate all of the guidance he has provided me over the last year.

At the Alabama State Bar's Annual Meeting in July, 2009-10 officers were elected for our section. They are:

President: Robert N. Bailey, II (Huntsville)

Vice President: Clay A. Lanham (Mobile)


Secretary: Navan Ward, Jr. (Montgomery)

Treasurer: Kitty Rogers Brown (Birmingham)

We are very excited about the upcoming year and the events planned. As always, we will be hosting our annual Sandestin seminar, so go ahead and book your calendars for **May 12 through May 16, 2010**. Also, we will again be hosting our annual Iron Bowl CLE in Birmingham in November, and we will be sending out e-mails with the dates in the near future. Finally, we will host the bar admission ceremonies for new admittees in Montgomery in October and May.

We also plan to continue our service projects this year. Our award-winning **Minority Pre-Law conferences** will again be held in Montgomery and Birmingham in the spring of 2010 and we hope to continue to expand our **Lawyer in Every Classroom Program**. Also, our **FEMA Assistance Program** will be prepared to assist victims of tornadoes, hurricanes or any other natural disasters.

We encourage everyone to be a part of **Pro Bono Week** from **October 25 to October 31, 2009**. It is the Alabama State Bar's Pro Bono Celebration Task Force's goal to encourage each judicial circuit to conduct a clinic or celebratory event during pro bono week. I encourage all young lawyers to get involved in your judicial circuit's event and also to join the Volunteer Lawyers Program. If you are interested, contact Linda Lund at linda.lund@alabar.org.

For more information about any of our events or programs, or to get more involved with your YLS, visit www.alabamayls.org or feel free to contact me at rnb@lanierford.com. 



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- Addendum*.....334-269-1515 Ext. 2124
- Public Information Pamphlets.....334-269-1515 Ext. 2126





- **Beverly P. Baker**, a shareholder in the Birmingham office of Ogletree, Deakins, Nash, Smoak & Stewart PC, has been elected a Fellow of The College of Labor and Employment Lawyers. Baker will be initiated into the college at a special induction dinner in Washington, D.C. in November.



Baker

- **John W. Johnson, II** and **Richard E. Smith**, partners at Christian & Small LLP, co-authored the second edition of the *Alabama Liability Insurance Handbook*, now called *Allen's Alabama Liability Insurance Handbook*. As authors, they were



Johnson



Smith

instrumental in changing the name of the book to reflect the contributions of the original author and the firm's senior counsel Bibb Allen, who passed away in March 2007. W. Steven Nichols, an associate with the firm, was a contributing author and editor of the book.

- **James W. Porter, II** of Birmingham has been elected 2nd vice president of the National Rifle Association of America. Porter, first elected to NRA's Board of Directors in 1989, will help set the direction of NRA policies and programs. Porter is a partner with Porter, Porter & Hassinger.

- **George Walker** of Hand Arendall in Mobile has been selected to serve as vice president of the Association of Defense Trial Attorneys (ADTA). The ADTA brings together selected trial lawyers from the United States and Canada, whose practice consists substantially in the defense of claims at the request of insurance companies and self-insurers.



Walker

- The Alabama Criminal Defense Lawyers Association (ACDLA) recently named **Paul Young** of Enterprise its 2008-2009 Roderick Beddow Award recipient. The Roderick Beddow Award is ACDLA's highest honor. The Beddow Award—named after Roderick Beddow Sr., who died in 1989 after practicing law in Alabama for 57 years—recognizes lawyers for a lifetime of achievement and excellence in their field. ▲▼▲



Young

- BEVERLY P. BAKER
- JOHN W. JOHNSON, II
- RICHARD E. SMITH
- JAMES W. PORTER, II
- GEORGE WALKER
- PAUL YOUNG

Spring 2009 Admittees

(Photograph by FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, photofouts@aol.com)



STATISTICS OF INTEREST

Number sitting for exam	214
Number certified to Supreme Court of Alabama	93
Certification rate*	43.5 percent
Certification Percentages	
University of Alabama School of Law	78.6 percent
Birmingham School of Law	30.1 percent
Cumberland School of Law	57.1 percent
Jones School of Law	71.4 percent
Miles College of Law	0.0 percent

*Includes only those successfully passing bar exam and MPRE

For full exam statistics for the February 2009 exam, go to www.alabar.org, click on "Members" and then check out the "Admissions" section.

Alabama State Bar Spring 2009 Admittees

Abrams, Wilbert Archibald
Agricola, Erin Montague
Aikens, Hunter Nolan
Allen, Caroline Harrington
Allen, Timothy Andrew
Allen, Jessica Lauren
Allen, Jennifer Longo
Allison, Matthew Scott
Anderson, Kwenita Chanae
Arnwine, Jr. Robert Arthur
Barnes, David Kevin
Barnes, Rhenda Lise
Berryhill, Kerrian Shawn
Bettis, Kathryn Lila
Bodden, Christopher Patrick
Brandt, Judson Clark
Braud, Nicholas Kyle
Brendel, Ian Avery
Brice, Shirley Ann
Brooks, William Heath
Bubnick, Krystal Rose
Burns, Jeffrey Leonard
Bushnell, Tricia Jessica
Butler, Marlyn Annette
Carter, Christa Grammas
Chattopadhyay, Shelly
Cogburn, Casey Francelyn
Comer, Jr. Braxton Bragg
Cooke, Jodi Daniel
Cooper, Benjamin Howard
Corley, Jonathan Keith
Cox, Natalie Amanda
Crowe, Enslin Lamberth
Curry, Anna Cotey
Drake, Katherine Elizabeth
Eschleman, Laura DeMartini
Ezell, Donnie Franklin
Fletcher, III William Richard

Ford, Christopher Ashley
Fortenberry, Jeramie Jacob
Fortson, Megan Elaine
Gaither, Beverly Lynn Elliott
Gallini, James Reid
Gardner, Larry Scott
Gebhardt, Beverly Gail
Grayson, Jonathan Ryan
Guin, Jonathan David
Gundlach, Amy Dawn
Gurley, Jr. Michael Edward
Hartley-Martin, Wendy Ann
Hausfeld, M. Kevin
Heck, Taylor Allison
Henderson, Kyle Jordan
Hester, Teresa Ann
Hill, Teresa Joyce
Hocutt, IV William Doss
Holmes, Sara Nicholas
Holt, Jr. John Neal
Hood, Christopher Boyce
Hubbard, Laurie Lee
Hudon, Kathleen Suzette
Hutchings, Joseph Anthony
Johnson, Thomas Evan
Lakey, Jimmy Randall
Lunardini, Joy Taylor
Mabire, Jonathan Brian
Manley, Christopher Ryan
Maples, Carla Putman
Maxcy, Karen Angela
Maxymuk, Benjamin Woodforde
McCord, Adam Michael
McCord, Catherine Ann
McGlynn, Kathleen Ann
McNeil, John Jamil
Millwood, Shirley Ann
Murphree, John Leland

Neighbors, Joseph Frederick
O'Rear, Howell Griffith
Osborne, Ryne Warren
Overton, Jason Clay
Pate, Andrea Lewis
Pate, Russell Wayne
Patton, David Earl
Pickett, Lori Limbaugh
Pinson, Rachel Harris
Rathbone, Gavin
Reynolds, Amanda Enid
Roberson, Sandra Cole
Roselius, Jennifer Leigh
Ross, LaWanda Diane
Saag, Andrew Weil
Sandoval, Elizabeth Creecy Goering
Sharp, Holly Thompson
Sieja, Andrew Michael
Summers, Jeremy Patrick
Taylor, Alec Michael
Thomas, Jordan Ross
Thomas, Megan Elaine Snow
Thorpe, Laurel Hinote
Tindal, Troy Ted
Torres, Josh Esua
Towery, Jeong-Hwa Lee
Upton, Stacy Lynn
Vishnu, Vinutha
Wallace, John Wesley
Whatley, David Phillips
Whitaker, Tara Lyn
White, Clayton John
Willingham, Kimberly Holcomb
Witherspoon, Elaine Lauren
Woodfin, Randall Lee
Worstell, Brian Merrick
Wright, Leslie Ann
Zimmern, Benjamin Joseph

LAWYERS IN THE FAMILY



*Kyle J. Henderson (2009), Walton W. Hickman (2006)
and Franklin A. Hickman (1976)
Admittee, brother-in-law and father-in-law*



*Erin M. Agricola (2009), J. Culpepper Sawyer, III (2007)
and Algert S. Agricola, Jr. (1978)
Admittee, husband and father*



*Katherine Kisor Drake (2009), Tom Drake (1963), Chris Drake (1985), Tommy Drake
(1989), Kimberly Drake (2004), G. Whit Drake (1989), and Tyson Kisor (2008)
Admittee, father-in-law, mother-in-law, brother-in-law, sister-in-law, husband, and brother*



*Sandra Cole Roberson (2009)
and R.D. Pitts (1979)
Admittee and brother-in-law*



*Catherine Ann McCord (2009), Roy O. McCord (1982)
and John D. McCord (1984)
Admittee, father and uncle*



*Jeremy Patrick Summers (2008), W. Alan Summers, Sr. (1968)
and Judge W. Alan Summers, Jr. (1997)
Admittee, father and brother*

LAWYERS IN THE FAMILY



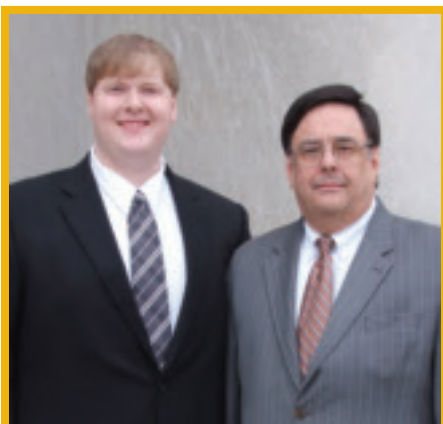
*Michael E. Gurley, Jr. (2009) and
Michael E. Gurley, Sr. (1972)
Admittee and father*



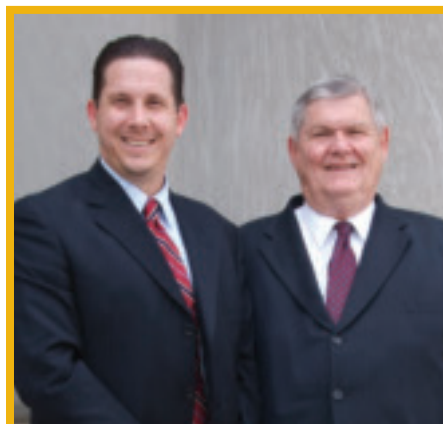
*Howell O'Rear (2009) and
Caine O'Rear (1975)
Admittee and father*



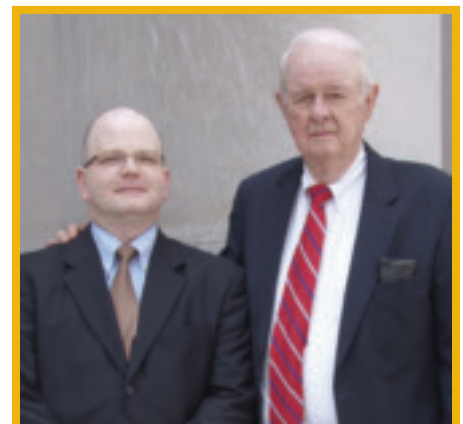
*Jeff Burns (2009) and Matt Burns (1975)
Admittee and father*



*Joseph Anthony Hutchings (2009)
and Bob Williams (1975)
Admittee and father-in-law*



*James Reid Gallini (2009) and
Judge R.W. Gallini (1971)
Admittee and father*



*John Neal Holt (2009) and
J.N. Holt (1951)
Admittee and father*

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By Sam David Knight

Background and Mission

The Alabama State Bar Board of Bar Commissioners initiated the Alabama State Bar Leadership Forum in 2005. The mission of the Leadership Forum is to: (a) form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations and community organizations can draw upon for leadership and service; (b) build a core of practicing lawyers to become leaders with respect to ethics and professionalism, resulting in raising the overall ethical and professional standards of lawyers in the community; and (c) raise the level of awareness of lawyers as to the purpose, operation and benefits of the Alabama State Bar.

With five years of graduates, the Leadership Forum continues not only to meet, but exceed its mission. The overwhelming response of the 144 former graduates about their Leadership Forum experience includes praise for the program and enthusiasm about relationships fostered during the forum. Leadership Forum alumni include a member of the state house of representatives, bar commissioners, local bar association presidents, candidates for public office, judges, a pastor, former military officers, a mayor, and leaders within our state bar organizations, specialty bars and sections.

2009 Leadership Forum (Class 5)

The fifth class of the Alabama State Bar Leadership Forum graduated May 14, 2009 and attended a banquet at the Summit Club in Birmingham. Alabama State Bar **President Mark White** presided. Following an invocation by Class 5 member **Christopher Allan Mixon**, President White introduced U.W. **Clemon**, retired chief federal judge of the Northern District of Alabama and now a member of the firm White, Arnold & Dowd PC, as the guest speaker. **Kimberly Till Powell**, a member of Class 3 of the Leadership Forum and co-chair of the 2008 and 2009 Leadership forums, provided inspirational comments on behalf of the 2009 Steering Committee. President White, assisted by **President-Elect Designate Alyce M. Spruell** and **Edward M. Patterson, assistant executive director and director of the Leadership Forum**, presented each graduate with a certificate and a compass commemorating their participation in the forum. **Freedom Court Reporting** gave engraved paperweights to each of the graduates. Class 5 graduates **Patrick C. Finnegan** and **Maricia D. Bennekin-Woodham** shared their inspired reflections on the Leadership Forum. Ed Patterson was honored with a gift from Class 5 for his com-



mitment to the Leadership Forum and his service to the Alabama State Bar. **Marie Updike**, assistant to Ed Patterson, was also honored with a gift from Class 5 for her extraordinary administrative skills.

Also in attendance at the graduation were ASB Past President **William N. Clark**, in whose term the Leadership Forum was approved by the Board of Bar Commissioners; **Jack Neal**, president of the Birmingham Bar Association, and his wife, Carolyn Neal; **Samuel Franklin** of Lightfoot, Franklin & White; **Greg Burge**, ASB commissioner from Circuit 10; **Phillip McCallum**, ASB commissioner from Circuit 10; **Joseph Fawal**, ASB commissioner from Circuit 10, and his wife, Susie Fawal; **James R. Pratt**, ASB commissioner from Circuit 10; **Robert E. Moorer**, ASB commissioner from Circuit 10, and his wife, Carol Ann Moorer; **Richard J. R. Raleigh, Jr.** (Class 1), ASB commissioner from Circuit 23; **Mike and Mickey Turner**, sponsors from Freedom Court Reporting; **Patrick Sheehan**, videographer from Freedom Court Reporting; and **Sam David Knight** (Class 4), 2009 Leadership Forum Selection Committee chair. Other Leadership Forum alumni in attendance included **John A. Earnhardt** (Class 1); **Kelly T. Lee** (Class 1) and ASB commissioner at large; **John A. Smyth, III** (Class 1); **Robert E. Battle** (Class 2); **Brannon J. Buck** (Class 2); **Wyndall A. Ivey** (Class 2); **Laura G. Chain** (Class 3); **R. Brent Irby** (Class 3); **John England, III** (Class 4); **Sandi Gregory** (Class 4); **Robert Lockwood** (Class 4); and **Tom Warburton** (Class 4).

Selection Process and Criteria

The 2010 Steering Committee is already actively involved in planning for Class 6. The Leadership Forum will continue to honor its mission through an evolving and expanded program designed to introduce participants to leadership opportunities throughout the state in the legal profession, education, business and industry, and social services, as well as in the access to justice arena.

Each year, the Selection Committee seeks to draw a broad and representative class of 30 members from throughout the qualified Alabama State Bar membership. Those suggested by the Selection

Committee are then reviewed by the Executive Committee of the Alabama State Bar, and the final selection is made and approved by the Board of Bar Commissioners. Applicants do not require a nomination in order to submit their application. One letter of substantial recommendation must be attached to the application.

If you have been a member of the Alabama State Bar for more than five years, but no more than 15, please consider applying to become a member of the Alabama State Bar's 2010 Leadership Forum. Following receipt of all applications, the Selection Committee, appointed by the president of the state bar and comprised of Leadership Forum alumni, reviews the applications for the following criteria in making the initial selection decisions, with special emphasis upon the first two criteria:

1. Demonstrated leadership ability based on past accomplishments and current engagements;
2. An understanding of the importance of servant leadership as demonstrated in the applicant's narrative;
3. Previous application to the Leadership Forum;
4. Practice diversity (criminal, civil, governmental and corporate);
5. Geographic diversity; and
6. Racial and gender diversity.

Class 5 alumni of the Leadership Forum are listed on the next page if you wish to contact one of them concerning their experience. To download and print an application to the 2010 program, go to www.alabar.org/members/leadership-update.cfm. ▲▼▲



Sam David Knight is a partner with Gordon, Dana, Knight & Gilmore LLC in Birmingham. He graduated from Auburn University and the University of Alabama School of Law. He is an alumnus of Class 4 of the Leadership Forum and is co-chair of the Leadership Forum Planning Committee for Class 6 (2010).

COMMENTS FROM CLASS 5 ALUMNI

Maricia D. Bennekin-Woodham

This has been an opportunity to meet persons from different practice areas and from different parts of the state. As a member of Class 5 of the Leadership Forum, I have learned an appreciation of the challenges that face different parts of our state. I truly want to become more involved in the education arena and join a bar committee. I can see how my classmates and I can work together to make a positive impact within the bar and our respective communities.

J. Eric Brisendine

I have been told that true leadership is the willingness to be a servant. The Leadership Forum has inspired me to contact my local economic development board to volunteer my time and services. I do not know what I can do to bring new jobs to our area, but I am willing to serve and try.

Paul A. Clark

As participants in this year's class, we have seen the great strides that Alabama has made in recent years, we have met and learned from the leaders within this state who have made these accomplishments possible and we have each been exposed to the depth and breadth of the issues which still confront our state.

Brandon K. Falls

There really is no comparable program on a statewide level that brings together this range of speakers and topics. The class taught me that Alabama is not so far behind the nation as the media would lead us to believe, and demonstrated effective ways of moving us into the future. The leadership classes, in particular, helped me focus the energy I expend in my work and direct the leaders in my office about how to do the same.

Patrick C. Finnegan

My participation in the Leadership Forum made plain to me that the Alabama State Bar has a vision for the legal profession that extends far beyond the confines of the legal system. Class 5 has heard some of Alabama's most important and accomplished leaders address the wide spectrum of major challenges that Alabama faces. All of this has been very inspiring and has certainly prompted me to redouble my efforts to be involved in helping Alabama move forward.

Richard M. Gaal

What a great privilege to have met so many good lawyers who are also good people. In addition to friendship, I have gained insight into the great strides Alabama has made in recent years to improve the welfare of its people. The leaders who spoke (from the public and private sectors) were genuinely dedicated to serving the people rather than promoting themselves—that was refreshing—but I also learned that there is much work to do. In areas of poverty, education and rural-city decline, there is a yearning for more leadership.

COMMENTS FROM CLASS 5 ALUMNI (Continued)

Othni J. Lathram

The Leadership Forum has been an invigorating and eye-opening experience. What has been inspiring about this program is that we have seen and heard about the true progress being made in this state. This progress is making great strides in educating our children, helping people rise out of poverty and developing some of the world's most advanced industries. This progress is a great hope for our future as well as a call to each of us to participate to ensure it continues.

Lara L. McCauley

I think the forum serves as a wonderful tool to allow leaders throughout Alabama to form a network. The forum has provided a way to have intelligent conversations with other lawyers on how to move our state forward. It has been a refreshing experience to be around such a diverse group of young lawyers who genuinely have one common goal—the betterment and advancement of Alabama.

D. Scott Mitchell

Being part of the bar's Leadership Forum has given me insight into many of the problems facing Alabama as well as many of the opportunities we have as a state. It also drove home the point that as attorneys, if we so choose, we can have the greatest impact on Alabama's future. Participation in the Leadership Forum has been an invaluable asset to me, and I hope the state bar will continue to grow the program.

Christopher A. Mixon

The Leadership Forum is a tremendous asset to the bar because it provides an opportunity for lawyers from diverse backgrounds, practice areas and parts of the state to get to know each other in-depth and in a way that would not be possible otherwise. Moreover, by exposing the participants to issues facing the state at large and by encouraging the participants to give back to the community, the forum exemplifies the best tradition of the bar—service in the public interest.

Val H. Plante

By participating in ASB Leadership Forum Class V, I have established an invaluable network of attorneys throughout the state with a common interest in promoting servant leadership. The sessions provided ideas on how to become a servant leader within my legal practice and within my community, and these sessions have inspired me to become a more active participant in community and statewide efforts to promote our state.

Erica L. Sheffield

The Leadership Forum provided the perfect opportunity to learn about the progress our state has made as well as the challenges that we still face. We should take pride in the role that attorneys have played in moving the state forward, but we should not forget that there is still work to be done. As attorneys, it is incumbent upon us to serve as leaders and take an active role in overcoming Alabama's challenges.

CLASS 5 GRADUATES



Joe Chandler Bailey, II	Lightfoot, Franklin & White LLC	Birmingham
Maricia Bennekin-Woodham	Equal Employment Opportunity Commission	Birmingham
James Eric Brisendine	Scruggs, Dodd & Dodd PA	Fort Payne
Jimmy Spurlock Calton, Jr.	Calton & Calton	Eufaula
Paul Anthony Clark	Balch & Bingham LLP	Montgomery
Lisa M. Darnley Cooper	Hand Arendall LLC	Mobile
John Gibbs Dana	Gordon, Dana, Still, Knight & Gilmore LLC	Birmingham
Brandon Kent Falls	District Attorney's Office	Birmingham
Patrick Conor Finnegan	Helmsing, Leach, Herlong, Newman & Rouse	Mobile
Michael Aaron Fritz, Sr.	Fritz & Hughes LLC	Montgomery
Richard Mark Gaal	McDowell, Knight, Roedder & Sledge LLC	Mobile
Christopher Dean Glover	Beasley, Allen, Crow, Methvin, Portis & Miles PC	Montgomery
Othni James Lathram	Alabama Law Institute	Tuscaloosa
Lauryn Akens Lauderdale	Lauderdale & Lauderdale PC	Opelika
Erin Elizabeth May	Infinity Insurance Company	Birmingham
Lara Lynn McCauley	W. Barry Alvis & Associates LLC	Birmingham
Douglas Scott Mitchell	Supreme Court of Alabama	Montgomery
Christopher Allan Mixon	Ogletree Deakins	Birmingham
Emily Kay Niezer	Knight Griffith McKenzie Knight & McLeroy LLP	Cullman
Bentley Hines Patrick	Attorney at Law	Birmingham
Valerie Hose Plante	Maynard Cooper & Gale PC	Huntsville
Robert Emmett Poundstone, IV	Bradley Arant Boult Cummings LLP	Montgomery
Emily Hawk Raley	Cusimano, Keener, Roberts, Knowles & Raley LLC	Gadsden
Erica Lynn Sheffield	Honda Manufacturing of Alabama	Lincoln
Audrey L. Oswalt Strawbridge	Strawbridge, Strawbridge & Strawbridge LLC	Vernon
Brian Paul Strength	Attorney at Law	Tuskegee
James Robert Turnipseed	Burr & Forman LLP	Mobile
Robert Hays Webb	Turner, Webb & Roberts PC	Tuscaloosa
Chad Edward Woodruff	Attorney at Law	Talladega



A Perspective on the Alabama State Bar's 2009 Leadership Forum—Class 5

By Lisa Darnley Cooper

“Do all the good you can, by all the means you can, in all the ways you can, in all the places you can, at all the times you can, to all the people you can, as long as ever you can.”

John Wesley (founder of Methodism, 1703-1791)

In the interest of full disclosure, as a Methodist I am a little partial to John Wesley. But John Wesley's rule perfectly sums up what the Alabama State Bar's Leadership Forum is all about: it is the ultimate training ground for those interested in service to our profession, service to our bar and service to our communities and state.

