

The Alabama Lawyer


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The Malignant Mystique of “Standing”

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2012 FALL CALENDAR

SEPTEMBER

21 Damages and Remedies — *Tuscaloosa*

OCTOBER

5 Alabama Probate Law: The Administration of Estates
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ON THE COVER

Pictured on the cover are Alabama State Bar President Phillip W. McCallum and wife Kelley, center, and their children (left to right), Murphy, 14; Caitlin, 18; and Savannah, 16.

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Phillip W. McCallum

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From the Get-Go

As I begin my year as president of the Alabama State Bar, I am reminded of an experience I had as a young lawyer. I was taking the deposition of the corporate representative of an insurance company and struggling to find the right words for a particular question. In a grasping manner, I asked this sophisticated executive a question. "And were these policies and procedures established . . . ah . . . umm . . . from the get-go?" Upon hearing the phrase "from the get-go" the defense lawyers around the table became agitated and objected to the use of nonsensical nomenclature to which no witness could be expected to frame a response. I was completely caught off guard by the hostility toward the question, which admittedly was a blunder as

I had labored to find a way to end my query. After being duly berated by these lawyers, I turned to the witness and simply asked him, "Do you understand what 'from the get-go' means?" Before the lawyers could launch into another tirade, the witness quickly answered, "Why, of course I do, it means from the beginning." Emboldened by my unnatural ability to communicate, for the remainder of the deposition I interjected the phrase "from the get-go" at least a dozen more times. Often nowadays, I still use the expression "from the get-go" when referring to the start or beginning of any event.

So, from the get-go, there is a special group of people I want to recognize for their service and commitment to

our association and that is our bar staff. I have had the opportunity to work closely with the staff over the past nine years as a bar commissioner. Our Alabama Bar staff is much like a family and, like any family, they experience difficult times. Two losses over the past year have been particularly devastating to the staff family.

Jeanne Marie Leslie (director of the Alabama Lawyers Assistance Program) was one of our bar's most valuable and underappreciated assets. For 14 years, Jeanne Marie assisted hundreds of judges, lawyers and law students through difficult times. Many of those she helped will openly admit that Jeanne Marie saved their careers, if not their lives.

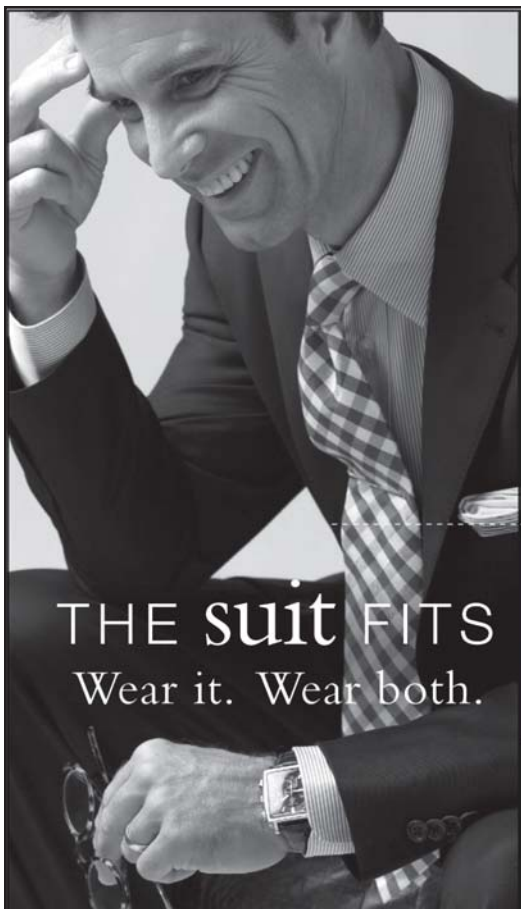
Unfortunately, last fall, Jeanne Marie was diagnosed with cancer and passed away on April 14, 2012. Through her difficult journey this past year, I was amazed at



Jeanne Marie Leslie

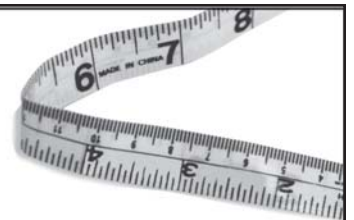
the support and compassion of our bar staff family. Unknown to most, the staff donated their own sick leave to Jeanne Marie during the course of her illness.

Jeanne Marie and I had always enjoyed a close relationship and I was fortunate to have an opportunity to see her and her family shortly before she passed. All she could do was go on and on with words of encouragement for me on my upcoming year's projects. In other words, in Jeanne Marie's way, she was telling me how things should be. As we concluded our visit, she peacefully dozed off. I left believing she was asleep but before I could walk out the door, I heard her final words to me "Give 'em hell, Phillip!" Jeanne Marie was a fighter and will always be remembered for all the many lives she touched and careers she saved during her years of service. I don't believe we will ever be able to replace Jeanne Marie, but we are currently conducting a national search to fill her very important position and continue her legacy.



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Phillip W. McCallum (front row, center) is congratulated by fellow members of McCallum, Methvin & Terrell, including Robert G. Methvin, Jr. (front row, left), Nicholas W. Armstrong (front row, right), and, on the back row, left to right, Rodney E. Miller, James M. Terrell, P. Michael Yancey, J. Matthew Stephens, and Brandon S. Hays.

We were also saddened by the death of Ed Patterson's daughter, Elliot Patterson Williams. Elliot was Ed and Beverly's oldest daughter; married and the mother of two young children. She was diagnosed with ovarian cancer and, at the age of 36, passed away on Memorial Day of this year. It was heart-wrenching to watch the effect her illness had on Ed and his family. Yet, again, however, I was amazed at the support of the bar family for Ed and his family. I have never witnessed a man so devoted to his daughter. The eulogy he delivered at Elliot's funeral was truly remarkable, and has challenged me to be a better father to my children. I reflect on these events as a reminder of how important our bar staff is to us both functionally and humanistically.



Elliot Patterson Williams

During the upcoming year, I am hopeful that we can continue the efforts of the many great leaders before me. I am interested in continuing the wonderful efforts of our **Access to Justice** initiatives, particularly through our VLP. This year, **National Pro Bono** week will be celebrated October 21-27. The Alabama State Bar's **Pro Bono**



Also at Baytowne to see the 136th president sworn in are family members, kneeling, left to right, Murphy McCallum, Chip McCallum and Chris McCallum. The middle row, left to right, included Scotty McCallum, Phillip McCallum, Kelley McCallum, Scott McCallum, Lynn McCallum, and Suzy Reinhardt. On the back row, left to right, are Russ Maddox, Caitlin McCallum, Savannah McCallum and Parker McCallum.

Celebration Task Force, chaired by **Jeanne Rasco**, has already made significant efforts in preparation. Alabama's Pro Bono Week Celebration has set a standard that serves as a model for the country. Events of the Pro Bono Week will increase the exposure of the Alabama State Bar to the public and civic leaders. This year is expected to be a huge success.

The most important continuing issue facing our bar is adequate funding for our courts. Under the guidance of **Chief Justice Chuck Malone**, **Alyce Spruell** (AOC director) and **Past President Jim Pratt**, as well as many others, a statewide court cost bill was passed by the legislature on the last day of the session and will act as a temporary repair for judicial funding. **Senator Cam Ward**, co-chair of the Senate Judiciary Committee and a loyal friend of the Alabama State Bar, recently remarked to me that he thought the court-funding crisis was one that will be extremely problematic for the next few years. Obviously, funding for our courts affects the livelihood of most lawyers in our state and will require the continued cooperative efforts of the judges, lawyers and clerks.

In July, the Alabama State Bar hosted the 2012 Annual Meeting at Baytowne Wharf in Sandestin. It was an outstanding event with great CLEs and wonderful fellowship. Be sure to read about this year's award recipients on page 338! | [AL](#)



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Keith B. Norman

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Alabama Attorneys Very Visible in the ABA

Alabama lawyers are well represented in the governance of the American Bar Association (ABA). The ABA's two governing entities are the House of Delegates (House) and the Board of Governors (Board). The House is the legislative body of the association to which officers, sections, committees and employees are responsible. It represents the various groups within the association, as well as the legal profession as a whole. The House consists of approximately 550 delegates elected by ABA members in each state, from every state bar association, large local bar associations, sections and divisions, other national organizations of the legal profession, and delegates elected by ABA members registered at the annual meeting. Included among the delegate members are the U.S. Attorney General and the director of the Administrative Office of the U.S. Courts who hold delegate positions by virtue of their office. The House meets twice a year during which it elects ABA officers and members of the Board of Governors and formulates association policy.

Every state has a delegate elected by the House. Our state delegate is **Clark**

Cooper of Birmingham. The ABA Bylaws provide that every state bar has one House delegate, but is entitled to additional delegates based on the total number of lawyer in the state. Because the Alabama State Bar has more than 14,000 in-state members, but less than 20,000, we have five state bar delegates. They are **Wade Baxley**, Dothan; **Bobby Poundstone**, Montgomery; **Circuit Judge Caryl Privett**, Birmingham; **Navan Ward**, Montgomery; and **Ken White**, Phenix City. The ABA's Bylaws provide for two-year terms of office and require that if a state has more than four delegates, one of them must be less than 35 years old at the start of their term. A local bar association that has 2,000 or more members is entitled to one delegate. Representing the Birmingham Bar Association in this position is **LaVeeda Battle**. Alabama also has a Young Lawyers' Division Delegate who is **Ethan Tidmore** of Birmingham. Finally, the Alabama delegation has two additional delegates, both of whom are former chairs of the House and former presidents of the ABA: **Lee Cooper** and **Tommy Wells**, both of Birmingham.

The ABA's second governing entity is the Board of Governors. The Board serves as the administrative arm of the House and performs the functions of the House between the annual and midyear meetings of the House. The Board develops methods and plans for making the ABA and its activities useful to the members, administers the facilities and staff, and formulates, as well as oversees, the ABA's budget and reimbursement policies. The Board has 38 members that include 18 district representatives. Alabama, along with Kentucky and North Carolina, comprise Division 5. Board members serve three-year terms that alternate among

the three states every three years. For the next three years, the Board member for Division 5 will be **Billy Coplin**. He has previously served as a state bar delegate to the House of Delegates.

There are other Alabama lawyers who hold leadership positions with divisions, sections and committees of the ABA. This reflects positively on the bar of this state. The Alabama legal community should be particularly proud of the devoted service that the 11 lawyers highlighted above render through their direct participation in the governance of the ABA. Their leadership represents our state and profession well. | AL



Babs and Bob McCurley, with a token of appreciation for his many years of service to the state and the practice of law



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Sam Moore Phelps

David Verlin Tranter

Sam Moore Phelps

Sam Moore Phelps died April 18, 2011 in Tuscaloosa.

Sam received his undergraduate degree from Auburn University in 1953 and his J.D. from the University of Alabama in 1958. Before earning his J.D., he served as an officer in the United States Air Force.

Sam practiced in Tuscaloosa County for more than 45 years, organizing the firm of Phelps Jenkins Gibson & Fowler LLP in 1968. He was a member of the Tuscaloosa County Bar Association and American Bar Association. He was also a member of the Farah Order of Jurisprudence, listed in Best Lawyers in America and a fellow in the American College of Trial Lawyers.

Sam was a fierce and determined advocate with a razor-sharp mind and wit. He was always soft spoken, courteous and collegial to all. These traits earned him the respect and admiration of his fellow members at the bar and the judges before whom he practiced in the state and federal court systems. He was a lawyer's lawyer in the finest sense.

Sam's strong intellect, common sense, good judgment and people skills as a lawyer carried over into his business and personal life. He was active in community affairs, serving on the DCH Health Care Authority from 1973 until 1999, the last 23 years as chair. Under his leadership, the DCH became one of the leading healthcare facilities in the southeast. In addition to his service on the DCH Health Care Authority Board, Sam served on the Tuscaloosa County Civil Service commission. In 2005, he was elected a "Pillar of the Community" by the Community Foundation of West Alabama.

Sam was one of the founders of Greene Group, Inc., a holding company which owned and operated many highly successful business ventures. He was also one of the founders of Bryant Bank.

Lawyer, businessman, community leader and a soft-spoken man are apt descriptions of Sam Moore Phelps. He will be missed.

—James J. Jenkins, Phelps Jenkins Gibson & Fowler LLP, Tuscaloosa



David Verlin Tranter

David Verlin Tranter, 54, of Clanton died at his home May 8, 2012, following an extended illness. David was a graduate of Jones School of Law and admitted to the Alabama State Bar in 2001.

Prior to his illness, he served as deputy attorney general and general counsel for the Alabama Emergency Management Agency under former Governor Bob Riley. David personally handled the legal, political and legislative issues arising from three federally declared disasters rising from hurricanes Ivan, Dennis and Katrina. Based on his knowledge of emergency management law, he became a featured conference speaker and guest lecturer across the country.

Prior to his appointment at the AEMA, he opened a practice in north Alabama specializing in government, domestic, real estate, employment, and probate law. David was founder

and CEO of Agape Title Corporation and co-founder of Alpha Omega Mortgage Company in Decatur. He was a nationally recognized Emergency 911 instructor and consultant.

Before moving to Alabama, he was a police officer in Lakeland, Florida for seven years, where he met his wife, Della Jo Tranter, who predeceased him. He was a hostage negotiator for the Lakeland SWAT Team. David received his BA in Political Science from Athens State University. He was a member of the National Christian Legal Society, the National Emergency Management Association (Legal Counsel Committee) and the Alabama State Bar.

David never met a stranger, was always quick to provide a laugh and, in the darkest hours of his illness, always spoke of his faith.

David is survived by his mother, sisters, stepchildren and their families.

—Ronald A. Holtsford, Montgomery

Abrams, David Lee

Jasper
Admitted: 1976
Died: May 8, 2012

Jones, Stephen M.

Birmingham
Admitted: 1983
Died: June 1, 2012

Peck, Harold G.

Florence
Admitted: 1966
Died: May 29, 2012

Black, Laura Jean Gautney

Birmingham
Admitted: 1999
Died: June 23, 2012

Little, Jane Cagle

Birmingham
Admitted: 1979
Died: June 29, 2012

Pennington, Hon. Harry L. Sr.

Huntsville
Admitted: 1950
Died: June 2, 2012

Clark, Jennifer Paige

Mobile
Admitted: 1999
Died: May 27, 2012

Matranga, Joseph Milton

Gulf Shores
Admitted: 1954
Died: June 3, 2012

Tucker, Michael Louis

Birmingham
Admitted: 1969
Died: May 10, 2012

Fay, John Charles, Jr.

Sterrett
Admitted: 1977
Died: May 15, 2012

Miller, Cameron Josiah

Birmingham
Admitted: 2011
Died: June 25, 2012

Wright, Ernest Jack

Birmingham
Admitted: 2008
Died: June 16, 2012

Hosch, Jean Bradley Peeler

Birmingham
Admitted: 1986
Died: May 31, 2012

Mullins, Barry Lynn

Tuscaloosa
Admitted: 1977
Died: May 13, 2012



Marc A. Starrett

By Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

By Wilson F. Green

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



Wilson F. Green

Like Caesar's Gaul, this month's report is divided *in partes tres*. First, we preview some of the upcoming cases on which certiorari review has been accepted for the U.S. Supreme Court's October 2012 term. Second, we note some recent civil decisions from the state and federal appellate courts ("note" and "some" being the operative words: due to space constraints we cannot cover all important decisions and cannot describe them in detail). Third, we review some recent noteworthy criminal cases.

Upcoming Cases in the U.S. Supreme Court's October 2012 Term

11-1085—*Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*: (1) Whether, in a misrepresentation case under Rule 10b-5, the court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory; and (2) whether the court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory

11-597—*Arkansas Game & Fish Commission v. U.S.*: Whether government actions that impose recurring flood invasions must continue permanently to become a "taking" of property

11-820–*Chaidez v. U.S.*: Whether the Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding that criminal defendants receive ineffective assistance of counsel when counsel fail to advise them that pleading guilty will trigger deportation, applies retroactively

11-864–*Comcast Corp. v. Behrend*: Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis

11-1327–*Evans v. Michigan*: Whether double jeopardy bars retrial after a trial judge erroneously held a fact to be an element of the offense and granted a mistrial directed verdict of acquittal because prosecution failed to prove it

11-345–*Fisher v. University of Texas*: Whether the University of Texas’s use of race in undergraduate admissions decisions is constitutional

11-817–*Florida v. Harris*: Whether an alert by a well-trained narcotics detection dog certified to detect illegal contraband is insufficient to establish probable cause for the search of a vehicle

11-564–*Florida v. Jardines*: Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause

11-1160–*FTC v. Phoebe Putney Health System*: Whether the Georgia legislature, by vesting a local government entity with general corporate powers to acquire and lease out hospitals and other property, has displaced competition in the hospital market to trigger the “state action doctrine” exception to antitrust

11-1059–*Genesis HealthCare Corp. v. Symczyk*: Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff’s claims

11-9307–*Henderson v. U.S.*: Whether, when the governing law is unsettled at the time of trial but settled in the defendant’s favor by the time of appeal, an appellate court reviewing for “plain error” should apply the time-of-appeal standard or the time-of-trial standard

11-1175–*Marx v. General Revenue Corp.*: Whether a prevailing defendant in a Fair Debt Collection Practices Act (FDCPA) case may be awarded costs for a lawsuit that was not brought in bad faith and for the purpose of harassment

11-70–*Moncrieffe v. Holder*: Whether a conviction of an alien under state law for distribution of a small amount of marijuana without remuneration constitutes an “aggravated felony,” where conduct would not constitute a federal felony

11-8976–*Smith v. U.S.*: Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove otherwise—the subject of a well-developed circuit split

11-1285–*U.S. Airways v. McCutchen*: Whether Section 502(a)(3) of ERISA authorizes courts to use equitable principles to override contractual language requiring participants to reimburse their plan for benefits paid, even where the plan’s terms give it an absolute right to full reimbursement

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11-556–*Vance v. Ball State University*. Whether the “supervisor” liability rule of *Faragher-Ellerth* (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim’s daily work, or (ii) is limited to those harassers who have the power to “hire, fire, demote, promote, transfer, or discipline” their victim

Decisions of the Alabama Supreme Court—Civil

Issue Preclusion

***Malfatti v. Bank of America*, No. 1101112 (Ala. June 29, 2012)**

A default judgment entered against a party for discovery violations does not satisfy the “actually litigated” element required so as to allow issue preclusion to attach to essential elements of an underlying claim in subsequent litigation.

Contractor Licensing

***White-Spinner Constr., Inc. v. Constr. Completion Co., LLC*, No. 1101285 (Ala. June 22, 2012)**

A general contractor may avoid payment to a subcontractor for work which the sub has subcontracted to another subcontractor which is unlicensed under *Ala. Code* 34-8-1.