The Leadership Forum is not a typical “Leadership 101” class. The essential principles of effective leadership are certainly covered, but Class 5 was not presented with a list of leadership techniques to master or even a list of the most significant qualities or characteristics of great leaders. Instead, with the central themes of servant leadership and our state bar's motto (“Lawyers Render Service”) guiding our five sessions, members of Class 5 were challenged by some of the most accomplished leaders

in our state and guest lecturers, simply stated. . . to serve.

Do All the Good You Can

For each month between January and May, members of Class 5 traveled to various cities across Alabama to hear from demonstrated servant leaders, and we learned that there were countless opportunities to serve and “do good” in Alabama. The topic of each session was different, of course, but the underlying directive from each presenter was the same. That is, true leadership is servant leadership. As Robert K. Greenleaf explains in his 1970 essay entitled *The Servant as Leader*, servant leadership starts from the sincere motivation to serve others *first* and, only then, followed by the conscious choice to aspire to lead. In other words, great leadership is the natural consequence of the primary desire to serve others.

COMMENTS FROM CLASS 5 ALUMNI (Continued)

Audrey O. Strawbridge

This program has provided me with the opportunity to meet with attorneys from all spectrums of diversification. The various speakers who were gracious enough to spend their time all had one common characteristic: servant leaders. This forum has taught me that Alabama is full of potential and the potential is being realized through servant leaders who work tirelessly to see Alabama achieve.

Brian P. Strength

The Leadership Forum helps the state bar connect to members in places other than Mobile, Montgomery, Huntsville and Birmingham, and any program of the state bar which does that deserves particular consideration. It is a good incubator for future bar commissioners. It also occurred to me that the state bar gets a benefit from all of the speakers interacting with emerging bar leaders.

J. Robert Turnipseed

I have met some wonderful people during this program, not only members of my class but also those who have come before and those community leaders who spoke to us. I learned that Alabama is a state full of amazing opportunities, but also difficult challenges that we, as natural leaders of our respective communities, have an obligation to engage. I am grateful for being afforded the opportunity to be involved in this program, and I truly hope I can continue to apply the lessons learned in the future.

R. Hays Webb

We are surrounded by smart and thoughtful lawyers, each hoping to serve their community and our state. We have been introduced to current and future leaders and exposed to ideas regarding and examples of leadership in situations which exemplify the highest standards of our profession. The various speakers, particularly those covering education and the Black Belt, provided excellent examples of leadership skills and qualities at work. Our classes reinforced Alabama's continual need for new leaders at every level who exhibit these same qualities.

Chad E. Woodruff

The sheer educational experience of the Leadership Forum has been the most surprising aspect to me. The forum has provided an extremely broad brush on so many pressing and important issues facing our state, including economic development, poverty and educational opportunities, just to name a few. Educating, networking, [visiting] historical sites—it has been a very rewarding time for me.



ALABAMA STATE BAR LEADERSHIP FORUM



Class 5 began to explore the concept of servant leadership in January when we met for an overnight retreat at the Marriott Renaissance Ross Bridge in Hoover for an orientation session on “Fundamentals of Leadership and Professionalism.” Class members got the opportunity to get to know one another, and we also enjoyed a first-class lineup of presenters. One of the many highlights was an interactive “leadership boot camp” with Allison Black Cornelius, founder of BLACKboard Consulting Company. Cornelius has a tremendous gift for motivating her audience to lead at the absolute highest possible level. In fact, she is one of those people who can make you feel completely at ease, while she is challenging you beyond your limits. Class 5 also enjoyed a presentation by Dr. Wayne Flynt, professor emeritus, Auburn University. Prior to orientation, we read several chapters of Dr. Flynt’s latest historical work, *Alabama in the Twentieth Century*. If you want to get passionate about reforming Alabama’s antiquated, ineffective and discriminatory 1901 Constitution, read this book and

hear Flynt speak. His passion about bringing Alabama’s constitutional framework *into* the 21st century is contagious.

In February, we traveled to the state bar in Montgomery for a session entitled “Leadership through Education,” where the panel included a “Who’s Who” of education in our state. This session was particularly inspiring, because while the education system in Alabama certainly has its challenges, such as the state education budget (see previous reference to ineffective state constitution), there has been significant progress over the last several years. We were able to see the progress first-hand by touring E.D. Nixon Elementary School. In 2008, E.D. Nixon received the Torchbearer Award which recognizes high-poverty public schools that have overcome the odds to become high-performing schools. After the tour of the school, I ate lunch with Dr. Regina Thompson, former principal of the school. As I listened to her talk about the struggles and triumphs at E.D. Nixon, I remember thinking of the familiar Margaret Mead quotation: “Never doubt that a small group of thoughtful,

committed citizens can change the world. Indeed, it is the only thing that ever has.”

Our third session was held in Selma and focused on Alabama’s Black Belt. Often called the state’s “Third World,” the Black Belt is plagued by poverty, high unemployment rates, high rates of unwed mothers, illiteracy, and so on, but the momentum to change that was palpable at this session. We also had the honor of visiting the Brown Chapel AME Church, headquarters for the voting rights movement and the starting point for the Selma-to-Montgomery marches that lead to the passage of the 1965 Voting Rights Act. It was amazing to hear firsthand accounts of this period of our state and nation’s history from Jamie Wallace, a reporter for the *Selma Times Journal* in the 1960s.

In April, we traveled back to Montgomery for a session focused on “The Legislative Process and Economic Development.” The morning session was held at the state capitol, where we met Governor Bob Riley, Lt. Governor Jim Folsom, Jr. and Speaker of the House Seth Hammett, just to name a few. The second part of the session involved a tour

Alabama State Bar Leadership Forum Applicant Demographics 2005-2009

	Class 5 (2009)			Class 4 (2008)			Class 3 (2007)			Class 2 (2006)			Class 1 (2005)		
	Applications	Class	Alternates	Applications	Class	Alternates	Applications	Class	Alternates	Applications	Class	Alternates	Applications	Class	Alternates
Number of Applicants	75	30	4	78	30	4	72	30	4	71	30	4	42	30	4
Male	52	19	2	51	20	4	52	20	3	52	20		25	16	
Female	23	11	2	27	10	0	20	10	1	19	10		17	14	
Black	4	3	0	7	5	0		2	1	6	6		2	2	
City:															
Birmingham	31	8	3	34	13	4	33	13		34	12		18	14	
Huntsville	2	1	0	2	2		6	2		4	1		4	3	
Mobile	7	4	0	7	2		6	2		6	2		5	2	
Montgomery	9	6	0	13	5		6	2		8	3		6	5	
Tuscaloosa	2	2	0	5	1		5	3		2	1		4	4	
Other	24	9	1	17	7		16	8		17	11		5	2	



of the Hyundai Motor Manufacturing plant, and discussions about the “nuts and bolts” of economic and workforce development.

In May, Balch & Bingham hosted an “Access to Justice” workshop in Birmingham which included discussions about the Volunteer Lawyer programs in Alabama, truth in sentencing and the many issues facing Hispanics in Alabama. At this session, presentations by Jon C. Goldfarb, counsel for Lilly Ledbetter, and G. Douglas Jones, the former United States Attorney who successfully prosecuted two former Ku Klux Klansmen for the murder of the four young girls killed in the Sixteenth Street Baptist Church bombing, reminded us that the work we do as lawyers is, above all else, a public service.

By All the Means and All the Ways You Can

One of the goals of the Leadership Forum is to form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations and community organizations can draw upon for leadership and service. As lawyers, we have the means and a unique set of skills and abilities to serve and lead our communities. Take, for example, just a few of the topics covered in the 2009 Leadership Forum. By our training and education, lawyers are uniquely qualified to effectuate constitutional reform or to serve in the state legislature (yet few do). Through *pro bono* efforts, we can also serve the disadvantaged or persons of limited means, thereby promoting the public interest, in ways no other profession can.

In fact, inspired by the Leadership Forum’s charge for servant leadership and by the examples of selfless leadership of

the many guest lecturers and panelists, Class 5 is planning a *pro bono* class project for the Black Belt community. Class 5 will certainly use what we learned through the Leadership Forum in our local communities, but we are also intent on a collective project that will hopefully reach beyond where we live and practice. With the help of the state bar’s Volunteer Lawyers Program, Class 5 members will conduct three *pro bono* clinics, one each in Demopolis, Selma and Tuskegee, this fall and winter. If you would like to help out, we would welcome your involvement. At a minimum, we request that every lawyer sign up for the Volunteer Lawyers Program at the ASB and your local VLP office, if you have not already done so.

In All the Places You Can, at All the Times You Can, to All the People You Can

One of the greatest characteristics of the Leadership Forum is the diversity of the class members, and Class 5 is no exception. Class 5 members reside in cities and towns all over the state of Alabama, including Birmingham, Cullman, Eufaula, Fort Payne, Gadsden, Huntsville, Lincoln, Mobile, Montgomery, Opelika, Talladega, Tuscaloosa, Tuskegee, and Vernon. Every type of law practice is represented, including solo practitioners; civil and criminal practices in small, medium and big firms; plaintiffs’ and defense attorneys; in-house counsel; government lawyers; a district attorney; a court administrator; a former circuit court judge; and lawyers employed by legislative agencies. Even prior to the Leadership Forum, members of Class 5 were extremely busy donating their time and energy to a host of organizations, such as Big Brothers-Big Sisters, the

Muscular Dystrophy Association, United Cerebral Palsy, the NAACP, the Boy Scouts of America, The Inns of Court, several Rotary and Kiwanis clubs, and historical preservation societies. Many members of Class 5 take time to tutor children and teach Sunday school. Almost every member is involved in our state bar and their local bar association at various levels. It is actually quite humbling to be included in such a group.

With the leadership skills the forum helps cultivate and the connections we have made with each other and with the state bar, I have no doubt that because of our Leadership Forum experience, members of Class 5 will be the future leaders of our state bar and positively impact people in every corner of our state.

As Long as You Ever Can

Alumni of the Leadership Forum include a state legislator, district attorneys, bar commissioners, judges, and presidents of local bar associations, and numerous other local and state leaders. In fact, if you consider the level of community and state bar involvement of the members of Leadership Forum classes 1-4, it is clear that graduation from the forum is truly a commencement of a commitment to leadership and service in Alabama. I look forward to seeing the future fruits of Class 5’s commitment to “do good” in our state. ▲▲▲



Lisa Darnley Cooper is a member of Hand Arendall LLC in Mobile. She received her J.D. from the University of Alabama School of Law, and she serves as vice president of the Mobile Bar Association’s Volunteer Lawyers Program. Cooper was a member of Class 5 of the Leadership Forum.

2009 AWARD RECIPIENTS

At the 2009 Alabama State Bar Annual Meeting in Point Clear, the following awards were presented:



President-Elect Methvin with **Thomas C. McGregor** (right) (Award of Merit recipient), who served for 18 years as ASB Legislative Counsel



President-Elect Methvin congratulates **Squire Gwin** (center) and **David M. Wooldridge** (right), who received the Award of Merit for their outstanding constructive service to the legal profession through their tireless work with the Lawyer Assistance Program.



Chief Justice **Sue Bell Cobb** with **Robert G. Esdale** (left), clerk of the supreme court (Commissioners Award recipient), and Supreme Court Associate Justice **Champ Lyons, Jr.** (right) (Judicial Award of Merit recipient)



Rosa Davis and **Walter Turner** (both center) of Montgomery were two of the recipients of the Commissioners' Award for their long-time service to the attorney general's office. Pictured with them are **Bill Baxley** (Birmingham), **Jenny Garrett** (Montgomery), **Tony McLain** (Montgomery), **Joe Marston** (Montgomery), **Judge Tom Parker** (Montgomery), **Tori Adams** (Montgomery), and U.S. Circuit Judge **Bill Pryor** (Birmingham).



Claude M. Burns, Jr. (right) received the **Walter P. Gwin Award** for outstanding service to the bench and bar of Alabama in the field of continuing legal education. President-Elect Methvin did the honors.



Volunteer Lawyers Program Award recipients (left to right) include **Alyson Hood** (Law Student Award), **Christopher J. Williams** (Al Vreeland Award), **Lisa Borden** (Firm Group Award) and **Charles H. Booth, Jr.** (Mediation Award).



Birmingham Bar Association President **Jack Neal** (right) is presented with a Local Bar Achievement Award by President Mark White for the BBA's 31 outstanding community service projects that helped to benefit the community.



Under the leadership of **Patrick L.W. Sefton** (right), president of the Montgomery County Bar Association, the MCBA was presented with a Local Bar Achievement Award for its "Project Impact Montgomery" program and its fundraising efforts on behalf of various local charities.



Commissioner **Cooper Shattuck** (right) accepts the Local Bar Achievement Award from President White on behalf of the Tuscaloosa County Bar Association.



President Mark White with Commissioner **John Gruenewald** (right), who accepts the ASB Local Bar Achievement Award on behalf of the Calhoun/Cleburne County Bar Association



Former Supreme Court Justice **J. Gorman Houston, Jr.** was honored as the recipient of the Chief Justice's Professionalism Award. Seated next to him is his wife, Martha.



Frankie Fields Smith (center) of Mobile received the 2009 Maud McLure Kelly Award presented by the Women's Section. Pictured with her are **Karen Laneaux** (Montgomery), chair, ASB Women's Section, and **Judge Shelbonnie Hall** (Mobile).



Fifty-year members attending the annual meeting included **Joe B. Thompson** (Brewton), **Albert E. Ritchey** (Birmingham), **Currin C. Humphrey** (Harvest), **Robert Sellers Smith** (Huntsville), and **James M. Tingle** (Birmingham), with President-elect Tom Methvin.

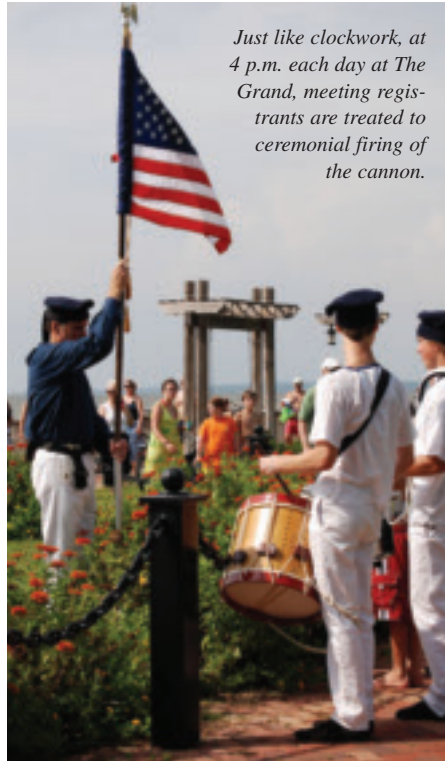
2009 ANNUAL MEETING PHOTO HIGHLIGHTS

Wednesday

PHOTO CREDITS: Thanks to Laura Calloway, Robert Cook, Wyatt Cook, Bruce Gray, Earl Lawson, Diane Locke, Robby Lusk, Frank McLaughlin, Cameron Murphy, Kari Skinner



Laura Calloway, director of the ASB Practice Management Assistance Program, with program presenters David J. Bilinsky (left) of Vancouver, BC and James A. Johnson of Mobile.



Just like clockwork, at 4 p.m. each day at The Grand, meeting registrants are treated to ceremonial firing of the cannon.



Sam and Pat Rumore (Birmingham) with a copy of her soon-to-be published book, *From Power to Service: The Story of Lawyers in Alabama*.



The GEICO gecko having a "high" time

Thursday



Panelists for "Appellate Practice: Views and Tips from the Bench & Bar" included Kevin C. Newsom (Birmingham), the Hon. William H. Pryor, Jr. (Birmingham) and the Hon. Greg Shaw (Montgomery), along with moderator Marc J. Ayers (Birmingham).



Rep. Jeff McLaughlin (Guntersville) gets some tips on baby-sitting from daughter Mary Crawford.



American Bar Association President Tommy Wells and the GEICO gecko assisted President White at the opening plenary session as he handed out disposable cameras and "Fun Police" hats to some of the younger crowd. Their job was keep the fun going and make sure they had the pictures to prove it. Frank McLaughlin (far right) of Guntersville served as President White's unofficial entertainment consultant for the annual meeting.



The hands-down big hit amusement had to be the gift caricatures drawn by Deano Minton, pictured here with Debra Jenkins of Birmingham. Lines were so long Thursday night that the original closing time had to be extended to accommodate everyone.

2009 ANNUAL MEETING PHOTO HIGHLIGHTS



During the Bench & Bar Luncheon, three lawyers, all named **Bradley Byrne**, “just happened” to be seated at the same table! And here’s the kicker: none are related.



Enjoying the reception honoring the 2009 Pro Bono Award winners are **Robert Ward** (center) with his son, **Kellen**, and **Andy Birchfield**, all of Montgomery.



Musical entertainment was provided by “Delta Reign” at Thursday’s Grand Family Night Carnival.



Robert Cook gets a (temporary!) tattoo applied. Attendees could choose from a variety of designs but none included the ASB logo. Maybe next year . . .



The variety of games and prizes...



...kept the crowds entertained for hours.



When we asked Chief Justice Sue Bell Cobb’s daughter **Caitlin** and her friend if they were enjoying the annual meeting they answered with smiles. ‘Nuff said.



Now you have to admit, that’s a pretty cool picture. Fireworks are a staple of the Thursday night program at the ASB Annual Meeting.

Friday



Mixing business with fun is the purpose of the annual Past Presidents' Breakfast. **Wade Baxley, Clarence Small, Fred Gray, Sr., Walter Byars** (front row, left to right), **Dag Rowe, Sam Rumore, Ben Harris, Jr., Boots Gale, Broox Holmes** (middle row), **Sam Crosby, Jim North, Bobby Segall, Doug McElvy, and Vic Lott** (back row) continue the tradition.



Lt. Col. J. Bruce Bright, USMC (ret.) was the guest speaker at the joint Senior Lawyers and Leadership Forum Alumni Breakfast.



Friday's Family Tennis Tournament winners were **Steve Sciple** (Mobile), **Sarah Lawson** (Birmingham), **Steve Chain** (Birmingham), **James Dorgan** (Fairhope), and **Taylor Brooks** (Huntsville).



Carol Ann Hobby and Chris Hastings, famed chef of Birmingham's Hot and Hot Fish Club, take a minute from the cooking demonstration offered on Friday.



Charlie Shah, U.S. Magistrate Judge Sonja Bivins and Augusta S. Dowd, all of Birmingham, were just three of the featured speakers for "Recruiting and Retaining Diverse Attorneys" Friday morning.



B-I-N-G-O! No matter the age, both adults and children had fun playing this ageless game.



Now this is why we have the annual meeting and why you need to be at Baytowne next year! Face-painting, balloon creatures and ice cream. What more could your family ask for?



A chance to sail on the 72-foot coastal schooner "Joshua" was among the extracurricular activities offered at the annual meeting.



Unofficial "First Assistants" **Chianne Sanchez** (left), who works with Mark White, and **Anna Pender Pierce**, who works with Tom Methvin, swap a few survival tips.

2009 ANNUAL MEETING PHOTO HIGHLIGHTS

Saturday



Commissioner **Robert E. Moorer** of Birmingham and spouse **Carol Anne** contemplate making a bid at the Fourth Annual Silent Auction Fundraiser. More than \$20,000 was raised.



Mickey and Mike Turner (far left and far right) of **Freedom Court Reporting** with **Frank Head** (Columbiana) and his daughter, **Jacqueline**. He was the men's winner of the Legal Runaround 5K Race (ASB members) and she won the non-ASB members' women's division. **Madeline Haikala** (Birmingham) won the women's division as an ASB member. Winners of the 1-mile Fun Run/Walk were **Bruce Thompson** and his daughter, **Haley**, both of Brewton. Both **Frank Head** and **Madeline Haikala** will receive free registration to the 2010 Annual Meeting!



Musical entertainment was provided by "The Brass City Band" at President White's Reception.



The 1-mile Fun Run/Walk and 5K Run sponsored by **Freedom Court Reporting** drew participants of all ages.



Chianne Sanchez is presented with a framed certificate of appreciation by President-elect **Methvin**. Keeping **Mark White** on track takes a lot of time and effort!



And the Grand Prize winner is **David Martin** (Montgomery), who received a three-day get-away to the Napa Valley, compliments of **ISI Alabama**. It pays to stay!



First ladies of the law—Alabama Supreme Court Chief Justice **Sue Bell Cobb** and Alabama State Bar President-elect **Alyce M. Spruell**



As with all the annual meeting events, attendees of President **Methvin's** Reception enjoyed themselves, no matter what the age.



President **Methvin** with his son, **Slade**, spouse **Amy** and **Leah McLain**, spouse of ASB General Counsel **Tony McLain**.



Saying "See you next year at Baytowne Wharf" are **Wyatt Williams** and his mother, **Elliott** (Birmingham).



Celebrate Alabama's Pro Bono Week

By Phil D. Mitchell

This year, the Standing Committee on Pro Bono and Public Service of the American Bar Association has sponsored the first National Pro Bono Celebration, scheduled to be held October 25 through 31, 2009. Currently, 940,000 Alabamians live in poverty, and of these, one in every four experiences legal problems. The majority of these problems are civil problems; consumer issues (creditor harassment, utility non-payment, bankruptcy); health issues (Medicaid, government insurance, nursing home); family law issues (divorce, child support/custody, abuse); employment issues (unemployment benefits, pension, lost employment); and housing issues (unsatisfactory repairs, foreclosure, eviction, poor living conditions). Many of these issues are critical to the citizen's safety and independence.

Presently, there are fewer than 55 paid legal aid lawyers to serve more than 422,000 low-income households in our state. Funding for low-income Alabamians who need civil legal assistance has not yet been adequately met, with the consequences being a lack of access to justice which is devastating to the poor and which weakens our democratic society as a whole. Pro bono lawyers have been called upon to assist in this crisis, and, last year alone, 2,772 members of Alabama's legal community donated 5,220 hours in free legal services and made generous financial contributions to legal aid organizations in our state. These efforts must be recognized and further efforts encouraged.

The Pro Bono Week Celebration is a coordinated national effort to showcase the great difference that pro bono lawyers make to the nation, its system of justice, its communities and, most of all, to the ever-growing needs of this country's most vulnerable citizens. Although national in its breadth, this celebration provides an opportunity for local legal associations across the

country to collaboratively commemorate the contributions of America's lawyers and also to recruit additional lawyers to meet the growing need. To this end, Alabama State Bar Past President Mark White saw the need to extend this celebration to our state and appointed the Pro Bono Celebration Task Force and charged it to plan and coordinate Alabama's activities during this important week. Current state bar President Tom Methvin has joined in the efforts with his announcement that the major initiatives of his term will include increased funding for "Access to Justice" with the goal of protecting the legal rights of people living in poverty.

Alabama's Celebrate Pro Bono Week is an opportunity for bar associations and attorneys across the state to plan events in recognition of individuals who currently do pro bono work and to encourage others to do the same. In order to facilitate increased focus on a wide array of pro bono activities, the task force is planning to include activities or events in every judicial circuit in Alabama. The task force is working with all segments of the legal community from law students to judges. Local bar associations, Alabama's judicial associations, Alabama's volunteer lawyer programs, Legal Services Alabama, Alabama's law schools, individual lawyers, and others will collaborate with the Alabama State Bar, through the task force, in publicizing and holding events locally as well as statewide.

Since its inception, the task force has already obtained proclamations by Alabama Governor Bob Riley, by each of the three Alabama judges' associations, by the Alabama State Bar Board of Bar Commissioners and by the cities of Tuscaloosa and Demopolis, recognizing October 25 through 31, 2009 as Pro Bono Week and encouraging participation in the Alabama State Bar's efforts in recognizing the contributions of our legal community

helping those most in need. Many more such proclamations are soon to come, further advancing the publicity of Alabama's Pro Bono Week Celebration.