Open Meetings Act

***Slagle v. Ross*, No. 1090638 (Ala. June 15, 2012)**

A *per curiam* plurality opinion in which the court affirmed the circuit court’s dismissal of an Open Meetings Act complaint, *Ala. Code* § 36-25A-1 *et seq.* At issue was whether the gatherings in question were “meetings” of the “Board” of Education for purposes of the statute, where the board allegedly met in rolling “serial” meetings over a multi-hour period, but without a quorum ever present at one time. Rehearing applications are pending.



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Trusts

***Regions Bank v. Kramer*, No. 1100967 (Ala. June 1, 2012)**

The question certified for appeal under ARAP 5: Whether beneficiaries of a trust may maintain a claim against the trustee under the Alabama Securities Act, or whether the only state law claim that may be asserted against a trustee is for breach of fiduciary duty under the Alabama Uniform Trust Code. Held: beneficiaries could maintain Securities Act claims as well as a breach of trust claim

State Immunity

***Ex parte Board of Dental Examiners*, No. 1100993 (Ala. May 25, 2012)**

The BDE is entitled to Section 14 state immunity.

Estates

***Ruttenberg v. Friedman*, No. 1090600 (Ala. May 11, 2012)**

The court affirmed awards of fees to estate counsel's law firms, over objections of heirs claiming conflicts of interest, where partners in the firms representing the estate were also serving as the estate's personal representatives.

Learned Treatises

***Hrynski v. Trammell*, No. 1101099 (Ala. May 11, 2012)**

Under *Ala. R. Evid.* 803(18), a learned treatise is admissible without regard to whether the expert specifically relies on a specific entry in the treatise to form an opinion in the case.

Decisions of the Alabama Court of Civil Appeals

Foreclosure

***Perry v. FNMA*, No. 2100235 (Ala. Civ. App. June 29, 2012)**

***Campbell v. Bank of America*, No. 2100246 (Ala. Civ. App. June 22, 2012)**

***Coleman v. BAC Servicing*, No. 2100453 (Ala. Civ. App. June 22, 2012)**

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***Nelson v. FNMA*, No. 2100842 (Ala. Civ. App. May 11, 2012)**

These foreclosure and ejectment cases have been decided on submission, and on rehearing, and, in the case of *Perry*, on second rehearing. Opinions are literally being issued weekly in this area, and the contours of this law are, therefore, continuously shifting. Rather than attempt to describe the current state of the law on a two-month delay to publication, we merely refer the reader to all of them and suggest you read the most recent case and move backward.

Collateral Source Rule

***McCormick v. Bunting*, No. 2100985 (Ala. Civ. App. June 29, 2012)**

The court, relying on its recent decision in *Crocker v. Grammer* (Ala. Civ. App. Sept. 9, 2011), reversed the trial court's judgment for the plaintiff in a personal injury action for the trial court's refusal to allow the defendant to admit into evidence payments from collateral sources.

Affidavits; Objections

***DWOC, LLC v. TRX Alliance, Inc.*, No. 2110418 (Ala. Civ. App. June 29, 2012)**

The recent decision in *Ex parte Sec. of Veterans Affairs*, requiring a non-movant to move to strike evidence in order to preserve appellate review on admissibility issues, does not apply outside the Rule 56 summary judgment context, and thus did not apply to a Rule 12 motion on venue.

Fraud; Sales of Land

Benton v. Clegg Land Co., No. (Ala. Civ. App. June 22, 2012)

Under *Teer v. Johnson* (Ala. 2010), a purchaser's fraud and suppression claims regarding misrepresentations concerning the condition of a lake on certain real property in conjunction with its sale were not actionable under the *caveat emptor* rule and the "as is" clause in the contract. Even though the purchaser proved an actual inquiry on the condition of the lake, that was not enough to survive summary judgment due to the as-is clause.

Real Property; Fraud

Allen v. Baker, No. 2101188 (Ala. Civ. App. June 15, 2012)

An experienced real-estate purchaser could not reasonably rely on the lender-seller's agent's representation, which arguably induced the purchaser to sit on his rights under a contract scheduled to close immediately but which the parties then extended, that the house would be sold to the purchaser at the expiration of the redemption period.

Depositions

Masterbrand Cabinets, Inc. v. Gilmore, No. 2100937 (Ala. Civ. App. June 8, 2012)

The expiration of the discovery cutoff date in the scheduling order precluded a party from taking the trial deposition of a party outside the court's subpoena power, because the *Alabama Rules of Civil Procedure* do not distinguish between discovery depositions and trial depositions.

Damages

S&M, LLC v. Burchel, No. 2110242 (Ala. Civ. App. June 8, 2012)

Under Alabama law, a party cannot recover loss of use where he is compensated for total loss of the vehicle.

Wantonness; Statute of Limitations

Mitchell v. Thornley, No. 2101127 (Ala. Civ. App. June 1, 2012)

A wantonness claim was timely, because under the pre-*Capstone* six-year statute of limitations applicable to this case, the substitution of the proper party was timely.

Will Contests

Dorough v. Ricks, No. 2101130 (Ala. Civ. App. June 1, 2012)

Under *Ex parte Helms*, 873 So. 2d 1139, 1144 (Ala. 2003), a will does not comply with the requirements of § 43-8-132(a) unless the official seal of an officer authorized to administer oaths is affixed to the will. Admission of the will to probate had no probative value in a will contest filed in the circuit court.

Auto Guest Statute

Glass v. Clark, No. 2100829 (Ala. Civ. App. May 25, 2012)

The passenger was deemed a guest under the auto guest statute, *Ala. Code* § 32-1-2, because the primary purpose of the passenger's presence was for companionship of the driver. Evidence of wantonness was insufficient because there was no evidence the driver knowingly continued to drive with a reckless disregard of sleepiness.

Decisions of the U.S. Supreme Court—Civil

Affordable Care Act

NFIB v. Sibelius, No. 11-393 (U.S. June 28, 2012)

The Court, in a lead opinion by Chief Justice Roberts, held that the Affordable Care Act was largely constitutional, except for the Medicaid provisions of the Act, under which the states' receipt of extant Medicaid funding are contingent upon the states' opting into the Medicaid expansion.

Campaign Finance

American Tradition Partnership, Inc. v. Bullock, No. 11-1179 (U.S. June 28, 2012)

The Court reversed the Montana Supreme Court's upholding, against a First Amendment challenge, a Montana statute barring corporate political donations, based on the 2010 decision in *Citizens United*.

FLSA

Christopher v. SmithKline Beecham Corp., No. 11-204 (U.S. June 18, 2012)

Pharmaceutical representatives qualify as “outside salesmen” for purposes of the FLSA under the most reasonable interpretation of the Department of Labor’s regulations.

Unions

***Knox v. Service Employees Int’l Union*, No. 10-1121 (U.S. June 21, 2012)**

The First Amendment does not allow a public-sector union to require objecting non-members to pay a special fee for the purposes of financing the union’s political and ideological activities.

Equal Protection

***Armour v. City of Indianapolis*, No. 11-161 (U.S. June 4, 2012)**

The city had a rational basis for refusing to make refunds to lump-sum payors, where payors over time were relieved of obligations on future payments, and thus did not violate the lump-sum payors’ equal protection rights.

Bankruptcy

***RadLAX Gateway Hotel, LLC v. Amal. Bank*, No. 11-166 (U.S. May 29, 2012)**

Debtors may not obtain confirmation of a Chapter 11 bankruptcy “cram-down” plan that proposes to sell substantially all of the debtors’ property at an auction, free and clear of the bank’s lien, using the sale proceeds to repay the bank, where the plan does not permit the bank to bid at the sale.

RESPA Fee-Splitting

***Freeman v. Quicken Loans*, No. 10-1042 (U.S. May 24, 2012)**

To establish a violation of 12 U.S.C. § 2607(b), the RESPA anti-fee-splitting provision, a plaintiff must demonstrate that a charge for settlement services was actually divided between two or more persons.

Social Security

***Astrue v. Capato*, No. 11-159 (U.S. May 21, 2012)**

The Court upheld the SSA’s interpretation of the Act to allow children conceived after their father’s death to qualify for Social Security survivors benefits only if they could inherit from their father under state intestacy law.

Decisions of the Eleventh Circuit—Civil

Trademark and Copyright

***Univ. of Ala. v. New Life Art*, No. 09-16412 (11th Cir. June 11, 2012)**

The Court split its decision in the long-running dispute between the UA and artist Daniel Moore concerning Moore’s First Amendment rights to depict Alabama football scenes in artwork and in ancillary media.

Employment Law

***Jones v. UPS Ground Freight*, No. 11-10416 (11th Cir. June 11, 2012)**

In a racially hostile environment case, the Court concluded that the conduct (particularly repeated allegations concerning the placement of banana peels by the plaintiff’s freight truck in the freight yard) constituted evidence of an objectively hostile environment.

***Chap. 7 Trustee (Williams) v. Gate Gourmet, Inc.*, No. 11-11819 (11th Cir. June 11, 2012)**

The plaintiff did not have to employ the McDonnell Douglas framework to survive summary judgment because the record contains enough non-comparator evidence for a jury to reasonably infer that her supervisor discriminated against her because she was pregnant.

***Gowski v. Peake*, No. 09-16371 (11th Cir. June 4, 2012)**

The retaliatory hostile work environment claim is a viable claim (which was an unsettled issue).

Bankruptcy

***Alderwoods Group, Inc. v. Garcia*, No. 10-14726 (11th Cir. May 30, 2012)**

A bankruptcy court in one federal district has no jurisdiction to determine whether a debt was discharged in a bankruptcy case litigated in another federal district.

ERISA

***Lanfear v. Home Depot USA, Inc.*, No. 10-13002 (11th Cir. May 8, 2012)**

A review of fiduciary decisions on self-invested stock is subject to an abuse-of-discretion standard.

FDCPA

***Reese v. Ellis, Painter et al.*, No. 10-14366 (11th Cir. May 1, 2012)**

An outside law firm was a debt collector, and its communication was designed both to collect a debt and enforce a security interest, and thus fell within the FDCPA.

Securities

***SEC v. Morgan Keegan & Co., Inc.*, No. 11-13992 (11th Cir. May 2, 2012)**

General disclaimer language concerning an investment risk was not sufficient to render immaterial alleged oral misrepresentations by brokers that the securities were “cash-equivalent” and were safe, when the defendant knew that the securities were compromised.

Title IX

***J.F.K. v. Troup Co. School Dist.*, No. 11-13297 (11th Cir. May 3, 2012)**

Evidence that sex harassment was brought to the attention of a decision-maker was insufficient to give rise to the inference of an actual notice needed to hold the school district liable for conduct.

Recent Criminal Decisions of Note

Decisions of the United States Supreme Court

***United States v. Alvarez*, No. 11-210 (June 28, 2012)**

“Stolen Valor Act,” a federal statute making the false claim of a military honor a criminal act, violated the First Amendment.

***Miller v. Alabama*, nos. 10-9646, 10-9647 (June 25, 2012)**

Mandatory life without parole for capital murder juvenile offenders violates the Eighth Amendment.

***Arizona v. United States*, No. 11-182 (June 25, 2012)**

State laws that 1) designated as criminal offenses the failure to carry an “alien registration document” or apply for work, and 2) allowed state law enforcement officers to make warrantless arrests of persons believed to have committed a deportable offense, were preempted. The provision requiring officers to make a “reasonable attempt” to determine a person’s immigration status if already lawfully detained was upheld against preemption challenge.

***Dorsey v. United States*, nos. 11-5683, 11-5721 (June 21, 2012)**

The federal Fair Sentencing Act, which decreased a disparity of punishment for federal drug offenses related to solid and powder cocaine, applies to offenders who committed offenses prior to the Act’s August 3, 2010 effective date but were sentenced after that date.

***Southern Union Co. v. United States*, No. 11-94, 2012 WL 2344465 (June 21, 2012)**

Criminal fines require a jury determination of any fact, other than a previous conviction, that increases the defendant’s maximum potential sentence.

***Williams v. Illinois*, No. 10-8505 (June 18, 2012)**

The Confrontation Clause did not bar expert testimony that a private lab’s DNA profile matched a profile produced by the state police laboratory, where the private lab’s profile was not introduced to prove the matter asserted and was non-testimonial. Decisions of the Eleventh Circuit

***United States v. Vana Haile*, nos. 10-15965, 11-10017 (11th Cir. June 29, 2012)**

Outrageous government conduct is not a defense for a jury to consider.

***United States v. Woods*, No. 11-11665 (11th Cir. June 18, 2012)**

Federal statutes prohibiting the possession or receipt of child pornography were not vague or overbroad.

Ineffective Assistance of Counsel

***Sochor v. Sec’y, Fla. Dep’t of Corr.*, No. 10-14944 (11th Cir. June 27, 2012)**

Even though there was ineffective assistance for failure to present mitigating mental health evidence, the petitioner failed to meet the prejudice element because there was no reasonable probability that the defendant would have received any sentence other than death even if trial counsel had not been deficient.

***Morton v. Sec’y, Fla. Dep’t of Corr.*, No. 11-11199 (11th Cir. June 20, 2012)**

The court rejected an ineffective assistance claim based on counsel’s affirmative presentation of evidence of the defendant’s antisocial personality disorder.

***In re Perez*, No. 12-12240 (11th Cir. May 25, 2012)**

The Supreme Court’s recent decisions extending the effective assistance requirement to pleas did not constitute new rules of constitutional law to support the defendant’s filing of a successive habeas petition.

***Evans v. Dep’t of Corr.*, No. 10-14920 (11th Cir. May 23, 2012)**

Counsel was held ineffective for failure to investigate and present mitigating evidence of the defendant’s “closed-head injury,” brain damage and resulting behavioral issues.

Decisions of the Alabama Court of Criminal Appeals

Evidence

***Cochran v. State*, CR-10-0516 (Ala. Crim. App. June 29, 2012)**

Under *Ala. R. Evid.* 412, there was no error in prohibiting the cross-examination of a rape victim regarding her past sexual conduct, and her trial testimony that she “had [her] childhood stolen” did not open the door to cross-examination.

“New Law” under Rule 32

***Clemens v. State*, CR-10-0772 (Ala. Crim. App. June 29, 2012)**

Several decisions from the U.S. Supreme Court did not constitute “new law” to support the filing of an otherwise precluded Rule 32 petition.

Sufficiency of Evidence

***Wallace v. State*, CR-10-1464 (Ala. Crim. App. June 29, 2012)**

Scientific testing is not required to sustain a conviction for the manufacture of methamphetamine.

Reading of Indictment

***State v. Thomas*, CR-10-1401 (May 25, 2012)**

The trial court was not required to specifically read the defendant’s indictment to the jury at his trial; as long as “the jury understands what it is called on to decide,” there is no error in failing to read the indictment in its entirety. | [AL](#)

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Transfers to Disability Inactive Status

Disbarment

Suspensions

Notices

- Notice is hereby given to **Anne Marie Hicks**, who practiced in Vestavia, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 13, 2012, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2011. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 12-652]
- Notice is hereby given to **Kristopher Wyatt Kavanaugh**, who practiced law in Northport, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 13, 2012, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2011. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 12-650]
- **Leon David Walker, III**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 28, 2012 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 11-1744 before the Disciplinary Board of the Alabama State Bar.

Reinstatement

- Wetumpka attorney **Kammie Bullen Lee** was reinstated to the practice of law in Alabama, effective March 19, 2012, by order of the Supreme Court of Alabama, subject to the terms and conditions set out in the March 19, 2012 order of the Disciplinary Board of the Alabama State Bar granting reinstatement. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Lee November 4, 2011. Lee was suspended from the practice of law in Alabama by order of the supreme court for three years, effective October 9, 2008. [Rule 28, Pet. No. 2011-1841]

Transfers to Disability Inactive Status

- Huntsville attorney **Cheryl Ann Baswell-Guthrie** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective May 29, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2011-1777]
- Birmingham attorney **Carey Wayne Spencer** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective February 23, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2012-218]

Disbarment

- Birmingham attorney **Robert Matthew Pears** was disbarred from the practice of law in Alabama, effective March 21, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based on Pears's consent to disbarment. Pears's consent to disbarment was based on pending investigations concerning the mishandling or misappropriation of client funds. [Rule 23(a), Pet. No. 2012-525; ASB No. 2011-1195; CSP nos. 2012-129 and 2012-258]

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Suspensions

- On May 22, 2012, the Disciplinary Commission entered an order accepting the conditional guilty plea of Dothan attorney **William Terry Bullard** for a 91-day suspension of his license. On June 15, 2012, the Supreme Court of Alabama entered an order accepting the Disciplinary Commission's order suspending Bullard for 91 days, effective June 1, 2012. Bullard waived the filing of formal charges and pled guilty to violating rules 1.15(a), 1.15(c), 8.4(a) and 8.4(g), *Ala. R. Prof. C.*, in that he misappropriated funds from his client trust account and used the funds to pay his law office's operating expenses. [ASB No. 2011-1107]
- Birmingham attorney **Robert Charles Gish, Jr.** was suspended from the practice of law in Alabama for three years, by order of the Supreme Court of Alabama, effective March 1, 2010. The supreme court entered its order based upon the Disciplinary Board's acceptance of Gish's conditional guilty plea wherein Gish pled guilty to violations of rules 1.3, 1.4(a), 1.4(b), 1.16(d), 8.4(a), and 8.4(g), *Ala. R. Prof. C.* In ASB No. 2012-1492, Gish met with a client regarding a lawsuit stemming from an automobile accident in which the client had previously admitted fault. At the time of the accident, the client did not have liability insurance. According to the client, Gish agreed to represent him for \$500 and agreed that the client could make payments toward satisfying the total legal fee. Gish subsequently filed an answer to the plaintiff's complaint on or about July 21, 2006. He contended that he only agreed to file an answer on behalf of his client, but Gish failed to provide any written documentation that the client had agreed to the limited scope of representation. Further, Gish never filed a motion to withdraw from the matter. The court referred the matter to mediation on August 10, 2006 and the court's order indicated that Gish was served with a copy of the mediation order. On December 13, 2006, the plaintiff filed a motion to continue the trial of the case based upon Gish's failure to participate in mediation. According to counsel for the plaintiff, he attempted to contact Gish on multiple occasions to discuss mediation and settlement; however, Gish never responded to any of his attempts to discuss the matter. Further, Gish never informed opposing counsel that he was not representing the client in the matter. The court subsequently continued the matter and reset the trial for May 8, 2007. After Gish and the client failed to appear for trial, the plaintiff filed a motion for default judgment on May 21, 2007. After Gish failed to respond to the motion, the court granted a default judgment against the client for \$41,000 on May 29, 2007. According to the client, he was never informed of the mediation order, trial date or the default judgment and only learned of the default judgment after having been served September 6, 2010 with a notice of levy against his homestead. [ASB No. 2010-1492]
- Montgomery attorney **Beverly Jean Howard** was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective March 30, 2012. The suspension was ordered held in abeyance and Howard was placed on probation for two years. The order of the Disciplinary Commission was based upon Howard's conditional guilty plea to violations of rules 1.3, 1.4(a), 1.4(b), 1.15(a), 1.15(g), and 8.4(g), *Alabama Rules of Professional Conduct*. In ASB No. 2009-2647, Howard was hired to represent a client in a divorce in July 2009. The client's deposition was taken, but not completed. A court order was issued requiring Howard and her client to supply opposing counsel a list of all bank accounts and account numbers. In August 2009, opposing counsel filed a motion requesting the court to enter a show cause order to Howard and her client for failing to comply with the court's order. Howard failed to file a response to the motion. Later, in August 2009, Howard's client was to reappear for his deposition. Neither Howard nor the client appeared for the deposition. Thereafter, opposing counsel filed a motion to compel and for sanctions as a result of Howard's client's failure to appear for the deposition. Subsequently, the court issued an order giving Howard seven days to respond to the motion to compel and for sanctions. Howard again failed to respond. In September 2009, Howard filed a motion to withdraw as counsel for her client, and the court issued an order that Howard would be allowed to withdraw from the case, only after she appeared for an October 15, 2009 hearing. While Howard's client appeared at the hearing with new counsel, Howard did not appear as ordered. In ASB No. 2011-151, Howard was hired to represent a client in a post-divorce matter which involved Howard's filing