During the celebration, the task force will work with local bar presidents and bar commissioners to speak on the topic of pro bono and Access to Justice to various local civic organizations throughout the state. Alabama State Bar Leadership Forum Class 5 plans to hold three legal assistance clinics during that time period as their class project. These clinics will be held in Demopolis, Selma and Tuskegee. Other events currently being planned include various advice and assistance clinics, including Wills for Heroes events, events providing assistance to the elderly, events providing assistance on mortgage foreclosures, continuing legal education events, and even a fund-raising "dinner theater" presentation by volunteer lawyers in Mobile. Continue to check the "Celebrate Pro Bono Week" section of the Alabama State Bar's Web site at www.alabar.org for more information on events and how you can be a part of the celebration.

Please join the Alabama State Bar's efforts in celebrating Pro Bono Week this October 25 through 31, 2009 to commend Alabama's attorneys for their ongoing pro bono contributions and, if you have not already done so, continue the celebration by joining one of the various volunteer lawyer programs throughout the state to provide much needed pro bono legal services to those otherwise unable to obtain justice. ▲▼▲



Phil D. Mitchell is a shareholder at Harris, Caddell & Shanks PC in Decatur and serves as the Alabama State Bar Commissioner for the 8th Judicial Circuit. Mitchell also serves on the

Celebrate Pro Bono Task Force, the Alabama State Bar Committee on Volunteer Lawyer Programs and the Board of Directors for Legal Services Alabama. He received his law degree from the University of Alabama School of Law in 1991 and his undergraduate degree from Jacksonville State University.



Kids' Chance Scholarship Recipients

Rising tuition fees and living expenses present a challenge for students whose families live on a limited income, but Kids' Chance Scholarship Fund rises to meet the challenge by helping young people continue their education and reach their goals.

Kids' Chance Scholarships help students whose parent or parents have been permanently disabled or killed on the job to attend college or technical school. Kids' Chance was conceived by the Workers' Compensation Section of the Alabama State Bar in 1992, and is administered by the Alabama Law Foundation, a private nonprofit division of the Alabama State Bar. The awards for this school year totaled \$39,500, bringing to a total \$422,000 that the successful program has awarded to more than 169 students since 1993. Without Kids' Chance, these students might not have been able to afford a higher education. In addition to their education improving their lives, Kids' Chance graduates work as teachers, surgical nurses, forest rangers and engineers, making their communities safer, healthier and more prosperous places to live.

The Law Foundation also recently elected **David Boyd** of Balch & Bingham's Montgomery office as its new president.

Boyd's main goal as the foundation president will be to find the strengths and weaknesses of the foundation so that it may improve in the future.

Boyd's outstanding leadership in legal associations and organizations led to his election. He served as chair of the Alabama Board of Bar Examiners, a member of the state bar's Board of Bar



Boyd

Commissioners, as well as state bar vice president, and chair of the state bar's Disciplinary Commission. He is a Fellow of the Alabama Law Foundation and the American Bar Foundation. He was also awarded the William D. "Bill" Scruggs Service to the Bar Award from the Alabama State Bar in 2006.

The Alabama Law Foundation is a statewide organization that provides civil legal aid to the poor. Founded in 1987, the foundation has developed volunteer programs in which lawyers from throughout Alabama give their time and talents back to the community by providing free legal counsel to those less fortunate. ▲▼▲

The Kids' Chance Scholarship recipients are:

Kelly Randall Blackwell, Jasper, \$1,500
Justin Boyles, Russellville, \$1,000
Keslie Paige Boyles, Russellville, \$1,500
Christopher Terry Cupit, Demopolis, \$1,000
Stephen Cupit, Demopolis, \$2,500
Corey DeFoor, Oakman, \$1,000
Hayley Kristine Fondren, Tuscaloosa, \$1,000
Robert Derek Fondren, Tuscaloosa, \$2,000
Ashley Michelle Henry, Headland, \$2,000
Casey King, Dothan, \$2,500
Kyle Martin, Alexander City, \$1,000
Kellie Oliver, Phil Campbell, \$2,500
Kellsie Oliver, Phil Campbell, \$2,500
Jarred Pate, Cordova, \$1,000
Brittany Patterson, Sweetwater, \$2,000
Ashley Pentecost, Trinity, \$2,000
Haley Prestridge, Jasper, \$2,000
Brittany Ann Russell, Toney, \$1,500
Joshua Squires, Semmes, \$1,000
Haley Steinbuchel, Madison, \$2,000
Hailey Taylor, Malcolm, \$2,000
Malaika Louise Washington, York, \$1,500
Heather Williams, Pisgah, \$2,500



ASB Lawyer Referral Service

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

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

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

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

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“The Times They Are A-Changin’”

seems just as true now as when Bob Dylan wrote the song in 1964. With these changing times we must roll with the punches and change ourselves accordingly. That is just what the Alabama State Bar Lawyer Referral Service is doing. The LRS is making changes to help its members be prosperous and effective. One of the new things we are introducing was made possible by the LRS committee, chaired by Charles Moses, Shannon Knight and Col. George D. Schrader. We have designed a new brochure for potential clients who are only in the military. These brochures are being distributed by Col. Schrader to military bases throughout Alabama. Many attorneys in our referral service have signed up to offer discounts to military personnel. This is a great added bonus for the potential clients, as well as a smart investment for our attorneys. Military personnel need an attorney for several areas of law such as military divorce, probate and real estate issues.

The LRS is also working to improve the service for its attorneys as well as potential clients. There are new screening processes being formulated to ensure our attorneys get as many viable clients as possible. We have moved into the era of e-mails to make things more convenient and efficient. Within 45 minutes of receiving a potential client's information, our database sends an e-mail to the intended attorney, so they will have the information faster than the previous method of “snail” mail. The old method of the post-referral survey is a thing of the past. Our attorneys now just have to sign onto the ASB Web site, www.alabar.org, fill in the requested information and it's done. Of course, our attorneys still have the option of receiving their information via the post office, if they choose.

With the savings of not mailing out referrals, and the percentage fees we are receiving for cases referred to our attorneys, we are able to find better ways to reach potential clients. We will continue to use our ads in the Yellow Pages, but are also exploring other methods of getting the “word” out. We will be sending our brochures out to all circuit clerks in the state this month, as well as being listed in several publications.

If you are not a member, you are missing an excellent opportunity. Not only do you have the potential of reaching a broader potential client base, but a chance to do a good service for the public. Many people who are dealing with the impacts of the current economic crisis often wonder where they can turn for help. For many of them, the answer is the LRS. For as little as a \$100 a year, you can have a “live” person versus a recording suggesting **you** to be a potential client's attorney!

Whether you are just starting your practice, or have been in business for years, the Lawyer Referral Service can work for you! For an application or more

information, go to www.alabar.org or call the Lawyer Referral Service at (334) 269-1515 or (800) 354-6154. ▲▼▲



Pictured above, left to right, are Colonel Bryan Morgan, state Judge Advocate General; CW5 Steve Missildine, director of Family Programs; Mary Jo Gowan, Family Readiness assistant; Charles Moses, LRS chairman; Major General Charles Rowe, commander, Alabama State Defense Force; Colonel George D. Schrader, staff judge advocate, Alabama State Defense Force; and Keith Norman, executive director, Alabama State Bar.

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Outside the Courtroom and Inside the Classroom: Career Attorney Discovers Joy of Teaching

By Kimberly L. Wright

Sometimes people look for new opportunities, a change of direction. Other times, in an act of kismet, new opportunities find people.

George C. “Bud” Garikes didn’t intend to change careers in 2001 after 19 years of practicing law. At that time, he was an attorney with almost 20 years of experience, including plenty of governmental legal exposure, who was pursuing a job with the Bush administration. He was the epitome of a career attorney immensely satisfied representing the public interest in court.

But something happened on the way to a political appointment. Something seemingly trivial crossed his path—a want ad. A pivotal advertisement in the *Washington Post* piqued his curiosity and changed his life. He has since transitioned from career attorney to educator, and he hasn’t looked back. Garikes is now the upper school director of St. Stephen’s & St. Agnes School, a private school in Alexandria, Va.

Despite what seems to be two totally unrelated career tracks, Garikes finds himself employing the same skills he learned and honed as an attorney on a daily basis as an educator and administrator. The mentors who helped him become an ethical and successful fighter for the public good as a government attorney now help him influence the public good outside the courtroom and inside the classroom, helping to influence the success of young people.

Legal Aspirations

Garikes didn’t start out with an inclination toward a career in education. Graduating with a bachelor of arts from the University of Alabama in 1979, he majored in history and minored in English and speech communication, along the way taking classes that would help him prepare for trial work as an attorney.

He soon zeroed in on a legal career. Garikes continued his academic studies at the University of Alabama, graduating from law school in 1982. At Alabama, he found mentors to help light his way: faculty members George Peach Taylor, Nat Hansford and Richard Thigpen, all three members of the Alabama State Bar. Their lessons would influence his growth and development as a lawyer and, later, as an educator himself.

According to the University of Alabama School of Law spokesperson Aaron Latham, Taylor was the faculty member



Garikes, with two upper school students, feels “nothing is more important and rewarding as working with young people.”

who established the university’s trial advocacy program classes and taught them for many years. His contributions included developing the curriculum, finding lawyers to teach sections of the class and helping mentor trial competition teams. He also taught classes in criminal law, criminal procedure and equity. Taylor was very available to students and often spent time outside of class encouraging and advising students. Upon his retirement, he became the public defender for Tuscaloosa County. His pre-faculty life included volunteering with the Peace Corps and working with several civil rights programs.

Taylor’s legacy is held in such high esteem that the law school recognizes excellent students with the George Peach Taylor for Award for Trial Advocacy. The award is sponsored by the firm of Hare, Wynn, Newell & Newton LLP and is presented to University of Alabama law students selected through competition as members of the national trial teams.

Garikes noted about Taylor: “He would take intangible concepts and show you the practical effects of them, which made his lessons memorable. I found myself readily drawing upon his lessons many years later. I thought I was well-trained by him.”



As the upper school director, Garikes continues the traditions of rigorous preparation for college, as well as good character, spiritual development and social awareness.

Hansford, who taught contract law and moot court, made an impact on the prospective attorney despite Garikes's lack of interest in that particular niche of the legal profession.

"Hansford was a tremendously gifted individual," he said. "He was always accessible to students. He was a delight as an instructor, and his intelligence was apparent in the way he presented the material. He took dry material and made it interesting."

Like Garikes's other instructors whom he held in the highest esteem at the University of Alabama, Thigpen's concern for his students was not limited to class hours, and didn't end at the conclusion of the course. Instead, Thigpen made himself available to students for advice about the legal profession and career opportunities, much to the benefit of the student body. Garikes, too, consulted him on matters such as career opportunities.

"He was a mentor to a lot of students," said Garikes. "He was a lawyer and instructor with the highest quality of integrity."

After he plunged into legal practice, Garikes considered himself blessed to serve for a year as clerk with then-Associate Justice Hugh Maddox of the Alabama Supreme Court. To a young lawyer just learning the ropes, Maddox made quite an impression.

"I learned from Justice Maddox what it meant to be an ethical lawyer," said Garikes. "He represented what a justice was supposed to be, and his high standards made a great impression on me just starting out. He was a tremendous mentor and writer. I was very fortunate to have gotten my start in my legal career by working with Justice Maddox."

Maddox, who retired in 2001 after 31 years on the Alabama Supreme Court, is a multifaceted man and a justice held in very high esteem. In recognition of the justice's advocacy for improving professionalism throughout the American and Alabama legal communities, in October 2008 he received the prestigious American Inns of Court's 2008 A. Sherman Christensen Award at the American Inns of Court's Celebration of Excellence, hosted by Justice Samuel A. Alito, Jr., at the U. S. Supreme Court.

After his tenure as Justice Maddox's clerk ended, Garikes entered private practice, working in a two-man firm in Baldwin

County with the late Young Dempsey. He left Alabama to work in a private firm in D.C. From there, he branched out into government service, becoming a government lawyer at the Federal Energy Regulatory Commission, Department of Energy and International Trade Commission, as well as working in political campaigns.

The responsibility and challenges of representing the public in the legal arena thrilled Garikes. "As a young lawyer, you get a tremendous amount of responsibility very quickly, including litigation. You get the responsibility of representing the public with the challenges of resources. Government lawyers don't have the same resources available that major law firms have, for instance, paralegals. You get the opportunity and challenge of learning your craft very quickly while representing the public interest."

Those seeking to make a career of representing the public do well to find a niche and become an expert in it, says Garikes. "There is a great opportunity for advancement for those willing to work hard and those with the patience to stay the course. There are opportunities for career lawyers as well as those who are political appointees, which change more or less every four years."

Garikes enjoyed the opportunity to make a positive impact on the world around him by serving as a problem-solver in cases where individuals came up against difficulties. "I found the challenges of finding resolutions and solving problems tremendously enjoyable."

Foray into Education

Garikes discovered the advertisement for a government and history teacher at St. Stephen's & St. Agnes School in a July Sunday edition of the *Washington Post*.

"At the time my children were enrolled in an independent school in our D.C. neighborhood of Capitol Hill," he said. "I was serving on the board of the trustees for the school (Capitol Hill Day School) and knew two important things about independent schools: In order to teach and join a faculty a candidate did not have to possess a teaching certificate. Also, a school the caliber of St. Stephen's & St. Agnes usually did not advertise positions and that it was late in the hiring season."



Together recently were Bud Garikes, retired Alabama Supreme Court Justice Hugh Maddox and ASB Executive Director Keith Norman. Both Garikes and Norman served as law clerks for Justice Maddox.

Intrigued, he sent a resume to the school. He received the call to interview a week later, and was soon offered a job to teach advanced placement U.S. and comparative government and ninth-grade world history.

The move didn't come without some controversy on the home front, for he had initially failed to talk over his prospective career change with his spouse.

"My wife, Margaret, a lawyer and a top lobbyist with the American Medical Association, at first did not fully endorse my move from law and government to teaching," said Garikes. His enthusiasm for education soon won her over. "She quickly saw how happy and satisfied at work I was and became my greatest fan of the career move."

He also enjoyed an unexpected bonus of becoming an educator, having more time to spend with his own children, Kerry, now a first-year architecture student at the University of Virginia and a 2008 graduate of St. Stephen's & St. Agnes School, and Ryan, a junior at St. Stephen's & St. Agnes School.

Valued Skills

Garikes soon discovered the great value of his legal background in the educational area, and he found himself employing the same skills he used as an attorney on a daily basis in the

classroom to inspire the next generation to learn, grow and flourish throughout their lives.

"As a lawyer, you must be able to anticipate possible questions as part of your preparation for litigation," said Garikes. "You have to know your subject well. You must learn to be flexible and to think on your feet. You must have excellent skills in communication, both verbal and writing. All those skills I employed as a lawyer I still use, only this time I'm preparing a classroom presentation instead of a courtroom presentation."

Moving into Administration

Garikes is now the director of the upper school at St. Stephen's & St. Agnes School. "I am the equivalent of the principal of the high school," he said. "The head of the school is Joan Holden, a remarkable educator and leader."

The move into administration was not among his original goals as an educator, but it soon became a natural extension of his educational career.

"When I started teaching eight years ago, I had no desire to move into administration," Garikes said. "I loved the teaching, the kids, the classroom, the schedule, and the entire community."

An inspired, enthusiastic educator, he ambitiously sought to improve his skills rather than move up. "My original goals were

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to simply improve each year in the classroom, become involved with my students in their extracurricular activities and pursue my passion for reading history and other books,” he said.

However, as often happens, opportunities knock for those dedicated and talented at their craft, and he soon embarked upon an administrative role. “After three years an opening arose and I became chair of the history department,” said Garikes.

It wasn’t long before another opportunity presented itself, and inspired by Holden’s faith in his abilities he reached a higher level of responsibility. He is now in his fourth year as director.

“The next year the long-time upper school director left, and after a lot of thought and talks with my wife and some colleagues, I submitted my name for consideration of the upper school director slot,” he said. “Joan Holden, who had faith in me by originally by offering me a teaching job, gave me the chance to lead our upper school. She’s the woman who allowed me to change my career. She’s a remarkable leader and a remarkable educator. I continue to learn from her example on a daily basis.”

In his current position, Garikes leads the faculty of what is roughly analogous to a high school, which serves 449 of the school’s 1,124 students.

The school has benefited greatly from his late-in-life career change.

“Bud Garikes’s passion for American history and government, combined with his real-world legal experience, has translated so well into teaching and administration for St. Stephen’s & St. Agnes School,” said Holden. “Students clearly feel and benefit from his career commitment and choices every day. This is someone who has achieved success in one field and then actively chosen academia as the next step. I am delighted and honored to have Bud Garikes at our school. He sets a high standard for himself and his students and is a compassionate educator.”

Bright Students Light His Way

Through his educational career, Garikes adheres to the original vision that inspired him to change careers and help prepare America’s youth for the challenges and opportunities of the future. He found that as much as he inspires his students to reach for excellence in their pursuit of their dreams, they inspire him with their enthusiasm to learn and limitless potential to share the future in their image.

“Nothing is more important and rewarding than working with young people,” he said. “Our students are bright, good kids, and they work hard at academics, arts, community service and athletics at our school. We prepare them to continue their educations at great colleges across United States. If I can influence a young person to make good choices, to find a passion for learning, an understanding to serve and to treat others with respect, then I have done a good job as a teacher.”

Garikes is also inspired by a dedicated staff of educators who share a common goal of creating the best possible future for their students through their everyday lessons and mentoring.

“We are blessed at St. Stephen’s & St. Agnes School with dedicated teachers and administrators and each day we all work

toward the common vision of supporting our students,” he said. “I have often told people that since joining our school and becoming a teacher that I have not had a bad day at work and that remains true. Working with young people keeps you optimistic, keeps you laughing and can inspire you each day.” ▲▼▲



Kimberly L. Wright is a staff writer with the Maxwell-Gunter Dispatch, a weekly newspaper based at Maxwell Air Force Base, as well as a freelance writer. She also blogs and twitters about baseball and media in her spare time. She was previously employed at Civil Air Patrol National Headquarters, the Montgomery Advertiser and the Democrat-Argus, Caruthersville, Mo. A 1997 graduate of the University of South Alabama, she resides in Montgomery.

St. Stephen’s & St. Agnes School

One of the six Episcopal Church schools in the Diocese of Virginia, St. Stephen’s & St. Agnes School has a long tradition of providing an excellent college preparatory education in northern Virginia. The school began as two separate single-sex schools, St. Agnes, founded in 1924, and St. Stephen’s, founded in 1944.



Established by a group of Alexandria Episcopalians, both schools were created for students in kindergarten through 12th grade with a focus on intellectual, physical and moral development. Over the years each school established its own curriculum and developed its own rich traditions, often coming together as brother-sister schools on important academic, athletic and social occasions. Both schools instituted an honor code, which remains in place to this day.

In 1991, the two schools merged to become one co-educational Episcopal day school with one administration and two campuses. The school has grown to include 1,124 students from diverse backgrounds and a talented faculty and staff of more than 200 men and women whose aims for their students include high standards of academic and artistic achievement, moral growth and behavior, service to others, and athletic endeavor. While St. Stephen’s & St. Agnes students undergo rigorous preparation for college, the school equally promotes the good character, spiritual development and social awareness embraced by the Episcopal school tradition.

—from the St. Stephen’s and St. Agnes School Web site



Law in a Changing Climate

By D. Bart Turner and Chris J. Williams

Mark Twain has often been quoted as saying “everybody complains about the weather, but nobody does anything about it.” While people have and always will complain about the weather, now there are just as many who are looking for a way to do something about it.

This year the United States celebrated its 40th annual Earth Day—a day first set aside in 1970 to encourage awareness and appreciation for our planet’s environment. In the wake of that first Earth Day, Congress began adopting legislation that formed the backbone of present-day environmental law and regulation. Indeed, the 1970s marked not only the creation of the U.S. Environmental Protection Agency but also the passage of a myriad of new laws aimed at addressing public concerns over air and water pollution, conserving natural resources, ensuring safe drinking water, protecting coastal areas, preventing extinction of endangered species, effectively managing chemicals and hazardous waste, and many others. While those laws have been amended and others added to the list, there has been no other comparable period over the last 40 years in which the federal government adopted such broad-sweeping environmental law and regulation. That is, until now. This year the United States appears to be on the brink of enacting new

environmental legislation, unprecedented in scope, to tackle what is perceived by many as being the most significant environmental threat of the current generation—global warming.

All but those who maintain a strict no-media diet have at least some cursory understanding of “global warming”—the name given to the phenomenon associated with the *average* rise in temperature observed worldwide over the last century and the prediction that this trend will continue in the future. A majority of climate change scientists attribute this rise in temperatures to an observed increase in greenhouse gases (GHGs) since the Industrial Revolution. Those gases—carbon dioxide, methane and nitrous oxide to name just a few—are collectively named for their ability to trap heat within the Earth’s atmosphere much like the glass panes of a greenhouse but on a global scale. To what extent global temperatures associated with this “greenhouse effect”—a natural phenomenon described by scientists over a century ago—can be influenced by human activities has, as most everyone knows, been the subject of debate over the last couple of decades. However, the political climate is changing much more rapidly than the Earth’s climate. As a result, the scientific debate has taken a backseat in the drive toward reducing the volume of GHGs

emitted into the atmosphere from human activities. Along with providing background regarding the momentum behind the urgency to enact some form of GHG legislation, as well as offering a forecast of what that legislation is likely to entail,¹ we offer some additional insights about how these changes may impact Alabamians in general and Alabama lawyers in particular.

The Environmental Climate

Although there is some dispute regarding the reliability of measurements, the last 150 years of reliable temperature records suggest a rise in average global temperatures by a little over 1°F. However, it appears that this warming trend has accelerated since the 1970s, and as of 2007, it has been estimated that 11 of the 13 warmest years on record occurred between 1995 and 2007. In the Southeast, along with measurable increases in moderate to severe drought conditions in the spring and summer months, the annual average temperature has risen about 2°F since the mid-1970s. Over the same period the concentration of carbon dioxide, methane and other GHGs, many of which are emitted by human activities such as the burning of fossil fuels, deforestation, agriculture and



other industrial activities, have increased at levels that cannot be entirely attributed to natural causes. The correlation between increases in global temperatures and increases in GHGs was made before the turn of the 20th century, but in 2007, the U.N. Intergovernmental Panel on Climate Change concluded that “most of the observed increase in globally averaged temperatures since the mid-20th century is very likely [i.e. greater than 90 percent certainty] due to the observed increase in anthropogenic GHG concentrations.”²

Predictions regarding the future impacts of this warming trend are fraught with uncertainty, particularly at the regional or local scale. Be that as it may, a balmy planet has already likely contributed to a measurable increase in sea levels over the last century due to the thermal expansion of ocean water as it warms in addition to the melting of land-based ice. Because a large percentage of the population in the Southeast lives along coastal areas, there are concerns that rising sea levels will contribute to contamination of coastal freshwater sources, submersion of coastal infrastructure and destruction of barrier islands which help protect that infrastructure from storm surges. Couple those concerns with the potential that higher ocean temperatures could lead to more frequent and intense tropical storms and hurricanes, and one can

see why coastlines along the central Gulf Coast (already sinking as a result of both natural phenomena and human activities) may be particularly vulnerable. In addition, if future warming trends contribute to the growing frequency of drought conditions in the Southeast, the threats to the region’s agricultural base and drinking water supplies brought on by last year’s drought may become more commonplace. Less water in a region with one of the fastest growing populations (in some measure, due to the warmer climate) could make it even more difficult for southeastern states to equitably apportion water supplies. Specifically, Alabama, Georgia and Florida may find it harder to settle their decades-old dispute regarding whether the water in the Apalachicola-Chattahoochee-Flint River Basin should be delivered to the citizens of Atlanta or allowed to pass down to Alabama for hydroelectric power and flood control or to Florida’s oyster beds.

To be certain, predicting the course of any global phenomenon decades, let alone centuries, into the future is far from an exact science. Assuming one could accurately forecast future warming trends and their associated environmental impacts, it is perhaps even more difficult to fully account for the resulting costs (and benefits) to society of a hotter planet. For example, as the Arctic melts and the fabled

Northwest Passage becomes a reality, will the discovery of new oil and mineral deposits beneath ice-covered waters or reduced shipping costs offset threats to coastal communities from rising seas or the encroachment of salt water into sources of drinking water? Moreover, it appears that even if immediate action is taken to reduce emissions of GHGs, it is unlikely to have any measurable impact on the current pace of global warming, at least in the short-term. Nevertheless, there is little doubt that the uncertainties associated with the environmental, economic and social impacts of climate change have taken a backseat to politics. Congress and the executive branch are now plowing ahead with initiatives aimed at trimming the emissions of GHGs generated in the United States. While there are more forces driving the country toward regulating GHGs than can be discussed here, in order to have some basis for understanding what approach the federal government is likely to take toward reducing emissions, there are several worth mentioning in some detail.

The Political Climate

International political pressure and the adoption of GHG reduction programs in

other countries are high atop the list of driving forces for new national climate change legislation. The 1988 creation of the United Nations Intergovernmental Panel on Climate Change (IPCC) and its first report two years later, lead to the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) at the Rio de Janeiro Earth Summit in 1992. The UNFCCC is an international treaty signed by over 190 countries, including the United States, with the principal goal of reducing worldwide emissions of GHGs. However, the treaty did not set specific emission limits or include enforcement provisions; rather, it allowed for amendments known as “protocols” that would be added later to bind signatory countries to specific GHG emission levels. The most well-known is the 1997 Kyoto Protocol which required participating nations to collectively reduce GHG emissions by 5 percent below 1990 levels by 2012. The Protocol, which took effect in 2005, was essentially set up as a “cap-and-trade” system—a system which has become the model GHG regulatory scheme adopted by other countries. As described in more detail below, this system is the type of regulatory arrangement most likely to be established in the United States.

The United States did not ratify the Kyoto Protocol treaty and did not otherwise commit to reducing GHG emissions in large measure because the Protocol exempted many developing nations, such as China and India, from adopting emission limits of their own. Indeed, the Alabama legislature, following the lead of the U.S. Senate, expressed dissatisfaction with the Protocol and the exemptions given to developing nations in its passage of the Kyoto Protocol Response Act in 1998.³ While allowing for voluntary reductions in GHG emissions, this act prevented the Alabama Department of Environmental Management from “proposing or promulgating any new regulations intended in whole or in part to reduce emissions of GHGs.”⁴ Notwithstanding the position Alabama and the United States took on the international community’s efforts to implement regulation, states and local communities have continued to press forward with voluntary or mandatory emission reduction strategies. With each taking slightly different tacks, even those among the regulated community believe that federal legislation is needed to avoid



...the EPA released its proposed finding that GHG emissions do in fact cause or contribute to pollution that endangers public health and welfare.

the morass associated with disparate and perhaps conflicting state or local laws.

At least 20 states have established targets for reducing GHG emissions and several more have enacted climate change legislation or appointed advisory bodies. The first mandatory GHG reduction program in the United States, known as the Regional Greenhouse Gas Initiative (RGGI), has been adopted by Delaware, Maryland, New Jersey, New York, and the New England states with Pennsylvania and the District of Columbia signing on as observers. The signatory states associated with this initiative committed to reducing carbon dioxide emissions from power plants in the region by 10 percent by 2019 through a cap-and-trade program that sets a total emissions cap, allocated among the 10 participating states, to be ratcheted down in later years. A similar Western Climate Initiative involving seven states and four Canadian provinces with additional observer states is anticipating launching another cap-and-trade program in 2012, and a Midwestern Greenhouse Gas Accord is also in the works. Similarly, Florida has entered the mix with its 2008 adoption of the Florida Climate Protection Act authorizing the state environmental agency to develop rules for a cap-and-trade program to reduce GHG emissions from electric utilities.⁵ On the local level, over 950 mayors have signed onto the U.S. Conference of Mayors Climate Protection Agreement which requires participating cities to strive toward meeting or exceeding the reduction standards set out in the Kyoto Protocol and encouraging adoption of federal or state legislation aimed at curbing GHG emissions. Included among the list of Alabama mayors who have signed are the mayors of

Auburn, Bessemer, Huntsville, Opelika, Troy, and Tuscaloosa.

In addition to the momentum generated by the international and domestic regional, state and local initiatives, the United States Supreme Court’s opinion in *Massachusetts v. EPA* and subsequent events arising out of that decision may prove to be the biggest motivator for Congressional action.⁶ In 1999, several environmental groups and a number of states pushed the EPA via a rulemaking petition to regulate GHG emissions from automobiles under the Clean Air Act. The EPA concluded that it lacked statutory authority under the Act to regulate GHGs as pollutants and that even if it had the statutory authority, it could exercise its discretion not to regulate for public policy reasons—namely, that the science regarding the impact of GHGs was uncertain and that regulation under the Act would necessarily be “piecemeal” and would interfere with voluntary reduction programs and international negotiations. The Court rejected the EPA’s arguments and held that the EPA may in its discretion not promulgate regulations but only after making a finding that GHGs do not “endanger public health or welfare.”⁷

Just after the two-year anniversary of the Supreme Court’s decision in *Massachusetts v. EPA* and less than 100 days into the new presidential administration, the EPA released its proposed finding that GHG emissions do in fact cause or contribute to pollution that endangers public health and welfare.⁸ To be clear, the proposal by the EPA was limited to a finding of endangerment—it did not propose any specific regulations for limiting GHG emissions. As such, the EPA’s proposed endangerment finding is a calculated political move designed to urge Congressional action on new GHG legislation. Indeed, the EPA has stated previously and in the press release issued along with the endangerment finding that it preferred comprehensive legislation on the issue rather than trying to regulate GHGs under the Clean Air Act. Under the Clean Air Act as currently drafted, the EPA would potentially be required to permit up to over a million individual sources of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride—the GHGs it stated are the “root cause of human-induced climate change.”⁹

In the meantime, the EPA has already begun setting up the reporting architecture needed for regulating GHGs, whether that regulation is mandated by new Congressional legislation or promulgated under the Clean Air Act. Specifically, the EPA has proposed mandatory annual reporting of GHG emissions by suppliers of fossil fuels or industrial GHGs, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more of certain GHGs.¹⁰ This proposed reporting rule, which would affect 85-90 percent of total emissions from approximately 13,000 facilities, was promulgated by the EPA pursuant to the Consolidated Appropriations Act passed by Congress and signed by President Bush in late 2007.

There are, of course, a number of other well-known factors behind the momentum for Congressional action on climate change. Al Gore brought the issue to the big screen with *An Inconvenient Truth* and then later that year shared the Nobel Peace Prize with the IPPC for increasing public awareness. The polar bear, the star of Disney's 2009 film, *Earth*, was listed as a threatened species under the Endangered Species Act due to the threat to its habitat from melting Arctic sea ice. Both presidential candidates supported climate change legislation while on the campaign trail. Perhaps less well-known are the corporations that are actively lobbying for federal legislation through such organizations as the U.S. Climate Action Partnership whose members include Alcoa, Caterpillar, ConocoPhillips, Duke Energy, DuPont, PepsiCo, and Shell. Likewise, before the recession stole its thunder, the 2008 energy crisis and concerns over the dependence on foreign oil opened up more opportunities for renewable energy sources and energy efficient technologies that are also seen as potential solutions to reducing GHG emissions. Moreover, there is a rapidly growing climate change industry—the international carbon markets were valued at over \$100 billion at the end of 2008 and a growing voluntary market in the U.S. was estimated to be worth over \$700 million in 2008—throwing its weight behind U.S. GHG legislation. With all of these forces pushing us toward the likelihood of federal action on climate change in the near term, it seems prudent to ask what kind of regulatory scheme Congress may establish and how will it affect Alabamians and their lawyers.



...setting a price on GHGs will incentivize the technological innovation necessary for cutting total emissions, but it is unclear how rapidly such technologies can be developed and implemented.

The Regulatory Climate

There are essentially two approaches to regulating environmental pollutants. The first is the traditional command-and-control strategy, in which governmental authorities set limits on how much of a particular pollutant can be emitted. Those limits are enforced via a permitting scheme that requires entities to adopt certain technologies to reduce the amount of pollutants released into the environment. This is the form taken by much of the aforementioned 1970s-era environmental regulations in this country. The second is a market-based approach in which the regulatory system primarily relies on economic forces of supply and demand to achieve pollutant reductions. One such form of market-based regulation is a tax on pollutants designed to encourage voluntary reductions in the amount released into the environment. This is the idea behind passing a “carbon tax” that has been bandied about for some time and which has gained a little more traction as the passage of GHG legislation becomes more likely. However, as noted above, the more common market-based approach in the context of environmental regulation is a cap-and-trade scheme which essentially sets a limit on total emissions of a pollutant for a certain period (the “cap”), and gives each entity the right to release certain amounts of the pollutant into the environment. Entities that reduce their emissions below their total allotment (“allowance”) earn credits which they can then sell or otherwise convey (“trade”) to those who

for whatever reason are not able to emit GHGs in quantities less than their total allowance.

Cap-and-trade is not foreign to the United States. Indeed, amendments to the Clean Air Act in 1990 set up the Acid Rain Program which established a cap-and-trade program for sulfur dioxide emissions from electric utilities. That program, which reduced emissions by approximately 40 percent at less than half the estimated cost, has generally been viewed as a success and was a model for the European Union's GHG cap-and-trade system. However, the Acid Rain Program was limited to reducing the emissions of just two pollutants (nitrogen oxides were added later) from a limited pool of electric utilities. The program also took advantage of the falling price of low-sulfur coal and technological advances in air pollution control that were underway at the time. In contrast, there are more than just two GHGs, and they are emitted economy-wide from virtually all industry sectors. Moreover, unlike the gases that contribute to acid rain, GHGs are much more difficult to capture and store, particularly from coal-fired power plants. Cap-and-trade enthusiasts counter that setting a price on GHGs will incentivize the technological innovation necessary for cutting total emissions, but it is unclear how rapidly such technologies can be developed and implemented.

As always, the devil is in the details, and there are diverging opinions on just how a GHG cap-and-trade system should be set up. In addition to determining which GHGs to regulate, Congress will also have to decide whether to regulate upstream to suppliers of fossil fuels or downstream to the entities that emit GHGs. Because of the government's experience associated with regulating existing large emitters such as manufacturing facilities and power plants, the leading climate change legislation proposed by Congress to date has taken a downstream approach. The stickier issues are how much flexibility should be given to setting the overall cap and how emission allowances should be distributed to the regulated entities. As to the cap, some want a safety valve that would kick in through the issuance of additional emission allowances if the costs of compliance or the price of allowances hit the redline in terms of their potential for economic damage. However, the presence of a safety valve could lead to increased emissions and therefore conflict with the whole purpose of setting up a

cap-and-trade program in the first place. As to the distribution of emission allowances, Congress could choose to distribute them to regulated entities for free or sell them at auction or some combination of the two. Although giving away all the emission allowances would reduce the initial costs of compliance, a 100 percent free allowance system is disfavored because it can lead to windfall profits, particularly if too many allowances are distributed as occurred during the European Union's first go-around at implementing its cap-and-trade program. Alternatively, auctioning all allowances would generate revenue that could be used to offset rising energy costs associated with reducing emissions or be used to fund development of alternative energy sources. An auction could also unfairly impact companies that cannot pass on some or all of the costs to consumers or that lack funds to purchase enough allowances.

A provision for allowing "offsets" is perhaps the most interesting component likely to be considered for inclusion in a U.S. cap-and-trade system. Offsets are emission reduction projects that are developed outside a cap-and-trade program and which generate credits made available for purchase by regulated entities to literally offset any emissions they are unable to reduce below their allowance. Common offset projects could include energy efficiency and renewable energy projects that reduce the demand for electricity from power plants; planting trees, which absorb carbon dioxide, on a formerly treeless tract of land; capturing and destroying GHGs emitted from landfills; and storing GHGs via injection into old oil wells, salt domes or coal seams. Projects like these will create opportunities for entrepreneurs and companies not necessarily directly targeted by GHG regulation if the kinks can be worked out. In particular, for offsets projects to have any real impact on reducing emissions, there will have to be assurances that the projects would not have been undertaken because they were required by other regulations; that they are viable without the income stream from selling the offset credits; that the projects are permanent (e.g., forestry projects have to account for the risk of fire or wind damage); and that the emissions reductions associated with a project are measured and can be independently verified.

Despite the difficulties associated with developing any new cap-and-trade regulatory scheme, adopting a market-based



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approach is widely viewed as being much more preferable to regulating GHGs under the Clean Air Act. As noted earlier, the Act is based on command-and-control strategies aimed primarily at reducing the direct health effects of regional and local air pollution such as dust, ground-level ozone and toxic air pollutants. It was not designed to address pollutants that are emitted by all sectors of the economy and by human activities throughout the world. Moreover, with the exception of the Acid Rain Program, it is doubtful that the Act gives authority to the EPA to rely on the mechanics of the market to reduce emissions. Rather, the EPA would be in the untenable position of potentially having to permit and monitor over one million businesses based on the threshold pollutant levels set out in the Clean Air Act itself. Congress is well aware of this problem and has seriously considered a number of different climate change bills over the last few years.

The latest, introduced March 31, 2009 by representatives Henry Waxman and Edward Markey, is the proposed American Clean Energy and Security Act of 2009 (ACES), which was passed by the U.S. House of Representatives on June 26, 2009 by a slim margin of 219-212.¹¹ The 1,201-page bill contains the following four major title programs: 1) a "Clean Energy" title that includes provisions related to renewable electricity standards for utilities, carbon capture and sequestration, and smart grid technology; 2) an "Energy Efficiency" title that includes provisions related to energy efficiency in buildings, lighting, appliances and vehicles; 3) a "Transitioning to a Clean Energy Economy" title that includes provisions designed to lessen the impact of the legislation on consumers, employees and

businesses; and 4) a "Global Warming" title that contains the core provisions for reducing GHG emissions via a cap-and-trade program. Under the "Global Warming" provisions of the bill, entities that emit greater than the equivalent of 25,000 tons per year of seven GHGs would be required to obtain federal permits, or emission "allowances" which could be banked for later use, traded, sold, exchanged, transferred, or held by anyone—not just those required to reduce emissions. The legislation allows for approximately 20 percent of emission allowances to be auctioned and 80 percent to be distributed free to regulated entities in the initial years of the cap-and-trade program, but increases the amount of allowances to be auctioned to approximately 70 percent by 2031. In addition to trading allowances, regulated entities would be allowed to emit more than provided for in their individual allowances through the purchase of offsets. The legislation provides that the total quantity of offsets allowed in any given year cannot exceed two billion tons of GHG emissions credits, which can be split evenly between domestic and international offsets. The legislation also proposes an aggressive GHG reduction schedule—compared to 2005 levels, ACES requires economy-wide reductions of aggregate emissions by 3 percent in 2012; 17 percent in 2020; 42 percent in 2030; and 83 percent in 2050.

Whether the Senate will pass all, part or any of the House's proposed climate change legislation is unknown. The biggest hurdle may be one of timing given that we are in the midst of an unparalleled economic crisis. Critics of any proposed legislation assert that we can hardly afford to drive up the cost of energy in the midst of one of the worst recessions on record. Opponents also point out that lack of participation by other nations in reducing their own GHG emissions will thwart any hope of achieving the overall emission reductions believed necessary to have some impact on global climate while at the same time increasing the cost of American products to those manufactured in non-participating countries. In other words, it would provide yet another incentive for U.S. industries and jobs to relocate or expand their operations overseas. Nevertheless, there is still enormous internal and international pressure to make meaningful progress in advance of the meeting at the December 2009 UNFCCC conference in Copenhagen where it is

hoped a successor treaty to the Kyoto Protocol, which expires in 2012, can be worked out in enough time for a replacement to go into effect.

The Future Climate

Without question, some of Alabama's major industry sectors will be directly and indirectly affected by whatever regulatory scheme is ultimately approved by Congress or promulgated by EPA. The current proposed cap-and-trade program would cover entities such as utilities, liquid fuel refiners and blenders, and certain steel and iron manufacturing facilities (depending on the volume of their GHG emissions). Due to their heavy reliance on coal-fired electric plants, utilities in the Southeast are particularly likely to be hit the hardest. However, because we all use electricity in our homes and businesses, we will all share in the increase in electric generation costs associated with the utilities' purchase of allowances either originally from the government or on the open market to reduce emissions below individual power plant allowances. Alabama's iron and steel industries are also likely to be heavily affected due to the GHG emissions generated when coke and iron ore are transformed into iron and steel and from increased electricity costs.

Of course, with these challenges come new opportunities. For example, new cap-and-trade legislation that allows regulated entities to avail themselves of offset projects will open up the possibility for new ventures in existing industries such as the coalbed methane business. Presently, various pilot projects involving both private industry and the Department of Energy are evaluating the effectiveness of enhancing coalbed methane production while sequestering carbon dioxide for long-term storage. These various pilot projects are focused on novel drilling technologies and production processes that yield useful natural gas products while creating areas to store GHGs in unmineable coal seams.¹² The injection of carbon dioxide for storage could, in turn, further stimulate additional yields of natural gas production at higher efficiencies through displacement principles. The key to successful implementation in states like Alabama is the development of cost-effective technologies and measured efficiencies with respect to natural gas



Due to their heavy reliance on coal-fired electric plants, utilities in the Southeast are particularly likely to be hit the hardest.

recovery, purification and long-term storage of carbon dioxide in these seams. Once these objectives are met, new and existing power plants and fuel-processing facilities within Alabama could have the ability to increase production efficiencies of natural gas recovery operations while reducing carbon dioxide emissions.

Alabama's forestry and agricultural industries may also find new sources of income by establishing offset projects. As alluded to above, trees and crops absorb and ultimately store carbon dioxide in their trunks, branches, foliage and roots, as well as in the surrounding soils. For example, it is estimated that pine plantations in the Southeast can accumulate almost 100 metric tons of carbon per acre per year. The voluntary carbon markets such as those offered through the Chicago Climate Exchange, currently provide opportunities for landowners to sell credits generated from afforestation (planting on formerly treeless land) and

sustainable management of existing forests. Some Alabama landowners and timber companies are already exploring this market. While prices per acre are wide-ranging, the average annual income expected in 2008 was \$5 to \$10 per acre for land enrolled in one of the voluntary carbon offset programs. The agricultural industry likewise may be able to capitalize from offset projects such as capturing methane from livestock manure and food waste management systems or adopting no-till farming practices.

Outside the regulatory system, the increased cost of producing energy from traditional sources with heavy GHG emissions will help feed the growth of renewable and alternative energy sources in Alabama such as biomass. Biomass burned for energy is considered "carbon neutral" because trees and plants absorb carbon dioxide while they are growing. Although burning the biomass releases GHGs back into the atmosphere, as long as new plants or trees are grown wherever the biomass was originally harvested, one can theoretically achieve a balance between the amount of GHGs stored and the amount emitted. Indeed, a major energy supplier in Alabama recently announced that it will join 36 other electrical cooperatives and municipal electric companies throughout Alabama, Georgia and Florida in purchasing power from a planned biomass-fired power plant on the Chattahoochee River. This planned facility will generate electricity from wood waste feed products from such sources as timber harvesting residuals, non-commercial trees harvested for thinning purposes, lumber

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scraps and wood reclaimed from landfills. GHG regulation should similarly support the nascent Alabama biofuels industry which has grown to at least seven biofuel processing plants, with additional facilities expected to come online within the next few years. Those that grow the common feedstock for biofuels, such as corn or soybeans, may also benefit.

The Legal Climate

As environmental lawyers it is clear to us that even without federal legislation or a mandate from the EPA requiring regulating GHGs in the United States, issues associated with climate change are becoming more and more central to our clients' businesses. Yet, even Alabama lawyers who have never delved into environmental law should begin thinking about how their clients and their law practices could be impacted by legislation which will affect nearly every industry sector. Certainly, lawyers who represent businesses that are expected to be directly regulated should counsel clients to incorporate their GHG emissions in future planning by at least calculating total emissions and assessing opportunities to achieve potential future emission limits. Indeed, many companies, particularly those that have aligned themselves with the growing trend to adopt "green" business strategies, are well on their way to fully incorporating climate change considerations in their businesses and are going to be at a competitive advantage to those that are slower to respond. Litigators should continue to follow the growing wave of toxic tort lawsuits filed against companies with heavy GHG emissions for damages allegedly associated with climate change. Attorneys who represent forest landowners and agricultural operations should be looking for opportunities for their clients to participate in offset projects and then educating themselves on the mechanics, risks and rewards associated with such projects. Lawyers who find themselves representing new businesses in the alternative and renewable energy industry will be faced with understanding and potentially protecting new technologies as well as giving advice on how to structure project financing, including seeking sources of free and cheap money from government energy subsidy programs. Even companies that are unlikely to be directly

affected should begin assessing their energy use and discovering more efficient ways to run their businesses. Perhaps, most importantly, because law offices are businesses too, lawyers should incorporate the increased cost of doing business in managing and planning infrastructure that supports their own practices from the electric bill to paper use. Indeed, the American Bar Association recognizes lawyers and law firms for taking a few extra steps to adopt better office paper management, purchasing renewable energy and use energy efficiently (see box on this page).

Ultimately, whether or not science or politics is driving the current push to do something "about the weather," all Alabamians and their lawyers should stay informed regarding what will likely be the most comprehensive environmental legislation in decades. As with any significant change, there will be opportunities and challenges, and being armed with good information is the surest way to navigate the rapidly changing environmental, economic and political climate.



Endnotes

1. The pace of change on the issue of GHG regulations is extremely rapid. Indeed, as we were preparing a final draft of this article, the U.S. House of Representatives passed sweeping climate change legislation. Although the legislation faces an uphill battle in the U.S. Senate, some of the specific observations about the type of legislation expected to be enacted may very well be dated by the time this article is sent to press.
2. IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers* at 10 (2007).
3. ALA. CODE § 22-28A-1 through § 22-28A-5 (2009).
4. *Id.* at § 22-28A-3.
5. FLA. STAT. 403.44.
6. *Massachusetts, et al. v. U.S. Environmental Protection Agency*, 549 U.S. 497 (2007).
7. *Id.* at 532-533.
8. Proposed Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (Apr. 24, 2009).
9. *Id.* at 18895.
10. Proposed Mandatory Reporting Rule of GHGs, 74 Fed. Reg. 16448 (Apr. 10, 2009).
11. H.R. 2454, 111th Cong. (2009).
12. See generally, "Enhanced Coalbed Methane Production While Sequestering CO₂ in Unmineable Coal Seams," available at www.netl.doe.gov/technologies/carbon_seq/index.html.

Earlier this year, Maynard, Cooper, & Gale PC adopted a new firm sustainability policy in its efforts to be a leader among law firms and within the larger business community in the state of Alabama in the sustainability context by reducing the firm's overall carbon footprint and environmental impact. In support of that policy, the firm's Birmingham headquarters has adopted the following practices: recycling office paper, reducing overall paper use, purchasing paper made with recycled materials, purchasing green power, and using energy more efficiently. In recognition of its efforts, the Birmingham headquarters was the first large law firm in Alabama to be named a Law Office Climate Challenge Partner by the American Bar Association. For more information on the ABA's program or Maynard Cooper's sustainability policy, please visit our Web site at www.maynardcooper.com/sustainability.aspx.