a motion with the court regarding the ex-wife's failure to re-finance the marital home in her own name. At the outset of representation, the client paid Howard a flat fee of \$1,500 and a filing fee of \$252. Howard failed to deposit the fees into her trust account. Thereafter, Howard failed to file a motion on behalf of her client and failed to promptly refund the fees upon the client's request. In addition, while Howard maintained a regular business checking account that was labeled "trust account," she failed to maintain an IOLTA account as required by Rule 1.15(a), *Ala. R. Prof. C.* [ASB nos. 2009-2647 and 2011-151]

- Daphne attorney **Daryl Keith Landers** was suspended from the practice of law Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective April 17, 2012 for a violation of Rule 1.15(a),

Ala. R. Prof. C. Landers initially pled guilty March 25, 2011 with the suspension being deferred pending successful completion of a two-year period of probation. Thereafter, Landers violated the terms of his probation. The Office of General Counsel filed a motion to revoke probation and Landers filed an answer admitting to the conduct and to violating probation. The Disciplinary Commission granted the Office of General Counsel's motion to revoke probation, which placed the 91-day suspension into effect. [ASB No. 10-632]

- Alabama attorney **Lance William Parr**, who is also licensed in Tennessee, was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, for one year, effective May 31, 2012. The supreme court entered its order, as reciprocal discipline,



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pursuant to Rule 25(a), *Ala. R. Disc. P.*, based upon the March 23, 2012 order of the Supreme Court of Tennessee, which imposed upon Parr a one-year suspension for violations of rules 1.7, 3.1, 3.3 and 8.4, *Tennessee Rules of Professional Conduct*. Parr represented a client in a divorce action with whom Parr was having an affair. Parr failed to adequately advise the client of the conflict or obtain a waiver of the conflict. Parr moved to quash a subpoena for text messages, claiming attorney/client privilege, although that privilege did not apply. Parr also forged a client's signature to a document, notarized the signature and submitted the document to the court. When discovered, Parr submitted an amended document, but misrepresented to the court that the only change was the corrected signature. [Rule 25(a), Pet. No. 2012-606]

- Birmingham attorney **Amy Lasseter Peake** was suspended from the practice of law in Alabama for three years by order of the Disciplinary Commission of the Alabama State Bar, effective May 22, 2012. The suspension was ordered held in abeyance and Peake was placed on probation for three years. In addition, Peake was ordered to complete all requirements of the Alabama Lawyer Assistance Program. The order of the Disciplinary Commission was based upon Peake's conditional guilty plea to violations of rules 8.4(a), 8.4(b) and 8.4(g), *Alabama Rules of Professional Conduct*. In December 2011, Peake was arrested and charged with unlawful possession of a controlled substance. Peake later pled guilty to the charges as part of the Jefferson County Drug Court Program and the court's deferred prosecution program. After successful completion of the drug court program, the plea will be set aside and the charge *nolle prosequit*. [ASB No. 2012-285]
- On May 22, 2012, the Disciplinary Commission entered an order accepting the conditional guilty plea of Montgomery attorney **Valerie Murry Smedley** to a 91-day suspension of her license. On June 15, 2012, the Supreme Court of Alabama entered an order accepting the Disciplinary Commission's order suspending Smedley for a period of 91 days, effective June 1, 2012. In ASB nos. 2007-40(A), 2007-193(A), 2008-26(A), 2008-148(A), and 2008-222(A), Smedley admitted she failed to comply with the terms of her probation, and entered a guilty plea admitting to violations of rules 1.3, 1.4(a) and 1.4(b), *Ala. R. Prof. C.* In ASB nos. 2010-1224 and 1421, Smedley pled guilty to violating rules 1.3 and 1.4(a), *Ala. R. Prof. C.*, because she failed to diligently pursue her clients' cases and failed to keep her clients reasonably informed regarding the status of their cases. In ASB No. 2010-1232, Smedley pled guilty to violating Rule 8.4(g), *Ala. R. Prof. C.*, for her failure to satisfy a judgment entered against her in civil court. In ASB No. 2011-498, Smedley pleaded guilty to violating rules 1.4(a) and 1.4(b), *Ala. R. Prof. C.*, because she failed to keep her clients reasonably informed regarding the status of their cases. ASB No. 2011-1274 will be dismissed if Smedley meets certain requirements. [ASB nos. 2007-40(A), 2007-193(A), 2008-26(A), 2008-148(A), 2008-222(A), 2010-1224, 2010-1232, 2010-1421, 2011-498, and 2011-1274]
- On June 7, 2012, Birmingham attorney **Gregg Lee Smith** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission found that Smith's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 2012-1126]
- Huntsville attorney **Christopher Eric Wood** was suspended from the practice of law in Alabama for three years by order of the Disciplinary Commission of the Alabama State Bar, effective May 2, 2012. The suspension was then held in abeyance and Wood was placed on probation for three years. In addition, Wood was ordered to complete all requirements of the Alabama Lawyer Assistance Program. The order of the Disciplinary Commission was based upon Wood's conditional guilty plea to a violation of rules 8.4(a), 8.4(b) and 8.4(g), *Alabama Rules of Professional Conduct*. In May 2011, Wood was arrested and charged with unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. Wood later pled guilty to the charges as part of a deferred prosecution program. Subsequently, the plea was set aside and the charges *nolle prosequit* after Wood successfully completed the Jefferson County Drug Court Program. [ASB No. 2011-1240] | [AL](#)

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



Alabama State Bar

SPRING 2012 Admittees

STATISTICS OF INTEREST

Number sitting for exam	255
Number certified to Supreme Court of Alabama	133
Certification rate *	52.2 percent

CERTIFICATION PERCENTAGES

University of Alabama School of Law	85.2 percent
Birmingham School of Law	35.7 percent
Cumberland School of Law	65.7 percent
Jones School of Law	78.9 percent
Miles College of Law	16.0 percent

**Includes only those successfully passing bar exam and MPRE*

For full exam statistics for the February 2012 exam, go to
www.alabar.org/admissions/files/stats0212detailed.pdf.