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Advisory Committee on the *Alabama Rules of Evidence*

The Alabama Supreme Court has reactivated the Advisory Committee on the *Alabama Rules of Evidence* for the purpose of conducting a comprehensive survey of the rules, which became effective January 1, 1996 and have not been amended in the interim. The committee will identify all interpreting case law, compare each rule with its counterpart in the *Federal Rules of Evidence*, consider all rules appearing in one system but not in the other, and recommend to the Alabama Supreme Court any amendments thought by the committee to be appropriate. Any person wishing to suggest matters for the committee's consideration are welcome to submit the same to any member of the committee. The committee is composed of the following members: Chair, Retired Supreme Court Justice Bernard Harwood, Rosen Harwood PA, Tuscaloosa; Helen Johnson Alford, Alford, Clausen & McDonald LLC, Mobile; R. Bruce Barze, Jr., Balch & Bingham LLP, Birmingham; Laveeda Morgan Battle, The Battle Law Firm LLC, Birmingham; Dean Steve Emens, University of Alabama School of Law, Tuscaloosa; Joseph C. Espy, III, Melton, Espy & Williams, Montgomery; Judge Langford Floyd, Baldwin County circuit judge, Bay Minette; Dean Charles Gamble, Tuscaloosa;

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A Labor of Love: Betty Love Blends Family, Service and A Lifetime Love of the Law

By Charles F. Carr



Betty C. Love

I am convinced that luck plays a lot more than we admit in the making of a good lawyer. In my case, having Joan Norris as one of my first secretaries was one of the luckiest breaks I ever received.

Ms. Norris (as I always called her, not because she was older but because she was so much smarter) had been born in Cuba and was forced to leave along with her family when Castro came to power. After arriving in the states, Ms. Norris was admitted to a very good American law school at a time when very few women were being admitted. I will always remember one story she told me. In a nutshell, one of the professors had accused her of taking a spot that would have otherwise gone to a more worthy male. As a 1977 graduate of the University of Alabama Law School, and with a class that appeared evenly divided between males and females, I remember my empathy for Ms. Norris when I heard her story.

The law profession's loss was a bad thing for everyone other than me. Ms. Norris taught me a lot about how to be a good lawyer. I should have been the secretary and Ms. Norris the lawyer. The client would have probably been better off.

When I started to take up the story of Betty Love, I expected to hear some similar stories. I didn't get any. Betty had nothing but good things to say about her professors and fellow law students at Cumberland School of Law which she attended in the early 1960s. I suspect that if any discriminatory comments were hurled at Betty Love in the early '60s the hurler quickly regretted it. My feeling is that from a very early age, Betty Love knew how to take care of herself.

Since 1965, Betty has been a fixture in Talladega County. She gives a lot of credit for her success to her husband and partner of many years, Huel Love. Betty had worked for Huel as a secretary for many years before becoming his bride and giving birth to the first three of their six children (make that seven children in all including foster son Fred Ledbetter). One day Huel told Betty that Cumberland School of Law was moving from Tennessee to Birmingham. He encouraged her to go to law school and Betty quickly accepted the challenge.

For the first few months, Betty lived on campus with children Kenny, Carla and Leigh. Leigh was just a little over one when Betty started her first year. Huel would drive up from Talladega on weekends. Before the semester was out, however, Betty brought the kids back to Talladega and commuted back and forth from Talladega to Birmingham.

In 1965, Betty graduated, passed the bar on her first attempt and started practicing law with husband Huel in Talladega. One of her first successful cases involved her efforts to mandamus a local judge who had issued an order that would have removed a child from the child's mother. Betty put mother and child up at the Love ranch and immediately started to find out how to file a mandamus petition. After asking several local lawyers and judges how to prepare a mandamus petition, Betty drove down to Montgomery to talk

to then Alabama Supreme Court Clerk Louise Livingston. After a little "earthy" lecture from Ms. Livingston on how law schools failed to prepare law students to be "real lawyers," Betty received enough information to draft a successful mandamus petition.

I think that standing up to an important judge made it easy for Betty to stand up to lawyers on the other side. Betty also credits local defense lawyer Ralph Gaines for making her a better lawyer. She said she learned pretty quickly that Ralph wasn't going to give her a "free lunch." Betty would have to earn every victory she achieved against Ralph Gaines. The process taught her to be prepared whether the case was small or large.

I suspect that events that occurred even prior to Betty's becoming a lawyer gave her the stubbornness and "strong-arm" tactics that fellow lawyers have described as traits they saw in Betty. Betty had an early desire to be an airline stewardess. She wanted to see the world and the travel benefits lured her to flight attendant school. She tells the story of a senior official warning her that she stood little chance of being accepted because of her freckles. He told her that no stewardess had ever been accepted who had freckles. Betty promptly spent hour upon



Offices of Love, Love & Love in Talladega



Front row, L-R: Huel M. Love, Sr., Cheryl Ledbetter (daughter-in-law), D. Leigh Love
Back row, L-R: Betty C. Love, Huel M. Love, Jr. (Kenny), Fred Ledbetter, Julie Love Templeton

hour using bleach and cleansing cream. Before she had arrived in Miami for Eastern's flight attendant school, the freckles were no longer visible.

Many people who have faced Betty in court have not been aware of her softer side. For 13 years, Betty ran a Girl Scouts troop in Talladega. Rumor has it that even the boys in the area wanted to get in this troop. Every year the troop took great trips such as going down the Snake River in Wyoming one year.

Betty's passion, however, can be found when you talk to her about Teen Challenge. Teen Challenge is a one-year program which even Betty Love describes as formidable. The program has rescued 18-and-over young adults from the possibility of prison because of battles with alcohol and/or drug dependency. The young adults get a four-month program at local centers such as in Baldwin County and Dallas County, and then an intense eight-month program at a campus in Lincoln, Alabama. Abstinence from tobacco, alcohol and drugs is combined with prayer and counseling, which leads to an effective alternative to a possible prison life.

Betty tells the story of a young man who faced seven years in the state's prison. Betty counseled the young man and his family to push his judge to consider Teen Challenge as an alternative to prison. The seven-year prison sentence was turned into a split term of one-year at the Teen Challenge facilities and six years of probation. The young man's entire life was changed. He now has a good job and no prison history. It was clear to me that Betty's success with this young man meant as much or more than any courtroom success she had achieved.

Betty Love was raised by two parents of the Depression era in the small town of Alpine, Alabama. Her early education was in a small school where one teacher taught 10 children of varying ages after building a fire in the fireplace of the school room every wintry morning. Betty had two sisters and one brother who were older. She had no members in her family who had been lawyers before her.

Of her six children and one foster child, four have become lawyers. The eldest, Kenny, practices commercial law and still handles appellate cases for Betty. Leigh has semi-retired but still gets a call from her mother anytime there is a workers' compensation issue that surfaces. Julie Love Templeton practices in Tuscaloosa. You should take a look at <http://huntsville.about.com/b/2004/10/13/alabama-lawyer-is-crowned-mrs-america.htm> for more information on Julie. In 2005, she was crowned "Mrs. America" and later finished third in the "Mrs. World" competition.

Betty's foster son, Fred Ledbetter, can be found practicing law with Betty in Talladega.

Non-lawyer children include Carla who works with the Alabama Department of Human Resources. Son John is a Pentecostal minister in Statesboro, Georgia. Son Jason, a former culinary school gradu-

ate and internist under famed Chef Frank Stitt in Birmingham, was also head chef at the Ombi in Nashville. He now has his own food-service business there.

Stepdaughter Alice Faye Love is an artist who lives in Birmingham and Paige Love Smith is a computer consultant living in Atlanta.

One thing I always remember about Betty Love from my early days in litigation was that she never backed down. At the time, it probably struck some male lawyers the wrong way. However, if they had seen the same defiance in a male lawyer, it was deemed an effective trait for a good litigator. Betty paved the way for a lot of female litigators in Alabama. She came a long way from Alpine, Alabama and has made a lot of difference in the lives of clients and women lawyers in this state. ▲▼▲



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



Front row, L-R: Julie Love Templeton, Fred Ledbetter, Carla Ann Love Tinney
Back row, L-R: Alice Faye Love, Huel M. Love, Jr. (Kenny), John Hugh Love, Jason Landers Love



A Brave New World of Judicial Recusal?

The United States Supreme Court Enters the Fray

By Kevin C. Newsom and Marc James Ayers

On June 8, 2009, the United States Supreme Court released its opinion in what has come to be known as “the West Virginia recusal case”—*Caperton v. A.T. Massey Coal Co.*¹ In a 5-4 ruling authored by Justice Kennedy, the Court held that the Fourteenth Amendment’s Due Process Clause required a state supreme court justice to recuse himself in a case involving a company whose CEO had made substantial expenditures in support of the justice’s election campaign. While its actual impact will be determined only in time, the Court’s decision raises a number of important questions and considerations for litigants and lawyers—not exclusively, but perhaps most particularly for those in the 39 states, Alabama among them, that elect at least some of their judges.

The Facts of the Case²

In August 2002, a West Virginia jury found A.T. Massey Coal Co. (“Massey Coal”) liable for certain business torts and awarded the plaintiffs, Hugh Caperton and his company Harman Development, \$50 million in damages. After the jury’s verdict but before Massey Coal filed its petition for appeal (what we in Alabama would call a petition for certiorari), West Virginia held its 2004 judicial elections. In that election cycle, attorney Brent Benjamin ran for a seat on the West Virginia Supreme Court of Appeals against an incumbent, Justice Warren McGraw. Benjamin ultimately won the election by some 50,000 votes (almost seven percentage points), and took his seat in January 2005.

The race between Benjamin and McGraw was heated by any measure, and involved strong messages and big dollars on both sides. Enter Don Blankenship, the CEO of Massey Energy and its subsidiary Massey Coal. Blankenship strongly disapproved of Justice McGraw’s jurisprudence. Blankenship believed that Justice McGraw was biased toward “the trial lawyers” and that McGraw’s decisions harmed West Virginia’s economy.³ (Blankenship’s sentiment tracked Benjamin’s campaign theme, which was that West Virginia’s courts had become “unfair and unpredictable”).⁴ Blankenship had no personal connection with Benjamin, but, according to Blankenship, desired to support him in order to unseat Justice McGraw.

And support Benjamin, Blankenship did. Not only did Blankenship contribute \$1,000 directly to Benjamin’s campaign, but also—and more significantly—he made substantial independent expenditures (without the cooperation of the Benjamin campaign) that totaled some \$3 million. Specifically, Blankenship spent approximately \$500,000 to fund direct mailings and advertising to support Benjamin and to oppose Justice McGraw, and then gave almost \$2.5 million to an organization established under 26 U.S.C. § 527(e)—“And for the Sake of the Kids”—which ran ads and held events opposing Justice McGraw.

Other organizations representing various interests—such as “Doctors for Justice,” “Citizens for Quality Health Care” and “Citizens Against Lawsuit Abuse”—also spent substantial sums to support Benjamin’s campaign. There was plenty of money on the other side, as well. The “West Virginia Consumers for Justice” (another § 527 group) spent approximately \$2 million to support Justice McGraw, approximately \$1.5 million of which it received from plaintiffs’ attorneys and \$10,000 of which it received from Caperton himself.

When Justice Benjamin took his seat on January 1, 2005, the *Caperton* matter was still before the trial court on post-judgment review. In October 2005—in anticipation of Massey Coal’s petition for appeal to the West Virginia Supreme Court of Appeals—Caperton filed a motion to disqualify the newly elected Justice Benjamin based on Blankenship’s campaign support. Justice Benjamin denied that motion in a written opinion.

The West Virginia Supreme Court of Appeals granted Massey Coal’s petition for appeal, and in November 2007, the West Virginia high court reversed the \$50 million verdict in a 3-2 opinion, which Justice Benjamin joined. Although the majority opinion noted that “Massey’s conduct warranted the type of judgment rendered in this case,” the court reversed the jury’s verdict based on (1) a contractual forum-selection clause that precluded the action from being brought in West Virginia and (2) the res judicata effect of a separate judgment reached in a Virginia court.⁵

Caperton requested rehearing, which was granted unanimously. Two of the justices—one from the majority opinion, and one from the dissent—recused themselves on rehearing, leaving Justice Benjamin (who had again refused to recuse and who was now sitting as acting chief justice) to appoint two new justices

to round out the rehearing panel. Justice Benjamin did so, and the court again, in another 3-2 decision, reversed the jury's verdict. (The justices appointed by Benjamin to rehear the *Caperton* decision split on the merits, with one justice in the majority and one in the dissent.) The dissenting justices not only challenged the majority opinion on the merits, but also objected to Justice Benjamin's participation in the matter.

Justice Benjamin eventually filed a lengthy concurring opinion, in which he addressed the various challenges to his participation in the *Caperton* matter. Benjamin contended that he had "no pecuniary interest in the outcome of this matter" and "no personal involvement with ... [or] personal antipathy toward any party or counsel."⁶ He also rejected the notion that he should recuse based on vague notions of "appearance." Moreover, Justice Benjamin wrote that even if "appearance" were the standard, there was no untoward appearance here. In particular, Justice Benjamin argued (1) that it was Justice McGraw's own message and actions that had sunk his campaign (Benjamin pointed specifically to a then-infamous campaign speech in which McGraw had claimed, among other things, that Benjamin wanted to "destroy democracy"); and (2) that Benjamin had voted *against* Massey companies in several other appeals.⁷ Indeed, before ruling on the merits of the *Caperton* appeal in November 2007, Justice Benjamin had ruled against Massey companies in four cases, at both the petition and the merits stages.⁸ And approximately one month after ruling in favor of Massey Coal in the *Caperton* matter, Justice Benjamin voted against hearing Massey's appeal of a \$243 million adverse judgment.

Caperton filed a petition for certiorari in the United States Supreme Court, alleging that Justice Benjamin's participation in the case violated the Fourteenth Amendment's Due Process Clause. The Court granted *Caperton*'s petition.

The Majority Opinion and the "Possible Temptation" Standard

In an opinion authored by Justice Kennedy and joined by justices Stevens, Souter, Ginsburg and Breyer, the Court found that Justice Benjamin's participation in the *Caperton* appeal violated the Due Process Clause. At the outset of its opinion, the Court identified two fundamental propositions: first, that "a fair trial in a fair tribunal is a basic requirement of due process," and second, that "most matters relating to judicial disqualification [do] not rise to a constitutional level."⁹ Under what circumstances, then, does a judge's non-recusal violate the Due Process Clause?

At common law, the Court observed, recusal was required only where the judge had a "direct, personal, substantial, pecuniary interest" in a case.¹⁰ That rule reflected the maxim that "no man is



At common law, the Court observed, recusal was required only where the judge had a "direct, personal, substantial, pecuniary interest" in a case.

allowed to be a judge in his own cause."¹¹ Beyond that core common law prohibition, the Court pointed to two additional circumstances in which it had required recusal as a constitutional matter. The first involves tribunals "where a judge [has] a financial interest in the outcome of a case, although the interest [is] less than what would have been considered personal or direct at common law"—the quintessential example being a case in which a municipal judge is paid a salary supplement for convictions but not acquittals.¹² The second instance in which the Due Process Clause has been deemed to require recusal is where a judge has a conflict of interest as a result of his participation in an earlier proceeding—the quintessential example here being a case in which a judge slandered by a contemnor later presides over the trial of the contempt charge.¹³

So, the question remained, what about Justice Benjamin? His participation didn't run afoul of any of the particular categories marked out by existing precedent. Did "the context of judicial elections," which the Court acknowledged was "a framework not presented" in prior cases, call for a variation on the existing rules?¹⁴ *Caperton*'s theory of recusal was that in the judicial election context, a judge (like Justice Benjamin) who had received substantial support might feel some kind of political "debt of gratitude" to his supporters that should be repaid with favor from the bench.¹⁵

The Court emphasized that the unwieldiness and indeterminacy of inquiries into judges' subjective biases "underscore[s] the need for objective rules."¹⁶ To that end, the Court seemingly embraced the following constitutional criterion, which it adapted from language in earlier cases: "[W]hether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear, and true.'"¹⁷

In applying the "possible temptation" test to the case before it, the Court stressed that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."¹⁸ But, the Court said, "this is an exceptional case."¹⁹ In finding the facts surrounding the *Caperton* appeal sufficiently "exceptional," the Court focused principally on two factors: the relative size of Blankenship's expenditures in support of Benjamin and the timing of those expenditures relative to the pendency of Massey's appeal:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.²⁰

The Court attached no significance to the fact that all but \$1,000 of Blankenship's support was by way of independent expenditures rather than by direct contributions. Instead, the Court found the totality of Blankenship's expenditures were simply too great:

[W]e conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.²¹

The Court held that “[i]n an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome.”²²

Ultimately, the Court majority held that “Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.”²³ “On these extreme facts,” the Court held, “the probability of actual bias rises to an unconstitutional level.”²⁴ Seemingly in an attempt to cabin the scope of its decision, the Court added the following coda: “Because [state recusal rules typically] provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.”²⁵

The Dissent and the Problem of Indeterminacy

Chief Justice John Roberts dissented, and was joined by Justices Scalia, Thomas and Alito. In his dissent, the Chief Justice lamented that the Court had improperly and unwisely extended the reach of the Due Process Clause into new territory with its “probability of bias” test—territory that in the past had been left to state-by-state regulation. The Court's new constitutional rule, he contended, “cannot be defined in any limited way” and “provides no guidance to judges and litigants about when recusal will be constitutionally required.”²⁶ The Chief Justice predicted that the Court's decision “will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.”²⁷

The Chief Justice expressed concern that “the standard the majority articulates—‘probability of bias’—fails to provide clear, workable guidance for future cases,” and raises far more questions than it answers.²⁸ Among the most important, he said, is “whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.”²⁹ After all, if the underlying concern is that an elected judge would feel a debt of gratitude to a campaign supporter, wouldn't an appointed judge likewise feel a debt to the

president or governor who appointed him? And more generally, what about “friendship with a party or lawyer, prior employment experience, membership in clubs or associations,” and so on?³⁰

Even moving beyond those initial macro-level questions concerning the scope of the Court's rationale, the Chief Justice lists 40 other significant open questions that litigants, lawyers and lower courts will have to address when thinking about recusal. Among them—

- How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”?
- Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?
- Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court or state supreme court?
- How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
- Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?
- Should we assume that elected judges feel a “debt of hostility” toward major opponents of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?
- Does what is unconstitutional vary from state to state? What if particular states have a history of expensive judicial elections?

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- Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?
- What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?
- Are the parties entitled to discovery with respect to the judge's recusal decision?³¹

Given these and many other open questions, and the difficult line-drawing exercises with which courts may be faced in resolving them, the Chief believes that the majority opinion "requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?) and psychologists (is there likely to be a debt of gratitude?)."³²

The dissenting Justices also highlighted a number of procedural uncertainties. "What procedures must be followed to challenge a state judge's failure to recuse?" May *Caperton* claims be raised only direct review—as in *Caperton* itself—or may a litigant file suit in federal court under 42 U.S.C. § 1983 to prevent an allegedly biased judge from sitting on his case? "Are the parties entitled to discovery with respect to the judge's recusal decision?" "What is the proper remedy" for a *Caperton* violation, if proved? Does harmless-error analysis apply? "Does a litigant waive his

due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?"³³

Finally, the dissenters expressed skepticism about the viability of the Court's repeated efforts to limit the scope of its holding to only cases involving "extreme" facts. "This," Chief Justice Roberts said, "is just so much whistling past the graveyard."³⁴ The difficulty, according to the Chief Justice, is that the majority's test is so circumstance-dependent—and seemingly limitless—that "all future litigants will assert that their case is *really* the most extreme so far."³⁵

The Ramifications of *Caperton*: Mountain or Molehill?

It is frankly unclear what *Caperton*'s real-world ramifications will be. The five Justices in the majority see no coming flood of recusal motions or other significant lurking complications. Litigants, they would say, have always had the ability to file recusal motions, and there does not appear to have been any unmanageable crush. That is an optimistic view, and may be proven correct in time.

Caperton could well change the game, though. Until now, litigants considering a recusal motion did not have a broadly-worded and seemingly open-ended federal constitutional sword to wield.



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Given the Supreme Court’s full-throated endorsement of the “possible temptation” standard, and its extension of that standard in the judicial-election context, the institutional limitations on recusal practice may shift.

In any event, litigants and lawyers will need to begin to consider the propriety of the “*Caperton* motion.” The basic battle lines would seem to be apparent: Parties seeking recusal on constitutional grounds in circumstances different from those in *Caperton*—say, with respect to a less “extreme” judicial-election scenario or with respect to an appointed judge—will have to focus on the Court’s broad language and try to show that the support at issue would create a sense of political debt and would therefore “offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear, and true.” On the other hand, parties resisting *Caperton* motions generally will want to hold fast to the particular facts of *Caperton* and contend that the Court’s constitutional rule applies only in the judicial election context—and even there only to cases presenting nearly identical facts.

Whatever the relative merits of the Court’s opinion and dissenters’ objections, it is clear that there is at least a new weapon in the litigator’s arsenal: the “*Caperton* motion.” Recusal practice—particularly in state courts, but possibly in federal courts as well—may well get more aggressive, and much more complicated, in the months and years to come. ▲▼▲



Until now, litigants considering a recusal motion did not have a broadly-worded and seemingly open-ended federal constitutional sword to wield.

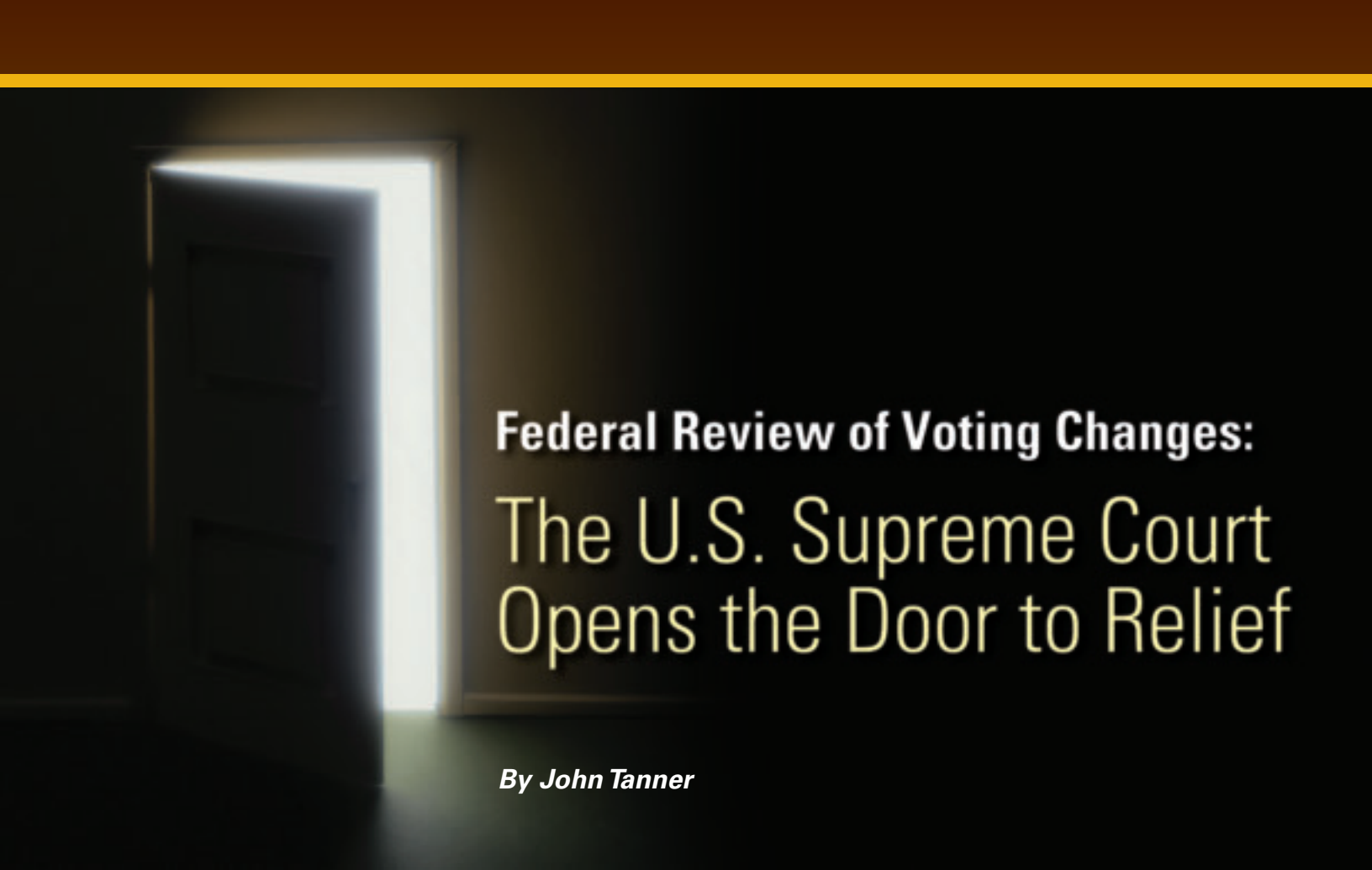
appeal involving an insurance company, and would have directly benefited by ruling against the insurance company in light of the pendency of his own lawsuit against another insurance company)).

13. *Id.* at 2261-62 (discussing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (a judge who presided over criminal contempt proceedings was the same judge who was verbally attacked by the defendant, thus giving rise to the charge of criminal contempt); and *In re Murchison*, 349 U.S. 133 (1955) (after a judge had questioned witnesses to determine whether criminal charges should be brought against them, the same judge proceeded to try and convict those witnesses for contempt in the earlier proceeding)).
14. *Id.* at 2262.
15. *Id.*; see also Pet. Br. at 17, 31-35.
16. *Caperton*, 129 S. Ct. at 2263.
17. *Id.* at 2260, 2261, 2264, 2265 (internal quotations omitted).
18. *Id.* at 2263.
19. *Id.*
20. *Id.* at 2263-64.
21. *Id.* at 2264.
22. *Id.*
23. *Id.* at 2265 (internal quotations omitted).
24. *Id.*
25. *Id.* at 2267.

Endnotes

1. 556 U.S. ___, 129 S. Ct. 2252 (2009).
2. The facts of the case as presented in this article were assembled from the Supreme Court’s opinion and from the opening briefs of the parties. See *Caperton*, 129 S. Ct. at 2257-59; Brief of Petitioners Hugh M. Caperton *et al.* at 1-15; Brief of Respondents A.T. Massey Coal Co. *et al.* at 3-9. Pinpoint cites are provided where text is quoted.
3. Resp. Br. at 3.
4. *Id.* at 5.
5. *Caperton*, 129 S. Ct. at 2258 (quoting *Caperton v. A.T. Massey Coal Co.*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007) (withdrawn)).
6. Resp. Br. at 8-9 (quoting *Caperton v. A.T. Massey Coal Co.*, ___ S.E.2d ___, 2008 WL 918444 (W. Va. 2008) (Benjamin, J., concurring)).
7. See *id.* at 54.
8. See *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005) (merits); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (merits); *McNeely v. Independence Coal Co.*, No. 042156 (W. Va. Feb. 9, 2005) (petition stage); *Brown v. Rawl Sales & Processing Co.*, No. 070889 (W. Va. Sept. 11, 2007) (petition stage).
9. *Caperton*, 129 S. Ct. at 2259.
10. *Id.*
11. *Id.*
12. *Id.* at 2259-61 (discussing *Tumey v. Ohio*, 273 U.S. 501 (1927) (a judge in criminal case personally received fees and costs only if defendant was convicted); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (a mayor was acting as judge over criminal matters, and city received fines only upon conviction of defendants); and *Aetna Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (an Alabama Supreme Court justice heard an
26. *Id.* at 2267 (Roberts, C.J., dissenting).
27. *Id.*; see also *id.* at 2274-75 (Scalia, J., dissenting) (stating that adoption of the Petitioners’ theory “was urged upon us on grounds that it would preserve the public’s confidence in the judicial system,” but that the Court’s decision “will have the opposite effect” by reinforcing “the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice”).
28. *Id.* at 2269 (Roberts, C.J., dissenting).
29. *Id.*; see also *id.* at 2274 (Scalia, J., dissenting) (“[T]he principal consequence of today’s decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges.”).
30. *Id.* at 2268 (Roberts, C.J., dissenting).
31. *Id.* at 2269-72.
32. *Id.* at 2272.
33. *Id.* at 2271-72.
34. *Id.* at 2272.
35. *Id.*

Kevin C. Newsom and Marc James Ayers are partners in the Appellate Litigation Group at Bradley Arant Boult Cummings LLP. Newsom and Ayers filed an amicus curiae brief in the *Caperton* case on behalf of the states of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah.



Federal Review of Voting Changes: The U.S. Supreme Court Opens the Door to Relief

By John Tanner

The 1965 Voting Rights Act

The Voting Rights Act of 1965 armed the national government with an array of tools to end racial discrimination in voting. The Act included in Section 2 a broad ban on voting discrimination, while Section 8 provided for federal examiners to register black voters where local officials refused and Section 6 allowed federal observers to enter polling places and ensure fair treatment of minority voters. Perhaps nothing, however, has transformed the landscape of local government in Alabama more than the “pre-clearance” requirement of Section 5 of the Voting Rights Act, a temporary provision that has been extended repeatedly.¹

Since 1965, every level of state and local government in Alabama and certain other states have been required to undergo federal review of every change in voting practices and procedures to ensure that the changes are free of racial discrimination, either in purpose or effect.² Until that review has been completed and pre-clearance either from the Justice Department or the U.S. District Court for the District of Columbia has been obtained, the new practice is unenforceable. That federal review has blocked some 100 voting changes in Alabama, including everything from polling place changes to municipal incorporations and annexations to redistricting plans.³ This federal review requirement is largely responsible for the broad representation and participation that minority voters in Alabama enjoy today. Congress extended the Section 5 review requirement for another 25 years in 2006.

In *Northwest Austin Municipal Utility District No. 1 v. Holder*,⁴ the Supreme Court has written an important new chapter in the life of the Voting Rights Act, one that holds both

promise and peril for local governments. Briefly, the *Northwest Austin* decision creates a realistic opportunity for many local governments to obtain release from the federal review provisions of the Voting Rights Act so that they will no longer have to obtain federal clearance before moving ahead with changes in voting practice. Significantly, the Court decided the case on a novel and narrow statutory interpretation, specifically, indeed ostentatiously, to avoid ruling on whether the federal review requirement and its “substantial federalism costs” remain constitutional after more than four decades, and whether “the Act’s current burdens ... [are] justified to meet current needs.”⁵

Standards for Release

The Voting Rights Act is well known in Alabama election circles for its requirement for federal review of voting changes. The pre-clearance requirement does not apply nationwide, but only to certain “covered” “political subdivisions,” generally an entire state or county (the unit at which voter registration is conducted). These areas were determined based on the use of a racially discriminatory voting “test or device” by local registrars, and low voter participation in the 1964, 1968 or 1972 general election.⁶ The entire state of Alabama and each county are subject to the Voting Rights Act. All cities, school districts, municipal utility districts and other electoral entities within each county are also subject to the federal review requirements of the Act.⁷

The Act has always provided an escape valve, awkwardly known as a “bailout” provision, whereby a jurisdiction may file suit in the

U.S. District Court for the District of Columbia and obtain judgment from a three-judge panel that federal pre-clearance of voting changes need no longer be required. Initially, however, only the entire state, in the case of Alabama, could seek such a judgment.⁸ In 1982, Congress amended these procedures to allow counties within states subject to the review requirements of the Voting Rights Act a realistic opportunity to obtain release from federal review, to recognize and reward jurisdictions which had not used discriminatory voting practices and to create an incentive for local governments proactively to enhance voting opportunities for minority citizens.⁹

Section 4(b) of the Voting Rights Act¹⁰ spells out the “bailout” criteria, the standards necessary to obtain such a release. Local officials as plaintiffs must establish that:

1. No “test or device,” such as a literacy or moral character test, has been used in the preceding 10 years. Because such tests and devices have been outlawed since at least 1970, this should not be a barrier to bailout for any jurisdiction.
2. There have been no successful voting rights lawsuits against the jurisdiction in the preceding 10 years.
3. Federal observers have not been assigned to monitor elections in the jurisdiction in the past 10 years.
4. There has been full compliance with the review requirements (timely submissions and no implementation without pre-clearance) for 10 years.
5. There have been no objections to voting changes in the past 10 years.
6. There have been affirmative steps to eliminate any discriminatory voting practices, including steps to eliminate intimidation and harassment of minority voters. There also have been constructive efforts to encourage minority registration and voting.
7. There has been no discrimination in voting in the past 10 years that was not caught by an earlier lawsuit or Section 5 objection. A bailout action will not proceed if there are pending Voting Rights Act lawsuits against the applicable state or county or any of its subdivisions.¹¹

The statute also requires the jurisdiction to provide current voter registration data and data on voter participation rates for both white and minority citizens, so as to show any racial disparities.¹² These data are readily available in Alabama. The statute also calls for public notice, and gives local minority citizens an automatic right to intervene in the lawsuit if they wish.¹³

Once a jurisdiction has obtained a favorable judgment, it no longer has to seek review of any of its voting changes. The District of Columbia District Court, however, retains jurisdiction over the case for 10 years. If there is any voting discrimination—any act that would have prevented the jurisdiction from being released if it had happened earlier—the court will vacate the bailout order, and restore the pre-clearance requirement of the Act.

Theory and in Practice

In passing the 1982 amendments, Congress believed that roughly 25 percent of all covered jurisdictions were eligible for release

from federal review, and that a majority would be eligible for bailout by 2007.¹⁴ The actual record has been far different: among 12,000 jurisdictions subject to the federal review requirement, only 17, all in Virginia, have been released or “bailed out.”¹⁵

The modest success in Virginia points to a key barrier to release or bailout in the past. Prior to *Northwest Austin*, for purposes of bailout/release suits, counties had to demonstrate not only their own full compliance, but also that all cities and other districts within their borders were compliant.¹⁶ Virginia is unique in separating many cities from the adjacent or surrounding counties. A county in Virginia, thus, is responsible only for demonstrating its own compliance and, perhaps, for one or two small towns within the county. Making sure that all voting changes have been submitted for federal review is a manageable task.

Compare Jefferson County, Alabama with its welter of large and small cities of all dispositions and resources, all of which may enact voting changes, or have the state legislature enact voting changes for any or all of them—all without consulting the others. Some of the cities spread into adjacent counties. For counties in Texas and elsewhere, with literally hundreds of utility, water, fire and other special-use districts, the idea of meeting the bailout criteria has been a complete non-starter.

The *Northwest Austin* determination that individual cities can obtain bailout and release from federal review of all voting changes holds great significance for individual cities across Alabama. A given city need simply get its own house in order and not worry

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about its neighbors. Accordingly, for some cities, the balance of time and expensive process has shifted from compliance to bailout. In those cases where the burden of federal review of each and every voting change no longer serves its vital purpose, the burden of compliance now can be lifted from local governments.

Considerations

Most of the Virginia jurisdictions which have obtained release successfully have been very heavily white, much like parts of northern Alabama. Such areas never devoted the time and energy to the voting discrimination that marked areas where minority voters had a real potential to affect election outcomes. An all-white city need do little more than make certain that all of its voting changes have been submitted for federal review.

Where there are substantial minority populations, the calculus can be more complicated, although it remains a distinct possibility in many areas. On the surface, most Alabama jurisdictions should be able to meet the bailout/release criteria. Objections to voting changes and voting rights lawsuits have been few and far between in the last 10 years, if only because the full Voting Rights Act has been so successful in earlier years. Along with the objections and scores of lawsuits against individual government entities, key cases such as *Dillard v. Crenshaw County* (elections in 192 cities, counties and school districts overturned under section 2)¹⁷ and *Harris v. Seigelman* (equalization of appointment of poll workers across Alabama, thereby minimizing the need for federal observers)¹⁸ transformed elections in Alabama. Those gains have been preserved in large part by the prophylactic role of federal review of voting changes in deterring backsliding, and there has been relatively little activity during the past 10 years—only two objections to voting changes, for example, and little federal observer coverage.

Accordingly, the main obstacle to bailout may be technical: establishing full compliance with the federal review requirement. What constitutes a voting change subject to federal review is not necessarily intuitive to local officials, and in the normal course many local officials will have failed to submit changes for review. Notoriously, the City of Calera found that it had failed to submit 177 annexations it had enacted and enforced over the years.¹⁹ There also may have been confusion regarding voting changes enacted by state legislation as to whether the state attorney general or local officials should make the submission.

Some non-compliance is genuinely unavoidable, and will not count against a city. Fire or storms may render a polling place unusable on the eve of an election, and a new site must be selected regardless of pre-clearance if the election is to proceed—and stopping the election without pre-clearance is a violation.²⁰ The Voting Rights Act specifically provides that violations which “were trivial, were promptly corrected, and were not repeated” can be discounted.²¹ The clear message from the Supreme Court in *Northwest Austin*, moreover, was that a reasonable opportunity for release from federal review is important to the constitutionality of section, and it is likely that the District of Columbia courts will not balk at technical violations or exigencies caused by events beyond the control of local officials.²²

Nothing in the *Northwest Austin* decision removes the understanding that a geographically larger jurisdiction can only bail out if there has been compliance by all sub-jurisdictions within

its bounds. Release by cities within a county, however, would simplify the release process for the county.

It may be that the main barriers to a successful action will arise from more recent circumstances. The court-ordered reports on compliance with the equalization of black and white poll workers mandated in *Harris v. Seigelman* ended long ago. There has been ample time for backsliding, and for failure to keep up with shifting populations. Voting rights problems certainly have not disappeared. Consider reports from a recent mayoral election between black and white candidates that white persons with video-cameras stood in pickup trucks outside each city polling place and filmed as black voters went to the polls. The potential for intimidation by such tactics should be clear, and has been recognized by the Justice Department.²³

While black-white tensions have long been familiar in Alabama, many have overlooked voting rights issues that have arisen as Latino and Asian-American citizens have moved into some parts of the state in significant numbers. The circumstances of these citizens raise serious issues, and appear to have generated significant hostility, including mistreatment of voters at the polls.²⁴

The possibility of recent discrimination that may interfere with efforts to obtain release from the federal review requirement is one that must be faced frankly and thoughtfully, with a full sensitivity to the range of possible discriminatory conduct. In many cases, the effects of discrimination can be erased for bailout/release purposes by reasonable proactive steps. A successful effort to obtain relief from the District of Columbia court will identify and effectively meet the needs of minority communities.

Consideration of bailout should include frank consultation and discussion among representatives of members of all racial and ethnic communities in a city or county. The statute allows “any aggrieved party” the right to intervene in the action,²⁵ and a judgment of discrimination in the decade after a successful release restores the pre-clearance obligation to the city or county.²⁶ If the state’s long experience with voting rights litigation has proved nothing else, it has shown that black political organizations in Alabama have been perhaps the most effective in the United States in generating the facts necessary to support voting rights litigation. As a practical matter, no city or county should pursue an action to escape continuing federal scrutiny of its voting changes unless it is serious about assuring to all of its citizens easy and equal access to all aspects of the election process for another 10 years and beyond.

Conclusion

A lawsuit to obtain release from the Voting Rights Act is not for every jurisdiction. Many communities see benefits in federal review of their voting changes, as it provides a respected forum for fast and inexpensive resolution of disputes and an alternative to costly litigation.²⁷ Cities that consider post-census litigation over redistricting, for example, may welcome the administrative forum for review of their plan.

For many cities and counties, however, release provides an opportunity to avoid the financial and other costs of continuing compliance with this unusual and stringent federal law requirement. Some will see an opportunity to remove a no-longer-merited stain of the past and replace it with a progressive and welcoming image as a community seeks to attract business and other growth.

Cities with few or no minority citizens will find the potential savings well worth pursuing. There also is a benefit for the effective enforcement of minority voting rights in eliminating the burden on the Justice Department of processing and reviewing voting changes from jurisdictions where there is no prospect of actual discrimination; the Justice Department would be able to spend its energies on stamping out discrimination in voting where it exists.

For all cities and counties across Alabama, a fresh look at the details of minority political access can be healthy and positive. Relief from federal review under the Voting Rights Act is now an option. Alabama cities that are eligible should give the possibility careful thought, and certainly all cities and counties in the state should strive to become eligible. ▲▼▲

Endnotes


1. 42 U.S.C. 1973c.
2. *Id.* The state or local officials can seek either administrative review by the Attorney General or may seek a declaratory judgment from the U.S. District Court for the District of Columbia that the change is not discriminatory. In the administrative procedure, the Attorney General can "pre-clear" a change and allow it to go forward, or can "interpose an objection." Until pre-clearance or a positive declaratory judgment is obtained, the change is legally unenforceable and can be enjoined.
3. For a list of voting changes blocked under section 5 see http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php.
4. ___ US ___ (June 22, 2009).
5. Northwest Austin, slip op. at 7-8.
6. The determinations, made by the Attorney General and the Director of the Census, brought into Section 5 coverage all of the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. A map and list of jurisdictions currently covered under Section 5 are available at http://www.usdoj.gov/crt/voting/sec_5/covered.htm.
7. *Sheffield Bd. of Comm'rs v. United States*, 435 U.S. 110 (1978). As if to forgive all lawyers who missed something in proofreading a pleading, the Court placed Sheffield in Texas rather than Alabama. Northwest Austin slip op. at 12.
8. *City of Rome v. United States*, 446 U.S. 156 (1980).
9. Report of the Committee on the Judiciary, United States Senate, Voting Rights Act Extension S. Rep. 97-417 at 45-46.
10. 42 U.S.C 1973b.
11. 42 U.S.C. 1973b(a)(1)(A-F).
12. 42 U.S.C. 1973b(a)(2).
13. 42 U.S.C. 1973b(a)(4).
14. S. Rep., No. 97-417 at 60. "The Committee is disappointed that more States have not taken advantage of this liberalized process and finds it telling of the commitment by some of the covered jurisdictions to end discriminatory practices. The Committee reiterates that termination of covered status has been and continues to be within the reach of compliant covered jurisdictions and hopes that more covered States and political subdivisions will take advantage of the process." H. Rep 1009-478 at 25.
15. Northwest Austin, slip op. at 16.
16. S. Rep. 97-417 at 56-57.
17. 640 F. Supp. 1347 (M.D.Ala.1986).
18. 700 F. Supp. 1083 (M.D. Ala. 1988).
19. August 25, 2008 letter to Dan Head, esq. from Acting Assistant Attorney General Grace Chung Becker, available at http://www.usdoj.gov/crt/voting/sec_5/ltr/L_082508.php. Annexations are "enforced" by allowing the annexed citizens to vote in city elections.
20. The most dramatic election disruption occurred in New York City, three boroughs of which are subject to section 5, on September 11, 2001.
21. 42 U.S.C. 1973b(a)(3).
22. For an overview of the various changes subject to section 5 and the circumstances that render each problematic see John Tanner, *An Informal Guide to Section 5 of the Voting Rights Act: A Manual for Citizens and Local Officials*, Alabama Law Institute 2008.

23. See, e.g., June 14, 1004, letter to Constance Slaughter-Harvey from Assistant Attorney General Deval L. Patrick; November 2, 1994 letter to Edward Allen from Acting Voting Section Chief John K. Tanner.
24. In Bayou La Batre, Alabama, Vietnamese attempting to vote systematically were subjected to race-based challenges until blocked by the Department. Statement of Karen K. Narasaki, president and executive director, Asian American Justice Center, before the Subcommittee on the Constitution, Civil Rights and Property Rights Committee on the Judiciary, United States Senate, Hearing on S. 2703, "Continuing Need for Section 203's Provisions for Limited English Proficient Voters" June 13, 2006, 14, available at http://www.advancingequality.org/files/VRA_Senate_Hearing_Statement_706.pdf.
25. 42 U.S.C. 1973 b(a)(4).
26. 42 U.S.C. 1973 b(a)(5).
27. Statement of Donald Wright, general counsel, North Carolina Board of Elections, before the Subcommittee on the Constitution, Civil Rights and Property Rights Committee on the Judiciary, United States Senate, "Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field," June 21, 2006.



John Tanner is a former chief of the Voting Section of the Justice Department, the office responsible for enforcement of the Voting Rights Act, including federal review of voting changes. He joined the office in 1976 and recently retired.

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Internet Transactions and Communications:

Expanding or Contracting Traditional Notions of Personal Jurisdiction?

By Anne Sikes Hornsby

Buying and selling via electronic transactions over the Internet are completely commonplace occurrences in most Americans' business and personal lives. We take for granted the ease, convenience and simplicity afforded by conducting commerce and communications from our homes and offices at any time of the day. But when a conflict arises over those communications or transactions, and leads to potential or actual civil litigation, what is the proper and fair place for resolving the dispute? Do courts need new guidelines and rules in the electronic age, or is justice better served by adherence to traditional principals of personal jurisdiction? Courts across the country are struggling with these issues, and both practitioners and their clients can benefit from consideration of the factors that courts are using and adapting to decide questions of personal jurisdiction pertaining to electronic communications and commerce.

A court's jurisdiction over a party or person has long been subject to a legacy of judicially-created standards, requiring determinations of what constitutes "minimum contacts," "purposeful availment" and other due process standards in cases whose names most lawyers recall from law school—*International Shoe*, *Burger King*, *Worldwide Volkswagen* and *Helicopteros*, to name a few. As technology has expanded our methods of communicating and transacting business, this jurisprudence has been applied in ways that some scholars and practitioners describe as vague, unwieldy and unpredictable. In the age of the Internet, videoconferencing, virtual communications and online contracting, how are courts determining whether they have the authority to adjudicate disputes with out-of-state parties

conducting business via the Internet, and how can parties avoid being haled into courts in far-away or inconvenient jurisdictions? Likewise, from the plaintiff's perspective, what should in-state residents consider when trying to litigate disputes with non-residents who may challenge an Alabama court's jurisdiction?

Overview of procedure, sources of law

Before addressing the current cases attempting to apply jurisdictional precedent to the myriad patterns created by the meteoric rise of Internet use for business and personal matters, it is worth visiting the basics. Any trial court's jurisdiction, state or federal, is limited by its home state's long-arm statutes. While Alabama and most other states have provided personal jurisdiction and long-arm provisions which extend to the maximum allowed by the Due Process Clause of the Fourteenth Amendment, some states' statutes are promulgated in other terms. For the lawyer possibly contesting jurisdiction in a foreign forum, or for a person or business entity conducting transactions outside of Alabama, it is worth first looking to the particular state statute or rule of civil procedure to see if its language provides a differently stated view of its state's reach or specifies certain kinds of conduct which might subject the party to the state's jurisdiction, sometimes referred to as enumerated act statutes. Alabama retained such a statute in its Rule 4(a) until August 1, 2004, when it completely rewrote its rules to eliminate the "laundry list" approach and utilize only the "catch all" clause now contained in Rule 4.2(b).¹

Another threshold consideration is the possible procedural routes to challenging

or asserting jurisdiction. First, failure to raise personal jurisdiction, as opposed to subject matter jurisdiction, can easily forever waive a party's right to contest it. A party must clearly preserve challenges to personal jurisdiction in any litigation, making only special, limited appearances in the contested jurisdiction to guard against any question of waiver. The challenge is framed as a Rule 12(b)(6) motion to dismiss, or the home state equivalent of that federal and Alabama rule. A plaintiff initially states the basis for jurisdiction in the complaint, which is presumed true. If a defendant objects and makes a prima facie case of lack of personal jurisdiction, the burden shifts to the plaintiff to prove those facts. *Bracewell v. Nicholson Air Service, Inc.*, 748 F.2d 1499, 1503 (11th Cir. 1984). Since any court analysis of personal jurisdiction is highly fact-specific, some courts have ruled it reversible error to deny preliminary discovery on jurisdictional facts. *E.g., Lakin v. Prudential Sec., Inc.*, 348 F.3d 704 (8th Cir. 2003). Depending on the case, a party might prefer to simply defend on the merits or prosecute in a less convenient forum to avoid the delay and expense of a jurisdictional battle that could include expensive discovery, and where success may simply result in litigation in a different forum. Alternatively, it may choose to engage in jurisdictional discovery for other strategic purposes, perhaps getting an early look into an adverse party's operations and resources.