Alabama State Bar

SPRING 2012

Admittees

Alford, John Michael	Farmer, Holly Lynn	King, David Benton	Sanyal, Poonam
Andrews, Joshua Keith	Ferris, Emily Katherine	Kistler, Amanda Leigh	Sausaman, David Kent
Baggett, Michael Joseph	Flavin, Amanda Besselman	Laney, Matthew Copeland	Sawyer, Asheton Wells
Baldwin, Ronald Craig	Foley, Patrick Anthony	Larche, Spencer Harrison	Scott, Adrienne Denise
Balzli, Chris Joseph	Gamble, Glenn Channing	Lee, Hye Won	Segrest, John Michael
Bang, Juyoung	Gary, Jacquese Antoinette	Lee, Jeong Min	Sexton, Kristina Jill
Bang, Moonyoung	Gladden, Jennifer L.	Lee, Jeoung Wook	Shaw, Terrika Vanescia
Barnes, John Carl	Glass, Anne Malatia	Lee, Shin Hee	Sheinfeld, Vladimir Gregory
Bellville, Colby Brett	Goodsell, Blake Bryant	Lee, Taehun	Shessler, Tracy Nicole
Benson, Elizabeth Frost	Graham, Andrea Freeman	Lee, Yong Jin	Simmons, Lauren Woodburn
Borden, Dorothy Skye	Gray, Jeffrey Todd	Lee, Yoongyung	Simpson, Michael Talmadge
Bowen, Charles Allen	Gregory, Deborah Annette	Lim, Sujin	Sizemore, Michael Christopher
Bright, Lisa Lynn	Griffin, LaKeesha Sharel	Little, Seth Clayton	Smelley, Sherri Johnson
Brown, Matthew Stephen	Guice, Stanna Crowe	Long, Michael Andrew	Smith, Brett Alan
Bunda, Jeffrey Allen	Guiyab, LM Felicito Patricio	Lovett, Stacey Renee	Smith, Jaletta Long
Bunn, Michael Thomas	Hadley, Thomas Jason	Lucas, Scott Michael	Snellings, John Brandon
Bustillo, Brittany Jenee	Haigler III, LaRue	Lynn, Karen Atha	SpeaksIII, Francis William
Carnes, Courtney Nicole	Hall, Carrie Elizabeth	Malone, Cristi Anna	Sullivan, Sarah Nicole
Carter, Mary Katharine	Hammock, Blaire Campbell	McDonald, April Leigh	Thomas, Sherri Angel
Carter, Sherice Monae	Harding Hart, Christine Elizabeth	McElderry, Leslie Winn	Thompson, Hannah Cotney
Cho, Chun Hyung	Hebson, Ryan James	McElmoyl, Leah Ruth	Thornton, Michael Leon
Christensen, Joshua Boyd	Hetzel, Gary Anthony	Merrill, Matthew Walter	Trundle, Andrew Stephen
Clay, Henry Marshall	Hill, Meaghan Erin	Moreton, Michael Hugh	Turner III, Richard Hill
Coaxum III, Louis	Hill, Michael Edward	Morris, Maria Viette	Tyler, Jeremy Fenton
Corhern, Steven Christopher	Hinds, Richard McLeod	Morrow, Conley Vann	von Seebach, Amye Adams
Cornelius, Andrew Wade	Hoecherl, Kelly Lynn	Mosley, Jeremiah Michael	Walder, Jonathan Michael
Crane, Dantwann Sherrod	Holt, Jarod Moss	Myrick, Matthew Callahan	Walker, Arthur M. Kelly
Danne, Derek Egan	Hosford, Nicholas Charles	Nakka, Saivandana	Walker Jr., Levy Rudolph
Darling, Shelly Kincaid	Huff, Haley Lauren	Nanayakkara, Chiranjaya W.	Wall, Julia Buntin
Davis, Timothy Michael	Ivey III, Garfield Woodrow	Nelson, Dayne Garret	Walton, Elma Rose
Dempsey, Sondra Annette	Jackson, Allilisa Marla	Nichols, Taylor Reed	Ward, Sara Renae
Dorius, Hazina Maisha	James, Brodie Taylor	Oertli, Nicole Anne	Webber, Tiffany Lauren
Dowdey, Amy Elizabeth	Jang, Seung Hyun	Peak, Eric Rodney	Wells, Romika Bridges
Drake, Martin Harrison	Jang, Taeho	Porter, Bryan David	Weston, Christopher William
Drinkard, Natalie Michele	Jeon, Uju	Powell, Kevin Tyler	Williams, Courtney Nyeshia
Dudley, Sean Patrick	Jo, Hye On	Prescott III, John Owen	Wills Jr., Wallace Howard
Dumas, Joey Dewayne	Johnson, Jonathan Alexander	Reid III, Samuel Fraser	Wilson, Courtney Parker
Dunn, Cole Everett	Johnson, Lawrence Forsythe	Rhodes, Nancy Ingeborge	Wilson, Jennifer Leigh
Eason, Emlyn Kay	Joyner, William Randolph	Roberts, Mary Catharine	Wilson, Joshua Fleming
Edmondson, Evan Spencer	Keith, Madelyn Michelle Davis	Roseman, Caryn Anne	Wood, Joshua Steven
Elmore, Katherine Sullivan	Kim, Daesun	Russell, Lacey Elaine	Wood, Keri Ann
Evans, Martin Whitfield	Kim, Na Rae	Sams, David Michael	Wood, Stephanie Kristin

LAWYERS IN THE FAMILY



1. *Chris Balzli (2012) and Stephanie Balzli (2010)*
Admittee and wife



2. *Andrea Graham (2012) and Michael G. Trucks (1976)*
Admittee and uncle



3. *Matthew Myrick (2012) and Paul Myrick (1976)*
Admittee and father



4. *Lisa Bright (2012), former Mayor and Congressman Bobby Bright (1983), Judge Lynn Bright (1979) and Janice Clardy Massa (1978)*
Admittee, father, mother and aunt



5. *Matthew Copeland Laney (2012), Buford L. Copeland (1942) and Brian Keith Copeland (1986)*
Admittee, grandfather and uncle



6. *Martin Whitfield Evans (2012), Dawn Stith Evans (1998) and Jesse P. Evans, III (1979)*
Admittee, stepmother and father

LAWYERS IN THE FAMILY



7. *Hannah C. Thompson (2012) and Stephen F. Thompson, Jr. (2006) Admittee and husband*



8. *John Michael Segrest (2012), Judge Dale Segrest (1967) and Philip Segrest (1992) Admittee, father and brother*



9. *Francis W. Speaks, III (2012), Francis W. Speaks, Jr. (1984) and Christopher Gowan Speaks (1991) Admittee, father and uncle*



10. *John Alford (2012) and Vic Baskerville (1980) Admittee and father-in-law*



11. *Stanna Crowe Guice (2012) and Stephen P. Bussman (1981) Admittee and father*



12. *Scott Michael Lucas (2012) and Ginger Hicks (2000) Admittee and mother*



Come Celebrate Alabama's 4th Annual Pro Bono Celebration Week

By Jeanne Dowdle Rasco



Next month, the Alabama State Bar will mark the fourth year that it has participated in the National Pro Bono Celebration Week, by showcasing the work and impact of pro bono lawyers across Alabama. Governor Robert Bentley named October 21-27 "Pro Bono Celebration Week," and many cities, counties and judicial associations have adopted resolutions recognizing the contributions of our legal community to those most in need. As Maya Angelou said, "How important it is for us to celebrate our Heroes and our She-roes!" Or, in our case, to celebrate the 4,000 Alabama lawyers who donate their time, effort and energies to help those less fortunate in Alabama obtain justice.

With the history of help and support of Alabama State Bar past presidents **Tom Methvin, Alyce Manley Spruell, Jim**

Pratt and current **President Phillip McCallum**, this year's Pro Bono Celebration Task Force will continue to spotlight the incredible difference that pro bono lawyers make in the lives of Alabama's poor and disadvantaged to our system of justice, our communities and, most of all, to the clients they serve.

Nationally-recognized program

As a model program consistently recognized by the American Bar Association, Alabama's Pro Bono Celebration Week has become well-known as one of the best in the country. The task force is continuing its successful efforts of the past along with incorporating new ideas, resources, activities and events for this year's Pro Bono Celebration, which are spotlighted at www.alabar.org.





Each local bar president and bar commissioner received sample proclamations, civic speeches, recruitment ideas, the basics of running a pro bono clinic, free CLE programs, and easy ways to celebrate more than 2,300 cases completed in 2011 by Alabama lawyers who donated 23,000+ hours.

Volunteer attorneys and law students will staff walk-in clinics to assist clients with civil legal issues including elder law, family law, probate and trust.

Law school activities

Alabama's law schools will coordinate several special clinics, in addition to their ongoing clinical programs. And, organizations at each school may submit applications for a \$500 mini-grant to fund a pro bono project or activity.

Last year, **Cumberland School of Law** students and volunteer lawyers assisted 85 clients at the Aletheia House Clinic on cases ranging from petty criminal matters to divorce and child custody, debt collection and landlord tenant matters.

The **University of Alabama School of Law** students and volunteer lawyers prepared free simple wills, POAs and health-care directives for first-responders in a "Wills for Heroes" Clinic.

This year, **Jones School of Law** will host a Public Interest Fair so students can start thinking about public interest careers and pro bono opportunities. And, two one-hour CLE programs on assisting indigent clients are also available at www.alabar.org, thanks to the efforts of prior task forces and Jones **Professor Jeff Baker**. One of the CLE programs even provides an hour of

ethics! Some clinics are scheduled during the lunchtime hour to make getting this CLE credit even more convenient.

Each of the five in-state law schools has selected two students who are devoted to public interest and pro bono work to attend November's Board of Bar Commissioners' meeting and be recognized.

Local bar associations

Madison County Bar Association will hold its second annual VLP Access to Justice Bash. Last year, pro bono lawyers from many areas of the law gathered to celebrate their success, while raising \$17,000 for the Madison County VLP.

At this year's annual meeting, lawyers recorded inspiring stories about their work in the VLP and with pro bono work. These stories, as well the Profiles in Service award recipients, are available online.

Coming to a town near you

And, be on the lookout for Alabama's first **Justice Bus**. Departing from Mobile, Montgomery, Birmingham and Huntsville, lawyers and law students will travel to those in need of legal advice but who can't afford an attorney. Consider the words of Quincy Jones, "Imagine what a harmonious world it could be if every single person, both young and old, shared a little of what he is good at doing." Come join the VLP and celebrate Pro Bono Week! | **AL**

Jeanne Dowdle Rasco is chair of the Pro Bono Celebration Task Force and also serves as an at-large bar commissioner. She is a sole practitioner in Talladega.



Leadership Begins with the LEADERSHIP FORUM

By Frederic S. Ury

leadership
LEADERSHIP
leadership



It's a word that we hear a lot about today. Our politicians extoll us with the virtues of their leadership skills. But in the world of politics can true leaders survive the political process? How can someone truly lead a town, city, state or country when all you hear about is the necessity of appealing to the base? We hear about leadership from our coaches and athletic heroes, only to be disappointed by some of their own shortcomings. It is one thing to talk about leadership but walking the path of true leadership is not an easy task.

This past spring, speakers around the country at our high school, college and law school graduations implored the graduates to go forth into the world and lead. Graduation speeches are mostly about doing good, and helping others. They are inspiring, but in a tough economy with mounting school debt it is tough to meet many of those inspirational goals.

What are the characteristics that make a great leader? Can they be taught? Or are they something intangible inside us that can only blossom under the right circumstances?

There is no one mold out of which leaders are born. The diversity of skills and styles that make an effective leader are different depending on the person and the type of organization. It is this diversity that makes it very difficult to craft a program to teach and foster leadership skills. But just because it is difficult does not mean we, as lawyers occupying leadership roles in our communities, should not try. And that is exactly the reason that the Alabama Bar Association decided to institute the Leadership Forum 8 years ago. Its overwhelming success has made it a model program on which other bar associations around the country have based their own.

The Leadership Forum is a five-month program conducted once a month for 30 members of the Alabama State Bar who

have been practicing between 5-15 years. The attendees, who apply for admission, represent a diverse cross section of the bar and come from all practice areas. They come from large and small firms, from the public defender's office to the district attorneys'. The participants hail from all geographical areas of the state.

The goals of the forum include:

1. Molding a critical mass of lawyers who understand and appreciate the concept of leadership;
2. Forming a pool of lawyers that will be leaders both in the state and local bar associations as well as in their communities;
3. Improving the State of Alabama through active leadership; and
4. Building a core of practicing lawyers that better understand the core values of ethics and professionalism and strive to raise the overall standards of our bar.

Graduates of the program have praised its success and have gone on to make great contributions to the Alabama bar as well as to the state as a whole. We in the legal profession need leaders who are willing to roll up their sleeves and help bring people together to make their communities better; we need leaders who are willing to listen and communicate in a civil and respectful way; we need leaders who show compassion, and we need leaders who are willing to lead for the overall good of Alabama. The Forum's emphasis on leadership through service fosters all of these laudable goals.

Tom Lyons and I have had the pleasure of speaking about the future of the legal profession at the last two forums. I can truly say, from firsthand experience, that the program lives up to its billing.

It is a tall order to develop leaders, but the Leadership Forum is a start. A very good start. | AL

Building a Community of Life-Minded Individuals

By Stephen P. Gallagher

I have had the pleasure of working with Ed Patterson and the Alabama State Bar's Leadership Forum for the past three years. I have always known of the Alabama State Bar Leadership Forum for its focus on the work of Robert Greenleaf, who writes that a "servant-leader is servant first" and does what he can to have a positive "effect on the least privileged in society."¹ When the 2010 Leadership Forum Planning Committee contacted me to help them develop an Alumni Survey, I was proud to help them with this most important initiative.

Neil W. Hamilton, professor of law at the University of St. Thomas School of Law and director of the Holloran Center for Ethical Leadership in the Professions, writes, "Servant leadership focuses on a continuing development of self-knowledge; the virtues or attitudes of stewardship, empathy, and commitment to the growth of others; and the development of the skills of: Reflection and Solicitation of Feedback Skills, Listening Skills, Conceptualization Skills, Persuasion Skills, Community-building Skills, and Counseling Skills."² I always wanted to see how these skills are taught, so I was delighted to be invited to take a seat at the table.

In planning Forum 7, we conducted research into a number of other bars and leadership academies to find out more about their program offerings and how they tracked program performance.³ I compiled resource materials that we distributed to program participants, and I also conducted telephone interviews with several dozen graduates from each of the alumni classes to get their insights into survey design.

In virtually every other corporate or academic leadership program we reviewed, leadership development was founded on a basic model that typically brought together top performers to identify best practices

and techniques. These techniques were then pulled together into a leadership competency formula. The Alabama Leadership Forum was different, because it focused on teaching leadership development and awareness of critical Alabama issues through the use of small group setting with meaningful access to elected officials, judges and industry titans. Leadership development was seen as a process tailored to needs of each individual.

Alumni Survey Results

In November 2011, we distributed questionnaires to all graduates. We were extremely pleased with a 51 percent response rate, and the survey results proved to be quite helpful. The number one recommendation for improving future forums was *adding more networking/social time, more workshops, more interactive projects and less large class room lectures*. The next recommendation was *placing greater emphasis on personal development, and lessons on how to lead, and not why you should lead*. The third recommendation was *finding ways to involve graduates, and possibly adding events for alumni that include MCLE credit*.

Many of these recommendations have been incorporated into the past two forums. The graduates clearly want this program to continue. Ninety percent of respondents say that they have recommended the forum to other attorneys, and many wanted to stay involved in growing this community. They also seemed interested in finding a way to extend the reach of the Leadership Forum to a broader range of Alabama attorneys. Many graduates expressed an interest in staying connected with individuals they have met during the forum. They also wanted to be able to support classmates with their community initiatives throughout the state.

Many participants saw *networking and exposure to the broad range of problems throughout the state* as the best part of program. **Lisa Darnley Cooper** from Mobile was one of the individuals I interviewed for the survey, and Lisa captured many participants' sentiments when she said that, "When you are engaged in the busy practice of law it is easy to get caught up in your own world and your own community. The topics covered, which included issues affecting our entire state and/or communities other than my own, not only enlarged my view, but the accompanying discussions and presentations inspired me to have a stake in these issues."

Another recommendation we heard in the survey was *placing greater emphasis on personal development; lessons on how to lead, not why you should lead*. **Andrew Nix**, a member of the class of 2010, and chair of the 2011 Forum Planning Committee talked about some of the changes incorporated over the past two forums. "The Forum didn't just pitch a laundry list of generic 'how to be a leader' topics at us. While there was an appropriate amount of 'leadership skills training,' the Forum went the additional step of presenting us with the issues and areas of need in our state that need our leadership."

In working with Alabama's Leadership Forum the past three years, I am pleased to have seen the emergence of this community that is looking for a place to *reflect, consult and engage* with like-minded individuals. I find it particularly interesting when I read what Neil W. Hamilton, at the Holloran Center for Ethical Leadership in the Professions, says about moral development and the profession: "Self-knowledge in terms of the moral insight grows through lifelong habits of reflection and consultation and engagement with others to seek honest and candid input."⁴

Conclusion

Benjamin S. Goldman, a member of Class 7, taught me about servant leadership. He said, "There is a call from the Leadership Forum to servant leadership, but servant leadership is actually just the light given off by the fire that the Leadership Forum ignites, not the fuel for the fire itself. I now realize that the one word to describe the experience (and the fuel for the fire that the Leadership Forum kindles) is really 'hope.' Hope for our state. Hope for our profession." | AL

Endnotes

1. Greenleaf, Robert, *The Servant as Leader*, p. 15 (The Robert K. Greenleaf Center 1998).
2. Neil W. Hamilton, *Ethical Leadership in Professional Life*, *University of St. Thomas Law Journal* Vol. 6:2, p. 387.
3. I spoke with representatives from the Cincinnati Academy of Leadership for Lawyers, Maryland State Bar Association Leadership Academy, Indianapolis "Bar Leaders Series," Tennessee Bar Association's Leadership Law Program, Washington State Bar Association Leadership Institute, and Memphis Leadership Forum.



PARTICIPANTS

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JAMES W. BLANK
PRESIDENT AND
CHIEF EXECUTIVE OFFICER

April 27, 2012

Ms. Christina Butler
Alabama State Bar
P.O. Box 671
Montgomery, Alabama 36104

Dear Christina,

Thank you so much for your gracious hospitality during the Leadership Forum meeting on Thursday. It was great to be with you and all the participants in Class 8.

I'm very excited to see that the Alabama State Bar understands the need for developing leaders within the legal community. There's so much unrealized potential in Alabama, and I believe if we can develop strong leadership among the next generation that we're poised to achieve great things.

Please accept my continued best wishes along with my thanks for all you do to make Alabama a better place to live and work.

Sincerely yours,

Jeremy Rane

JR/mjs

LEADERSHIP FORUM SECTION

Enables Others to Experience Goals of Program

By Benjamin S. Goldman

Something for everyone

Exceptional experiences and exclusive access have always been defining parts of the Alabama State Bar Leadership Forum (LF). My wife, fellow attorney and in-house counsel, **Christine Goldman**, would agree. Although she is not an alumna of the Leadership Forum, she joined us for the first meeting of the LF Section in February in Point Clear. The keynote speaker was General George W. Casey, Jr., the 36th Chief of Staff of the U.S. Army, one of the most accomplished soldiers in U.S. history and an authority on strategic leadership. After dinner, conference participants were invited to retreat for a “friendly game of cards.” We ended up at a table with General Casey and his wife, and to this day—with some frequency—Christine will remind me (and others) that she beat a General at cards.

Truth be told, Christine got a glimpse of what nearly 250 members of the Alabama State Bar have had the opportunity to enjoy over the past eight years. It would not be uncommon to hear Leadership Forum alumni recall having breakfast with the governor and lieutenant governor, catching up one-on-one with the Chief Judge of the United States Court of Appeals for the Eleventh Circuit, taking a backstage tour of the Alabama Shakespeare Festival or hearing stories about “The Bear” from Mal Moore. Others might tell of encounters with astronauts or confessions from a perpetrator of the HealthSouth fraud. This really gets to the heart of what is so beautiful about the Leadership Forum: there is something for everyone. Whatever that something may be, the Leadership Forum has managed to consistently roll out one-of-a-kind experiences that participants would never otherwise encounter.

Focus on servant leadership, offering hope and forming relationships

Such experiences will also be part of the attraction of the newly formed section of the Leadership Forum, made up of the forum’s graduates. Of course, just like the LF itself, the section will focus on servant leadership, finding and offering hope for the future of our state and forming meaningful relationships among the leaders of our bar. In fact, the confirmed purpose of the section is “to promote the objects of the Alabama State Bar within the field of leadership.” However, Leadership Forum graduates *and now* section

members learn these lessons through programs of the highest caliber. It is the hope of the section to continue to offer these experiences and the relationships that come with them to graduates of the Leadership Forum.

The section’s first officers are **Rebecca DePalma** as chair, **Andrew Nix** as vice chair and **Rich Raleigh** as secretary-treasurer. These individuals, together with Assistant Executive Director of the Alabama State Bar Ed Patterson and Alabama State Bar Director of External Relations and Projects Christina Butler, were largely responsible for the formation of the section.