Second, review of a court's jurisdictional ruling dismissing a party is a final order and appealable as such, but a denial of a motion to dismiss on jurisdiction grounds is not, and must go up either on a certified question or writ of mandamus. The ruling is reviewed *de novo* in either

case. A party may not be permitted to supplement the record on review, however, so it is important to create a thorough record at the trial court level, despite the preliminary nature of the litigation.

Traditional personal jurisdiction analysis

The standards set by *International Shoe*, decided in 1945, and its progeny, continue to control judicial jurisdiction analysis and application throughout the technology boom to the last half of the 20th century and the first decade of this one. The rule is both seemingly straightforward and yet, some argue, vague, and responsible for confounding judicial opinions in this area. For a court to exercise jurisdiction over a nonresident defendant, that defendant must have sufficient purposeful contacts with the forum state in order to satisfy traditional notions of fair play and substantial justice; otherwise, the protections of due process of law are violated. *See, e.g., International Shoe v. Washington*, 326 U.S. 310, 316 (1945). Because the maximum reach of courts is set by the home state's long-arm statute and constitutional boundaries, the standards for determining whether a court has personal jurisdiction over a nonresident defendant are the same in both state court and federal courts. *See Kittle Heavy Hauling v. Rubel*, 647 So.2d 743, 744 (Ala. 1994). Basically, the fact-intensive inquiry is directed at determining whether a nonresident defendant has sufficient minimum contacts with the forum, and, if so, whether exercising jurisdiction over that defendant would be fair and reasonable. The burden of establishing that a court has jurisdiction falls on the plaintiff, whose jurisdictional allegations in a complaint are accepted as true unless challenged by a defendant with supporting evidence.

Personal jurisdiction breaks down further into two categories: general and specific. General jurisdiction—the kind necessary to hear claims that did not arise out of a

defendant's contacts with the forum state—may be exercised when a defendant has such “continuous and systematic” contacts with a forum state that it would be reasonable and just for that defendant to be haled into court there, even though the claim does not relate to those contacts. *See Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 413, 415 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Most jurisdictional challenges related to Internet transactions, but certainly not all, involve facts which are insufficient to establish general jurisdiction's “continuous and systematic” contacts mandate, particularly when such contacts are based on the sale of a product. *See Seymour v. Bell Helmet Corp.*, 624 F. Supp. 146, 148 (M.D. Ala. 1985) (quoting *Helicopteros*: “mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchases”).

Specific jurisdiction, on the other hand, permits courts to exercise jurisdiction over a party where the cause of action arises out of the nonresident's contacts with the forum state, so long as the exercise of that jurisdiction comports with due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The touchstone for the specific jurisdiction due process requirement is “purposeful availment.” The Supreme Court has explained this requirement in this way:

“The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum

state, thus invoking the benefits and protections of its laws.”

Hanson v. Denckla, 357 U.S. 235, 253 (1958). The requirement of purposeful availment “insures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party.” *Burger King*, 471 U.S. at 475. Additionally, the *Burger King* court explained that:

“Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state. Thus, where the defendant deliberately has engaged in significant activities within a state, or has created continuing obligations between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.”

A rather different standard was suggested by the United States Supreme Court's decision in *Calder v. Jones*, which expounded upon the purposeful availment doctrine to give courts yet another standard to consider in determining whether personal jurisdiction may be exercised over a party to a dispute. 465 U.S. 783 (1984). *Calder* relied on *World-Wide Volkswagen* in concluding that a California court had personal jurisdiction over two Florida residents responsible for the writing and publishing of an allegedly libelous article within the *National Enquirer*, causing harm to a California resident plaintiff, actress Shirley Jones. The Court weighed a number of facts, among them that the act was an intentional tort targeting a celebrity known



For a court to exercise jurisdiction over a nonresident defendant, that defendant must have sufficient purposeful contacts with the forum state in order to satisfy traditional notions of fair play and substantial justice; otherwise, the protections of due process of law are violated.

by the defendants to reside in California, and that the largest circulation of the publication in any state was within California. It concluded that minimum contacts were satisfied because California was the “focal point of both the story and of the harm suffered.” This decision has been deemed an articulation of an “effects” test, whose reach stops short of mere foreseeability of harm, but extends to those who should reasonably recognize that their conduct will result in damages in the jurisdiction, presumably intentional tortfeasors. While criticized by many and frequently distinguished on its facts (Westlaw lists 139 negative citations), it has reemerged as a test used in assessing Internet conduct alleged to have created injury or “effects” in another state.

WorldWide Jurisdiction v. Requiring “Something More”

Two early trial level cases dealing with Internet activity, both of which were very influential, illustrate the range of applications of traditional personal jurisdictional jurisprudence to similar fact patterns. In 1996, a federal district court in Connecticut held that the maintenance of a Web site advertising a company’s services and accessible nationwide, along with a posted toll-free number, constituted sufficient minimum contacts to bring to a defendant into Connecticut to defend alleged trademark infringement. *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). Interestingly, the Internet was still novel enough that the court’s short opinion includes a description of the Internet and domain names: “The Internet is a global communications network linked principally by modems which transmit electronic data over telephone lines. Worldwide there are approximately 20 to 30 million users of the Internet.” For context, in 2008, market sources estimate that nearly 1.6 billion people worldwide have access to the Internet, including nearly 75 percent of North America’s population. The specter of global jurisdiction raised by the *Inset Systems* decision led some to wonder if the boundaries of personal jurisdiction were eroding beyond recognition.

One year later, the Ninth Circuit Court of Appeals addressed a similar situation in *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997). While acknowledging *Inset Systems*, it reached the conclusion that an alleged trademark infringement of

an Arizona company on a Florida company’s Web site was insufficient to assert personal jurisdiction over the Florida business. It stated that, “[S]o far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff’s home state. . . . Rather, in each, there has been ‘something more’ to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.”

Zippo- The Interactivity Test

In the mid to late ’90s, it became clear that courts were attempting to craft new articulations of established jurisdictional rules, if not new rules altogether, to address legal disputes arising out of Internet communications or transactions. In some cases, plaintiffs seeking to bring defendants within reach of their home courts argued that the court should consider Web postings or

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transactions ubiquitous, and, therefore, to be minimum contacts with any jurisdiction from which they are read or accessed. Others argued that the location of computer servers determine where Web transactions occurred. Courts struggled with cases involving commerce or communication over the Internet, and because defendants not only maintained Web sites accessible from plaintiffs' home jurisdictions but conducted exchanges with persons in the forum, parties before them proposed new applications and formulations of jurisdictional principles.

The era's most significant opinion was set out by the Eastern District of Pennsylvania in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122, 1125-27 (W.D. Pa. 1997). In formulating an opinion that was applied in *Cybercell*, the *Zippo* court was confronted with a claim alleging trademark violations arising under the Lanham Act and Pennsylvania state law by the manufacturer of Zippo cigarette lighters, a Pennsylvania corporation with its primary location in Bradford, Pennsylvania, against a computer news service using the domain names of zippo.com, zippo.net and zipponews.com.

Zippo news was a California corporation based in Sunnydale, California, which provided its news service nationwide. The defendant had sold approximately 3,000 passwords to Pennsylvania residents, and had contracts with seven Internet access providers to furnish service in that state. The news service moved to dismiss for lack of personal jurisdiction. While applying and relying on the basics of *Burger King's* "purposeful" contacts inquiry, the court also proposed a "sliding scale" inquiry where Web sites would be ranked on a spectrum of "interactivity." Web sites labeled as "passive" are those where information is simply posted and interactivity non-existent. At the other end of the spectrum are interactive Web sites where information is exchanged or transactions conducted. In those cases, the court reasoned, it would be reasonable and fair to bring a defendant into the forum to defend an action. Cases falling in the middle of the spectrum would be tipped in one direction or the other based on the amount and quality of interactivity permitted or conducted.

Widely heralded as a solution to this problem, the *Zippo* test was and is the source of much debate among the circuit courts of appeal as well as in state courts across the country. Applications of the *Zippo* sliding scale have resulted in varied and inconsistent determinations, sometime reaching seemingly different conclusions as to what "interactivity" actually means. Virtually all of today's Web sites are far more interactive than those established a dozen years ago when *Zippo* was decided, approximately the time when AuctionWeb first did business as a Web site named "ebay." Narrow applications of that test have resulted in findings of jurisdiction in cases where a more traditional jurisdictional analysis might not—sometimes leading to an expansion of personal jurisdiction in a manner about which non-*Zippo* courts have expressed concern. In fact, applying *Zippo*, the Fourth Circuit remarked upon the posting of an e-mail address on a Web site as a factor to consider in a *Zippo*-type interactivity analysis. The idea that this commonplace practice could be used to establish jurisdiction added to speculation and concern that the reach of personal jurisdiction would expand beyond recognition, potentially chilling commerce.

In *Molnycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, a federal district court considered whether Dumex's maintenance of a Web site, through which

Pennsylvania residents could purchase its products online, conferred general jurisdiction over it in Pennsylvania. 64 F. Supp. 2d 448 (E.D. Penn. 1999). The court concluded that "the establishment of a Web site through which customers can order products does not, on its own, suffice to establish general jurisdiction." In rejecting the plaintiff's arguments in regard to the Web site, the *Molnycke* court noted that adopting such a premise would vastly extend the jurisdiction of courts. Instead, the court subjected the question to a traditional jurisdictional analysis and analogized to cases involving national advertising campaigns, observing that "while the Web sites are available in every state, they are not necessarily targeted toward every state." The court also rejected the notion that sales of Dumex products within Pennsylvania conferred general jurisdiction, because the sales in Pennsylvania were not "an essential part of the conduct of Dumex's business," suggesting that the volume or percentage of a person or entities overall business is a relevant consideration and a potentially pertinent target of jurisdictional discovery.

After another trial court used a *Zippo* analysis to find that an interactive Web site did, in fact, confer general jurisdiction over an out-of-state party, at least two circuit courts of appeal addressed and clarified *Zippo's* applicability to jurisdiction over parties in non-Internet disputes or matters. The Sixth Circuit specifically noted that the creation and maintenance of a Web site, regardless of its interactivity, does not allow personal jurisdiction over a party when the transaction or activity is *unrelated* to the matter in dispute. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). Since that time, the Fifth Circuit, which had expressly adopted interactivity as a sliding scale indicator of personal jurisdiction, clarified its position in noting that the *Zippo* criterion "is not well adapted to the general jurisdiction inquiry." *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

Conversely, more courts began utilizing the *Zippo* sliding scale of Web site interactivity in specific jurisdiction inquiries where the transactions or communications occurring via the Web are the source of the legal controversy, addressing that test as at least one factor, if not solely determinative, of specific jurisdiction. In fact, *Moore's Federal Practice's* most recent statement on this

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...the establishment of a Web site through which customers can order products does not, on its own, suffice to establish general jurisdiction.

topic remarks that most jurisdictions have recognized that a “sliding scale” must be applied,” citing cases from the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth circuits, while noting that it may not be well adapted to a general jurisdiction inquiry. *Moore’s Federal Practice-Civil* § 108.44 (3d ed. 2008).

Alabama and 11th Circuit Cases

One of the first post-*Zippo* cases to be addressed within Alabama was *Butler v. Beer across America, et al.*, 83 F. Supp. 2d 1261(N.D. 2000). In that case, parents of a minor brought a civil action in the Northern District of Alabama against the defendants for the sale of 12 bottles of beer purchased by their child through a Web site and delivered to their home in Alabama. The complaint sought damages under the Alabama Civil Damages Act, which creates a right of action for a parent to whose child alcohol has been illegally sold or furnished. *Ala. Code* § 6-5-70. The Act has been interpreted by the Alabama Supreme Court as penal in nature, providing for only punitive damages. The minor involved, in fact, suffered no injuries as a result of the consumption of the alcohol.

Defendants moved to dismiss for lack of personal jurisdiction due to their lack of contacts with Alabama. Specifically, defendants submitted affidavits stating that:

“Defendants market several products, including beer, by advertising nationally, including Alabama, by Internet, newsletters, in magazines and by word-of-mouth. Customers purchase products by means of mail, telephone 800 number, and Internet, all initiated by the purchaser. Defendants’ sole places of business are in Illinois. They have never had a place of business in the State of Alabama; they do not possess real or personal property in this state; they

do not have an agent representative in Alabama. Defendants do not directly solicit business of Alabama customers within this State.

“For all purchases from defendants regardless of the location of the buyer, defendants require prepayment for merchandise, full freight charges, and handling at the time of sale. After payment in full, they deliver the merchandise to a shipper in Illinois, freight paid, for delivery to the customer according to the customer’s instructions. Title to the prepaid merchandise passes to the purchaser in Illinois, not in Alabama. See p. 2, Terms of Sale (“ownership of the product being shipped [] pass[es] to you at the time the product is picked up by your courier”).”

As is the proper next procedural step, the burden shifted to plaintiffs to establish sufficient contacts to warrant exercise of the court’s jurisdiction. After a hearing, the court permitted limited discovery as to jurisdictional facts and accepted submissions of evidence from the parties. Plaintiffs alleged that Alabama courts had both general jurisdiction and specific jurisdiction over Beer Across America, its holding company, and a distributor of one of the brands used in its Beer of the

Month club. Citing *Zippo*, the plaintiff argued that the interactivity of the Web site, which required electronic response to a question (asking to attest that the buyer is over 21 years of age), and entry of name, address and method of payment, rendered the Web site sufficiently “interactive” to warrant the exercise of jurisdiction in the Northern District of Alabama.

In making its determination, the court agreed that, under the U.C.C., the sale of the beer occurred in Illinois, not Alabama. Not relying solely on the function of law or the submitted affidavits, this determination was further supported by the sales invoice, the shipping documents and the fact that the invoice included a charge for sales tax, but not beer tax—relevant because under Alabama law, sales tax is collected on items purchased out-of-state, while beer tax is collected on beer sales within the state. The court analogized the situation to the purchase of a duty free item out of state and shipped by an Alabama resident to his or her home.

The court undertook a thorough analysis of many factors in concluding that it did not have jurisdiction over Beer Across America. Among them were the nature of Beer Across America’s advertising (national, not regional or local within Alabama), the lack of direct solicitation for the sale, the fact that there was only one sale to the plaintiff



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rather than a series of transactions, the value of the sale (\$24.95), the relatively small volume of sales made by the defendant in Alabama, and the low percentage (3 percent-4 percent) of the defendant's total sales involving Internet orders. It also applied, without specifically adopting, the *Zippo* interactivity test, concluding that the purchase via the Internet and credit card was insufficiently interactive, likening it to "an electronic version of a postal reply card." In its discussion of "fair play and substantial justice," the court accounted for and took into consideration the full range of *Burger King* and *World-Wide Volkswagen* factors, including the distance and inconvenience to the defendant, the interest of the forum state in the litigation, the interests of the plaintiff in efficient relief, the interests of the interstate forum in economical dispute resolution, and the joint interests of the states in promoting social policies. Not willing to dismiss the action, however, the court elected to transfer the case to the Northern District of Illinois.

A few years later, the Alabama Supreme Court addressed the question of jurisdiction over a Georgia Dodge dealership in a matter alleging fraud and breach of contract arising from a plaintiff's purchase of a truck from the defendant's dealership in Cumming, Georgia. *Ex parte Troncalli Chrysler Plymouth Dodge, Inc.*, 876 So. 2d 459 (Ala. 2003). The plaintiff claimed that the defendant's use of an interactive database to locate the purchased vehicle vested Alabama with authority to assume jurisdiction over the seller. The court disagreed and noted both that the Web site was maintained by Chrysler rather than the dealership, and that the Web site was "passive" in nature and "little more than an electronic billboard for the posting of information."

In 2006, the Middle District of Alabama acknowledged with seeming approval the application of the *Zippo* sliding scale test, but as "only one factor in a general personal jurisdiction analysis." *Thomas v. Mitsubishi*, 436 F. Supp. 2d 1250 (M.D. 2006) (finding lack of jurisdiction over

seller where Web communications were not related to the cause of action). Even more recently, the Eleventh Circuit discussed common criticisms of *Zippo* in a long footnote, appearing to call into question its utility in jurisdictional analysis. *Oldfield v. Pueblo de Bahia Lora*, 558 F.3d 1210 n.26 (11th Cir. 2009).

Just last October, the Alabama Civil Court of Appeals held that a car seller utilizing the ebay auction Web site did not have sufficient minimum contacts with Alabama to subject him to personal jurisdiction, despite the fact that the car was sold to a resident of the state. *Ex parte Harrison*, 2008 WL 4684156 (Ala. Civ. App. 2008) The plaintiff alleged that the defendant seller misrepresented the car as a police squad vehicle when, in fact, it was used as a taxi. The Illinois defendant presented similar evidence to that submitted by Beer Across America, including the fact that the sale was completed in Illinois, and that shipping, while arranged by the seller, was paid for by the Alabama purchaser who assumed risk of loss in transit. The court did not specifically mention *Zippo*, but it did cite a portion of *Butler's* discussion and comparison of national advertising on the Web as being "passive." The court found that the sale was a single, isolated contact initiated by the plaintiff, which was insufficient to trigger personal jurisdiction over a defendant. It treated this transaction no differently because it took place over the Internet.

Alabama state courts and the Eleventh Circuit have adopted a rather conservative view of personal jurisdiction where there have been out-of-state transactions. Adhering to traditional jurisdictional analysis and applying factually analogous methods of evaluating Internet transactions—for example, treating the *Zippo* sliding scale elements simply as factors among many others—these courts have not extended their jurisdictional reach without "something more" than a single contact, even when the contact involved a purchase initiated by a plaintiff. This position will

likely continue, at least until the United States Supreme Court weighs in with some clear guidance. Until that time, lower courts should expect to see more challenges to their exercise of jurisdiction and appeals of those decisions. Jurisdictional discovery and evidentiary submissions may become far more common as both plaintiffs and defendants test these limits, and litigants should consider these factors in choosing or challenging a forum.

Trends nationwide

Nationwide trends echo the recent decisions in Alabama. Even in California, where *Calder* and the "effects" test govern, last year, a Ninth Circuit opinion recognized a distinction between those who simply use existing Internet sites (like ebay, Craigslist and the like) to engage in business, and those who conduct business via their own Web site. In *Bochetto v. Hansing*, the Court of Appeals found that a defendant who used the ebay auction Web site to sell a vehicle had not "purposely availed" himself of the privileges and protections of the state of California. 539 F. 3d 1011 (9th Cir. 2008). The court reasoned that by simply placing his product for sale in an auction accessible to anyone with access to a computer, the seller had not purposely availed himself of any particular jurisdiction.

In another high profile case brought by singer-songwriter Jackson Browne against the Ohio Republican Party (ORP), Senator John McCain and the Republican National Committee, a California court held that it did not have jurisdiction over ORP. The complaint alleged copyright infringement and violations of the Lanham Act arising from the unauthorized use of Browne's performance of the song *Running on Empty*. The song was used in a commercial that mocked statements made by candidate Barack Obama—whom Browne was known to support—which was broadcast on networks in Ohio and Pennsylvania, was posted on YouTube (a California resident with whom ORP had a contract) and the political



All parties involved with litigation arising from Internet activity should be prepared to litigate the issue of personal jurisdiction, as the likelihood of jurisdictional disputes has increased significantly.

blog *huffingtonpost.com*, and aired on national news media, including MSNBC. In a decision acknowledging that the “effects” test is the jurisdictional standard in the Ninth Circuit, but which inexplicably ignores *Calder* and its similar facts, the court found that the plaintiff had failed to show that ORP did not know the harm caused by its acts was likely to be suffered in the forum state.

Conclusions

The expansion of worldwide access to the Internet, and the accompanying growth of e-commerce in its wake, appears to have further clouded the already murky waters surrounding the determination of personal jurisdiction over non-resident parties. As courts have sought or embraced new criteria in their jurisdictional analyses, the results have sometimes served to shorten the reach of long-arm statutes at a time when appearances in non-resident forums is less expensive and more convenient than ever. Many scholars and commentators urge courts to return to the language of key precedent while the United States Supreme Court presently remains silent on the issue. Individuals and businesses doing Internet business concerned that out-of-state litigation might be unduly burdensome would be well advised to include protections such as forum selection clauses, clarifications of the location and terms of sale in their home forum and assurances that the shipping agent and risk pass to the buyer. Some may choose to narrow the scope of services provided by geography. Plaintiffs, on the other hand, should be prepared to fully develop jurisdictional facts, to analyze Web transactions and, where possible, particularly for intentional conduct, to rely more on the *Calder* effects test. Courts are likely to place greater emphasis on the nexus of Internet transactions or communications in the plaintiff’s cause of action. All parties involved with litigation arising from Internet activity should be prepared to litigate the issue of personal jurisdiction, as the likelihood of jurisdictional disputes has increased significantly.

Attempts at formulating new guidelines for new technology and communications, such as the *Zippo* interactivity test, risk quickly becoming outdistanced by the rapid development in manners courts cannot anticipate. On a broader scope, as more Internet jurisdictional challenges have made their way through the courts, the parties and courts have been tempted to

propose rules which assist in subsets of cases, but which are not flexible enough for application to others. So, while a sliding scale of interactivity might be a good method for determining purposeful availment and minimum contacts in cases

where services are provided electronically, or where communications and negotiations are on-going and substantive, it does not offer significant assistance in cases involving intentional torts or scams where the Web site is passive, but targets its victims

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- **Mike Long,** MSW: Lawyer, Employee Assistance Professional and coauthor of *Lawyers at Midlife: Laying the Groundwork for the Road Ahead*, released October 2008;
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with defamatory statements or misrepresentations. Therefore, courts may be in danger of developing differing standards or ruling inconsistently based on the subject matter of the cases, using one standard for contract matters, another for intellectual property cases or intentional torts, another for products liability—threatening to further complicating a messy area of the law.

This author endorses what may seem, on its face, a paradox: both a re-emphasis on traditional jurisdictional analysis and a more expansive view of personal jurisdiction. This approach recognizes the realities of the continued development of technology, as did Justice Black more than half a century ago, as later quoted by Justice Brennan in his dissent in *WorldWide Volkswagen*:

Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

(quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957)). Justice Brennan urged the Court to turn its inquiry away from the contacts between the defendant and the forum and hone in on the strength of the state's interest in the case, which includes an exploration of actual inconvenience to the defendant—something that should be “heavy and disproportionate” before a court permitted the party to escape its reach. Or as he put it, “Assuming that a State gives a nonresident defendant adequate notice and opportunity to defend, I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial.” On the other hand, the *Burger King* opinion recognized the underlying concept of fair play, noting that even when a defendant may have purposely engaged in activities in the jurisdiction, the rules should not be strictly adhered to “in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.” 471 U.S. at 476-78.

The Alabama Supreme Court seems to be moving in that direction, as evidenced by its opinion in *Ex parte DBI*, 2009 WL 1164959 (May 1, 2009). Though not a dispute based on a Web transaction or communication, the court carefully examined the basic principles found in *Burger King* and *World-Wide Volkswagen* in analyzing whether the exercise of jurisdiction over a Korean seat belt manufacturer in a products liability case falls within the scope of due process. The court considered a vast array of facts—not at all limited to contacts with the forum—directed toward the volume of business done in the United States, and the steps taken to design, market and evaluate its products to conform to U.S. regulations. The court also evaluated the actual burden placed on the foreign company to defend a products liability suit in Alabama, given the global nature of its business and its resources, and noting that it had retained U.S. counsel (and quoting the Justice Black opinion recited above). Furthermore, this well-considered decision addressed the plurality opinion of *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), which created confusion about jurisdiction over non-resident manufacturers and distributors of products. Ultimately, however, the court grounded its decision not on any shorthand test or conflicted opinion, but on a fact-intensive evaluation of the evidence as applied to traditional notions of fair play and substantial justice. This type of thoughtful application of existing precedent to contemporary reality of Internet commerce is what is needed in the future of personal jurisdiction inquiries in cases resulting from Web-based communications and transactions.

In ways unforeseen a decade ago, retail e-commerce is routinely conducted between parties around the globe and among various states. Recent statistics from the U.S. Census Bureau give an indication of just how rapidly this method of conducting business has grown, and make clear how vital this method of doing business has become for the economy. ▲▼▲

Endnotes

1. Former “laundry list” of Rule 4.2

“(2) Sufficient Contacts. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person’s:

“(A) transacting any business in this state;

“(B) contracting to supply services or goods in this state;

“(C) causing tortious injury or damage by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, aircraft, boat or watercraft in this state;

“(D) causing tortious injury or damage in this state by an act or omission outside this state if the person regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state;

“(E) causing injury or damage in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person might reasonably have expected such other person to use, consume, or be affected by the goods in this state, provided that the person also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

“(F) having an interest in, using, or possessing real property in this state;

“(G) contracting to insure any person, property, or risk located within this state at the time of contracting;

“(H) living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising from alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state ...”

Former section (I), stands alone since 2004

“(b) Basis for Out-of-State Service. An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States”



Anne Sikes Hornsby serves as the acting assistant dean for clinical programs at the University of Alabama School of Law. She is a 1996 graduate, *summa cum laude*, of the law

school and was in private practice for several years after having served as law clerk to the Honorable Myron H. Thompson and the Honorable Truman Hobbs, U.S. District Court for the Middle District of Alabama.



J. ANTHONY MCLAIN

Law Partners of Substitute Municipal Judge May Represent Clients in Municipal Court Provided Said Matters Are Completely Unrelated to Those Wherein Partner Presided As Substitute Judge

QUESTION:

The City of Anywhere has a full-time municipal court judge. I am one of four attorneys designated by the city council to serve as a substitute judge on the rare occasions when the full-time judge is on vacation, or is otherwise unavailable. We are paid by the hour. To the best of my memory, I have been asked to substitute on three or four afternoons and one or two morning sessions over the past year.

Once I was designated a substitute judge, I stopped taking any city court cases. My question, however, is whether my designation as a substitute judge on this rare basis would disqualify other members of my firm from representing city court clients? We obviously check before I substitute to ensure that no one has a case on the same day.

ANSWER:

The *Alabama Rules of Professional Conduct* allow your law partners to represent criminal defendants in municipal court, even though you serve as a substitute municipal court judge, provided that the matters wherein your law partners represent these criminal defendants are completely unrelated to those wherein you presided as a substitute judge.

OPINIONS OF THE GENERAL COUNSEL Continued from page 387

DISCUSSION:

The Disciplinary Commission, in RO-91-18, dealt with the issue of whether a lawyer was prohibited from representing applicants before a state agency licensure board where that lawyer's partner served as a hearing officer. The commission held that the lawyer could represent applicants before this same licensure board even though the lawyer's partner served as a hearing officer for that same agency, provided that the representation involved matters completely unrelated to those in which the partner presided as a hearing officer. Quoting from RO-89-115, the commission determined that if the matters are unrelated, representation would not be prohibited subject to consent by both parties involved, and the attorney's determination that he could render undiluted and vigorous representation to the client.

In RO-84-190, the inquiring attorney served as a municipal judge. The lawyer had been contacted by a police officer of that same municipality, concerning possible representation of him in a criminal case in circuit court. The case arose out of the shooting and killing of a suspect while fleeing from police officers, one of whom was the lawyer's prospective client.


The Disciplinary Commission determined that there would be no ethical impropriety in the lawyer representing the police officer should he be indicted, and in representing the city should a civil suit be filed against the city by the personal representative of the slain man if, in the capacity as a municipal judge for that same city, the lawyer did not and would not act upon any facet of the merits concerning the possible indictment or civil suit against the city.

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Acknowledgment is made of Rule 1.10(a) of the *Alabama Rules of Professional Conduct* which states:

“Rule 1.10 Imputed Disqualification:

General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.”

However, the Disciplinary Commission interprets this rule to apply to general conflicts questions and issues, since the rules specified in 1.10(a), with the exclusion of Rule 2.2, deal with conflict of interest.

While there would obviously be a conflict in your handling representation of criminal defendants in municipal court wherein you preside from time to time as a substitute municipal judge, such a conflict would appear to be more personal in nature, rather than firm-wide and thus not imputed to your law partners.

Due to the personal nature of this conflict, and the conflict not being imputed to your remaining law partners, your law partners are therefore not prohibited from representing criminal defendants in the same municipal court where you, from time to time, preside as substitute judge, provided that the matters being handled by your law partners are in no way related to those matters which are presided over by you in your capacity as substitute judge.

The Disciplinary Commission would also encourage you to disclose to the governing body of the municipality that employs you in this substitute municipal court judge capacity that your law partners will continue to represent criminal defendants in municipal court, but only in those cases in which you have absolutely no connection or participation.

This determination is consistent with a previous decision of the Disciplinary Commission, specifically, RO-93-12, wherein the commission determined that a lawyer could represent clients before a state agency even though that lawyer’s partner served as a hearing officer for the agency, provided that the lawyer’s representation involved matters completely unrelated to those in which the partner presided as a hearing officer. The commission relied upon Opinion 1990-4 of the Committee on Professional Ethics of the Association of the Bar of the

City of New York which had held that a lawyer or members of his firm could not represent claimants before a commission for whom the lawyer served as an administrative law judge or a mediator. The qualification was that the lawyer served frequently and repeatedly as a part-time administrative law judge for this agency. On the other hand, the opinion also held that the lawyer



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State Bar Employee Earns National Recognition from ABA

Alabama State Bar General Counsel Tony McLain is among seven recipients of the 2009 CoLAP Meritorious Service Award sponsored by the American Bar Association Commission on Lawyer Assistance Programs. This award is presented to disciplinary counsel who have distinguished themselves by advocating for or working with lawyer assistance programs and who have gone beyond just cooperating with such programs.

McLain was nominated by Alabama Lawyer Assistance Program Executive Director Jeanne Marie Leslie who wrote, “...I am recommending him for this award because he has always valued the work our program does. I cannot imagine working with a general counsel who did not respect or value the services ALAP provides. Mr. McLain is a man of integrity; he is a lawyer’s lawyer and understands lawyers, the bar and the public benefit when our offices work together.”

Bravo, Tony!

He will pick up the award at the National Conference for Lawyer Assistance Programs’ annual dinner in Phoenix in October. Don’t forget the golf clubs!

OPINIONS OF THE GENERAL COUNSEL Continued from page 389

and members of his firm would be allowed to represent claimants before this same commission *if the lawyer served only occasionally and sporadically as a judge pro tempore*.

The commission also pointed out, consistent with other opinions and provisions of the prior *Code of Professional Responsibility*, that the frequency of a lawyer as a part-time judge or administrative hearing officer would dictate whether that lawyer or his law partners could represent clients before those same agencies or boards.

The commission would reference Rule 8.4 which concludes that it is professional misconduct for a lawyer to state or imply an ability to influence

improperly a government agency or official. Pursuant to this provision, the commission obviously considers the frequency of appearance as administrative law judge or hearing officer a primary factor in determining whether the law partners of such a hearing officer or substitute judge could represent clients before the same agency or tribunal.

Absent such frequency, the commission is of the opinion that your infrequent service as substitute municipal court judge does not prohibit your remaining law partners from handling cases for clients appearing in this same court provided that you are in no way involved in or connected with said proceedings. [RO-1999-03] ▲▼▲

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Super Lawyers



The Alabama Law Institute's annual meeting program was highlighted by two separate panels providing analysis and review of the state's new business entity and real estate laws. Above: (l-r), Rep. James Buskey, Sen. Ben Brooks, Rep. Cam Ward and Prof. Howard Walthall, Cumberland School of Law

Below: (l-r), Sen. Rodger Smitherman, Rep. Jeff McLaughlin, Sen. Roger Bedford, and Rep. Demetrius Newton, speaker pro tem, Alabama House of Representatives



ROBERT L. MCCURLEY, JR.

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

Annual Meeting of the Law Institute

The annual meeting of the Law Institute was held during the state bar meeting in July. Re-elected for the 2009-2010 year were the following officers:

- President: Representative Demetrius Newton
- Vice President: Senator Roger Bedford
- Secretary and Director: Robert L. McCurley, Jr.
- Executive Committee:
 - Representative Marcel Black
 - David Boyd
 - James M. Campbell
 - William N. Clark
 - Peck Fox
 - Fred Gray
 - Representative Ken Guin
 - Richard S. Manley*
 - Oakley W. Melton, Jr.*
 - Yetta Samford*
 - Senator Rodger Smitherman
 - Representative Cam Ward
 - (*emeritus member)

Elected to fill unexpired terms on the council were Allan Chason of Bay Minette for the 1st District and Leatha Gilbert of Birmingham in the 6th District.

LEGISLATIVE WRAP-UP

Continued from page 391

New Laws for 2009

Ad Valorem Tax Redemption—effective September 1, 2009

Uniform Limited Partnership Act—effective January 1, 2010

Electronic Recording of Real Estate Records—effective January 1, 2010

Business and Non-Profit Entities Codes—effective January 1, 2011

(See the July 2009 *Alabama Lawyer* for a summary of acts.)

Proposed Bills for 2010

The Institute expects to propose to the Alabama legislature the following revisions that are being completed

in time for the January 5, 2010 beginning session of the legislature:

1. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The current Guardianship and Protective Proceedings Act was passed by Alabama in 1987 and was based on the Uniform Act at the time.

Due to increased population mobility, cases involving simultaneous and conflicting jurisdiction over guardianship increased to the point that Alabama passed the Uniform Child Jurisdiction Enforcement Act in 2000 to clarify the law concerning child custody where the parents are in different states. This same problem now exists for adults who have similar problems of guardianship of aging parents with children living in

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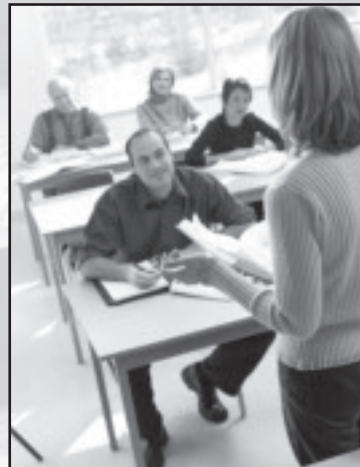
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different states. Guardians are regularly appointed by courts to care for an aging adult in one state where the individual is domiciled or physically present. There needs to be an effective mechanism for resolving multi-jurisdictional disputes.

The Full Faith and Credit clause of the U.S. Constitution requires that court orders in one state be honored in another state but there are exceptions to Full Faith and Credit doctrine of which guardianship and protective proceedings law is one. Sometimes guardianship must be initiated in a second state because of the refusal of financial institutions, care facilities and the courts to recognize a guardianship or protective order issued in a second state.

This law is organized into five articles.

Article 1—General Provisions—contains definitions and provisions designed to facilitate cooperation between courts in different states.

Article 2—Jurisdiction—specifies which court has jurisdiction to appoint a guardian or conservator. Its overall objective is to locate jurisdiction in one and only one state except in cases of an emergency or in situations where the individual owns property located in multiple states.

Article 3—Transfer of Guardianship or Conservatorship—specifies a procedure for transferring guardianship or conservatorship proceedings from one state to another.

Article 4—Registration and Recognition of Orders from Other States—deals with enforcement of guardianship and protective orders in other states.

Article 5—Miscellaneous Provisions—contains boiler-plate provisions.

The Uniform Adult Guardianship and Protective Proceedings Act will clarify many guardianship issues such as the original guardianship, registration and transfer and out-of-state enforcement. It provides procedures that will help to considerably reduce the cost of guardianship and protective proceedings from state to state.

This is the result of a study committee chaired by Tuscaloosa attorney Sandy Gunter with University of Alabama Law Professor Hugh Lee serving as reporter.

2. Uniform Child Abduction Prevention Act

Child abduction is a serious problem faced by parents and families today. The Office of Juvenile Justice and Delinquency Prevention estimates over 250,000 children are abducted annually with approximately 78 percent abducted by a family member. While current state laws address the initial child custody determination and the criminal repercussions of child abductions they generally provide inadequate prevention mechanisms.

In 2006, the Uniform Law Commission promulgated a uniform act for deterring both domestic and international child abductions by parents and persons acting on behalf

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LEGISLATIVE WRAP-UP

Continued from page 393

of parents. In 1999, Alabama passed the Uniform Child Custody Jurisdiction and Enforcement Act. This proposed act builds on the interstate jurisdiction and enforcement mechanisms including the temporary emergency jurisdiction available now for minors.

The parties seeking the abduction prevention measures must file a petition with the court specifying the risk factors for abduction as well as other biographical information, a statement regarding any prior actions or arrests relating to abduction or domestic violence and finally any additional information required by state child custody law.

The Act sets out factors to be considered and determines whether it is a credible risk the child will be abducted. These factors include overt signs such as previous abductions, attempts to abduct the child or threats of abduction, as well as signs of general abuse including domestic violence, negligence or refusal to obey child custody determination. Other factors for consideration would be a wide range of activities that may indicate a planned abduction, including abandoning employment, liquidating assets, obtaining travel documents or travel tickets or requesting the child's school or medical records.

The act also addresses special problems involved in international child abduction including risk factors related to whether the party is likely to take the child

to a county that is not a party to the Hague Convention on the Civil Aspects of the International Child Abduction or is on a current risk of state sponsors of terrorism or engaged in active military war.

The court may enter an order that will impose travel restrictions, prohibit the individual from removing the child from the state or other said geographic area, place the child's name on the U.S. Department of State's child passport issuance alert program or require the individual to obtain an order from a foreign country containing identical terms to the child custody determination. The order would then be effective until revoked or the child's 18th birthday.

If abduction appears imminent, the court may issue a warrant to take physical custody of the child, direct law enforcement officers to take steps to locate and return the child or exercise other appropriate powers existing under state law.

Retired Supreme Court Justice Gorman Houston chaired this committee with Kim Bart, director, Domestic Violence Law Clinic, University of Alabama, serving as the reporter.

In the next *Alabama Lawyer* article the discussion of the Uniform Durable Power of Attorney Act and the Model Trademark Act will be discussed.

The Uniform Mortgage Satisfaction Act was discussed in the January 2009 *Alabama Lawyer*. ▲▼▲



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Notice

- **Beatrice Elaine Oliver**, whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 28 days of September 15, 2009 or, thereafter, reciprocal discipline shall be imposed upon her by the Disciplinary Board of the Alabama State Bar pursuant to Rule 25(a), *Ala. R. Disc. P.*, in Pet. No. 09-1489.

Disbarments

- The Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Commission disbarring Birmingham attorney **Arnold Bush, Jr.** from the practice of law in Alabama effective April 23, 2009. Bush entered a guilty plea in the United States District Court, Northern District of Alabama, to violations of 21 U.S.C. § 846 and 18 U.S.C. § 922(g)(3), conspiracy with intent to distribute marijuana and unlawful user of controlled substance in possession of a firearm, respectively. On May 27, 2008, Bush was sentenced to serve 63 months in prison. [Rule 22(A), Pet. No. 07-66; ASB No. 07-69(A)]
- On April 23, 2009, the Supreme Court of Alabama entered an order adopting the order entered March 27, 2009 by the Disciplinary Commission of the Alabama State Bar disbarring Birmingham attorney **Matthew Taylor Knight** from the practice of law in Alabama. This disbarment was entered pursuant to Knight's 2007 conviction on a felony charge of Rape II, in the Circuit Court of Jefferson County, Bessemer Division. The Office of General Counsel only recently became aware of Knight's criminal conviction. Prior to the filing of the petition to disbar, the Office of General Counsel was notified that Knight had also been charged with having violated the terms of his probation. [Rule 22(a), Pet. No. 09-1166]
- Birmingham attorney **Daniel Pinson Rosser** was disbarred from the practice of law in Alabama, effective April 22, 2009, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Rosser's consent to disbarment. Rosser admitted that he intends to plead guilty in federal court to a two-count information that charges him with conspiracy to manufacture a controlled substance and manufacture of a controlled substance in violation of 21 U.S.C. 846, 21 U.S.C. 851(a)(1) and 21 U.S.C. 841(b)(1)(B). [Rule 23(a), Pet. No. 09-1394; ASB No. 08-211]
- Gulf Shores attorney **William Ronald Waldrop** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, dated April 3, 2009. The Disciplinary Commission determined that Waldrop's continued

DISCIPLINARY NOTICES

Continued from page 395

practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 09-1248; *In re* ASB No. 08-1050(A)]

Suspensions

- Huntsville attorney **Mary Isabelle Eaton** 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 dated March 27, 2009. The Disciplinary Commission determined that Eaton'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. 09-1185; ASB No. 08-1391(A)]
- On April 23, 2009, the supreme court entered an order adopting the March 26, 2009 order of Panel I of the Disciplinary Board of the Alabama State Bar accepting Montgomery attorney **Valerie Murry Smedley's** conditional guilty plea. According to the terms of the plea, Smedley's license to practice law is suspended for a period of 180 days, effective April 23, 2009, for violations of rules 1.3, 1.4(a) and 1.4(b), *Alabama Rules of Professional Conduct*. Smedley will serve 30 days of the suspension and the remaining 150 days will be held in abeyance. Smedley will be placed on probation for two years. [ASB nos. 07-40(a); 07-68(A); 07-193(A); 08-26(A); 08-148(A); and 08-222(A)] ▲▼▲

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About Members

Henry C. Chappell announces the opening of **Henry C. Chappell LLC, Attorney at Law**, at 2800 Zelda Rd., Ste. 200-1, Hillwood Office Center, Montgomery 36106. Phone (334) 356-0444.

Ralph M. Clements announces the opening of **The Law Office of Ralph M. Clements, III LLC** at 2709 8th St., Tuscaloosa 35401. Phone (205) 391-4866.

Benjamin H. Cooper announces the opening of **The**

Law Office of Benjamin H. Cooper PC at 205 20th St. N., Frank Nelson Building, Ste. 920, Birmingham 35203. Phone (205) 305-1181.

Jonathan S. Cross announces the opening of his firm at 1410 Manhattan St., Birmingham 35209. Phone (205) 966-5677.

Wesley S. Mobley announces the opening of **Mobley Law Offices LLC** at 306 Cherokee Ave., Centre 35960. Phone (256) 927-8881.

Susan D. Sanich announces the opening of **Susan D. Sanich LLC** at 1203 U.S. Hwy. 98, Ste. 3C, Daphne 36526. Phone (251) 382-1123.

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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 397

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Katrina Washington announces the opening of **The Law Offices of Katrina Washington LLC** at Two 20th St. N., Ste. 1010, Birmingham 35203. Phone (205) 581-8812.

Gregory Zarzaur announces the opening of **Zarzaur Law LLC** at 1725 14th Ave. S., Birmingham 35205. Phone (205) 983-7985.

Among Firms

Adams Law Firm announces that **Shirley A. Millwood** has joined as an associate.

Brinyark, Lee, Hickman & Hocutt PC announces that **James F. Reddoch, Jr.** has joined the firm *of counsel*.

Christian & Small LLP announces that **Lynn Shutt Darty** has been named *counsel* and **Aubrey J. Holloway** has joined as a partner.

Cunningham Bounds LLC announces that **Lucy E. Tufts** has joined as an associate.

The Internal Revenue Service announces the appointment of **Kerry Curtis** as San Francisco Area counsel for IRS General Legal Services.

Jackson Lewis LLP announces that **Steven M. Stastny** has joined as a partner and **Susan W. Bullock** has joined as *of counsel*.

Maynard, Cooper & Gale PC announces that **Heyward C. Hosch III** and **Barry A. Staples** have joined the firm.

Morgan & Morgan PA announces that **Jennifer Bernel** has joined as an associate.

O'Bannon & O'Bannon LLC announces that **Kerrian Jaudon Berryhill** has joined as an associate.

The **Social Security Administration** announces the appointment of **Windell R. Owens** to U.S. Administrative Law Judge.

The **United States Court of Appeals for the Eleventh Judicial Circuit** recently reappointed **Judge Thomas Bennett** and **Judge Michael Stilson** of the U.S. Bankruptcy Court for the Northern District of Alabama to their second 14-year terms.

The Wicker Park Group announces that **Heather Brock** has joined as director of operations.

Young, Wollstein, Jackson, Whittington & Russell LLC announces that **Beth Rogers** has joined as an associate. ▲▼▲

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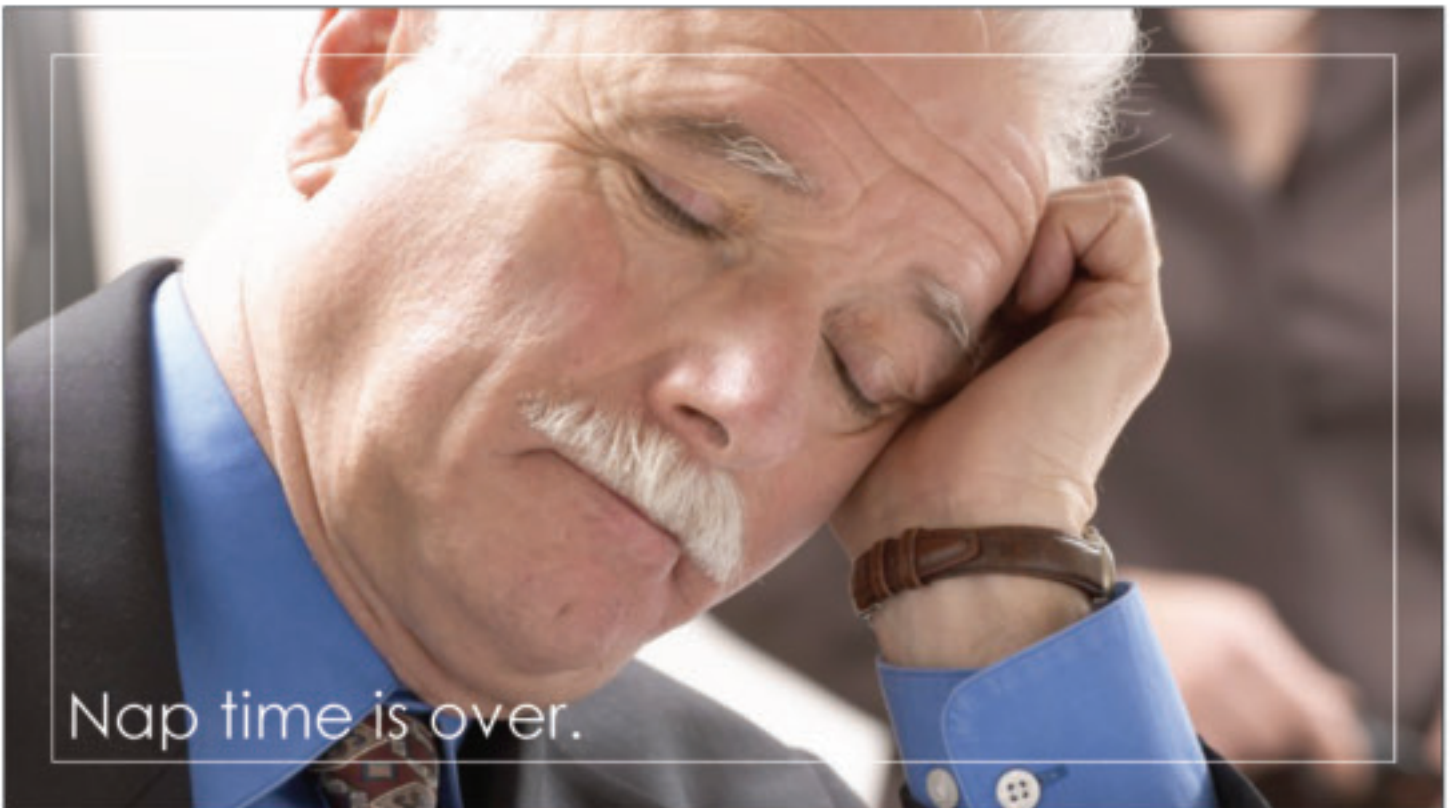
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