As provided by its bylaws, the section also has two standing committees. The members of the Communications Committee are **Ben Goldman** (chair), **Sela Blanton**, **Chad Bryan**, **Lisa Cooper**, **John Dana**, **Jonathan Lowe**, **Reta McKannon**, **Flynn Mozingo**, **Candi Peebles**, **Sherrie Phillips**, **Bobby Poundstone**, **Chuck Price**, **David Rains**, **Audrey Strawbridge**, and **Carlen Williams**. The Communications Committee will produce regular section publications that offer articles on leadership and that help section members to stay up-to-date on the activities of the other Leadership Forum alumni. Furthermore, the Communications Committee will improve the Leadership Forum’s web presence and offer a Leadership Forum alumni directory.

The members of the Events Committee are **Laura Gibson** (chair), **Jenna Bedsole**, **Hope Cannon**, **Valerie Chittom**, **Shayana Davis**, **Nicole Diaz**, **Brandy Hambright**, **Brett King**, **Sam David Knight**, **Tara Lockett**, **Derrick Mills**, **Anil Mujumdar**, **George Newton**, **Cynthia Ransburg-Brown**, **Katrina Ross**, **Charlie Shah**, **Ed Sledge**, **Brian Wahl**, and **Jamie Wilson**. As hinted, the Events Committee will provide opportunities to further section members’ leadership skills through continuing education and through access to profound speakers and experiences. Moreover, the Events Committee hopes to strengthen and maximize relationships among the section members by providing networking opportunities.

The opportunity to network actually brings me back to where I started, on takeaways from the first section meeting. With no disrespect to the other sections of the bar, Christine and I observed that the meeting in Point Clear was the most collegial bar event that we had ever attended. In the end, that is really what this section is about; if we are going to successfully lead, we are all going to have to work together. We will build hope and a better future for this state as we build relationships. | [AL](#)

Bar Adds Construction Law Section

To Serve Vital Alabama Industry

By W. Alexander Moseley

Background and purpose

At January's meeting, the Board of Bar Commissioners voted unanimously to create a new state bar section on the construction industry. This will allow Alabama lawyers to provide more effective service to their clients in the construction industry, including consumers of construction and design services, to one another and to the public.

A task force appointed by then President Jim Pratt to study the need for a section focusing on the construction industry surveyed a number of factors, including the extent to which the Alabama economy depends on construction. An impressive number of large, stable and well-regarded construction firms are headquartered in Alabama, particularly around Birmingham, serving customers regionally and nationally. Recent statistics indicate that the construction industry represented around 10 percent of U.S. Gross Domestic Product, and up to 12 percent of Alabama GDP, with nonresidential construction spending in Alabama reported at \$5.7 billion in 2010. The industry is a crucial engine of Alabama progress and prosperity.

Large numbers and widespread involvement

Moreover, a significant percentage of Alabama lawyers are professionally involved in the construction process. Many represent

owners, contractors, design professionals or surety companies in negotiating and documenting their contractual agreements, and often find themselves involved in dispute resolution among these parties. Other lawyers, many of whom would not describe themselves as construction lawyers, have been or will inevitably be touched by construction issues, including those who represent real estate developers, commercial lenders, insurance interests, or injured workmen. The section on the construction industry aspires to serve all of these lawyers and their clients by encouraging the exchange of information among all segments of the industry about best practices for efficient, cooperative and safe delivery of construction and design services.

The section seeks to share the body of industry knowledge accumulated by its members, assisting the legislature and administrative bodies, cooperating with the university and community college faculties whose courses include or touch on construction issues, publishing and offering programs on issues of concern or novelty, and performing pro bono service where needed.

All lawyers who represent, or seek to represent, owners, lenders, sureties, insurers, contractors, material suppliers, architects, and engineers can benefit from the knowledge exchange the Construction Law Section will facilitate, and are encouraged to join today. | [AL](#)



Women's Section Continues Tradition Of Dedication To the Study of The Law

By Christina D. Crow

The ASB Women's Section recently awarded **Britni Terrell** the 2012 **Justice Janie L. Shores Scholarship**. Terrell, who received a \$3,500 scholarship, is a 2L at the University of Alabama School of Law and exemplified the qualifications that Janie L. Shores herself exemplified—dedication to the study of the law and a motto to “Never Give Up.” The Women's Section funds this scholarship through its silent auction at the state bar's annual meeting. This year, the section raised more than \$10,000 with the auction. | [AL](#)



2012 Award Recipients

Judicial Award of Merit

Judge Philip Ben McLauchlin, Jr., 33rd judicial circuit



Judge Phillip Ben McLauchlin, Jr. and family

Chief Justice's Professionalism Award

Judge J. Scott Vowell, presiding judge, 10th judicial circuit



Judge Scott Vowell and President Jim Pratt

President's Awards, Exemplary Service to the Profession

S. Eason Balch, Jr.
Ralph Preston Bolt, Jr.
Gregory Paul Butrus
John Foster Clark
Rebecca Garity DePalma
Bruce Peter Ely

William Stanley Gregory
Henry Hamilton Hutchinson, III
James Edgar Long, Jr.
John Hobson Presley, Jr.
William Burwell Sellers
Ashley E. Swink

Maud McLure Kelly Award

Professor Marjorie Fine Knowles

Volunteer Lawyers Program Pro Bono Awards



Recipients include, left to right, Anne Hornsby (accepting the Law Student Award for the University of Alabama); Tom Methvin (accepting for Beasley Allen); Al Vreeland Award recipients Greg Hawley and Judge Scott Vowell; and Mediation Award recipient Robert Stankoski.

Al Vreeland Award

Judge J. Scott Vowell
Gregory H. Hawley

Firm/Group Award

Beasley Allen Crow Methvin Portis & Miles PC

Law Student Award

University of Alabama School of Law students

Mediation Award

D. Robert Stankoski

Local Bar Achievement Awards

Birmingham Bar Association
Calhoun/Cleburne County Bar Association
Mobile Bar Association
Tuscaloosa County Bar Association



Joseph Fawal (representing the Birmingham Bar Association), Henry Callaway (representing the Mobile Bar Association), Bill Broome (representing the Calhoun/Cleburne County Bar Association) and Nettie Cohen Blume (representing the Tuscaloosa County Bar Association)

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2012 ASBA ANNUAL MEETING AWARDS AND HIGHLIGHTS

WEDNESDAY



President Pratt (fifth from left) accepts a token of appreciation for his year of service and dedication from several members of his Executive Council, including, left to right, 2011-12 President-elect Phillip McCallum, Joe Fawal, General Counsel Tony McLain, Vice President Rocky Watson, Albert Trousdale, Past President Alyce Spruell, Hamp Baxley, and Executive Director Keith Norman.



Bringing Clarence Darrow to life in "All Too Human" was White Plains attorney Henry Miller.



The Debro family enjoying the "Taste of Italy" dinner and all the trimmings

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2012 ASB ANNUAL MEETING AWARDS AND HIGHLIGHTS

THURSDAY



Judge Caryl Privett is entertained by fellow member of the bench, Judge Charles Price, prior to their moderating "Thirty Years of Law in Alabama."



AJ Joseph, 2012-13 president-elect, and speaker Rick Stawarz, owner and trainer, The Mac Instructor



President Pratt and plenary speaker John Reed, Thomas M. Cooley Professor of Law Emeritus Member, University of Michigan, Ann Arbor



Wonder what Marcia Pratt and Debbie Byrd could be discussing?



John Remsen makes a point during "Characteristics of Today's Most Successful Law Firms."



Getting a few tips is Jeanne Rasco with Lance Tarrant (left) and Jay Butchko (right), at the conclusion of the LexisNexis seminar, "Marketing Your Firm Online."



Entertaining and educating at the same time are "How to Lose an Oral Argument in 10 Minutes" participants, left to right, Marc Ayers, Justice Lyn Stuart, Aaron McLeod, Jonathon Hooks, and (ret.) Judge Bernard Harwood.



Prior to his presentation, Dean Daniel Meador enjoys visiting with Greg and Alice Cusimano and autographing his book, The Transformative Years of the University of Alabama Law School, 1966-1970.

2012 ASB ANNUAL MEETING AWARDS AND HIGHLIGHTS

FRIDAY



Covering a wide variety of topics during “Litigation and Arbitration in the Consumer Setting” were, left to right, panelists Roman Shaul, George Parker, Judge Bernard Smithart, Judge Gene Reese, Bill Coleman, and Judge Ken Simon.



Enjoying their annual get-together were past presidents, front row, left to right: Justice Sonny Hornsby, Johnny Owens, Wade Baxley, Tom Methvin, Walter Byars, Clarence Small, Jim North, and Spud Seale. Back row, left to right, were Mark White, Boots Gale, Bill Clark, Fred Gray, Larry Morris, Alyce Spruell, Sam Crosby, Ben Harris, and Alva Caine.



Speaker Volney Riser, Ph.D. (“Legal History Workshop: Politics, Popular Constitutionalism and the Adoption of Alabama’s 1901 Constitution”) and past President Fred Gray



Speaker Sue Talia visits with several attendees after her seminar, “Got Clients? Expanding Your Family Law Practice under Limited-Scope Representation Rules.”



Once again, the “Build-A-Bear” workshop was the most popular place to be as many new friends were “made!”



Elizabeth and Richmond Pearson at the much-anticipated Silent Auction fundraiser, sponsored by the Women’s Section



Another highlight of the evening was meeting artist Donna Burgess, who personalized her special commemorative piece for attendees.



Mamie Bedsole enjoys her time with granddaughter Charlotte Bedsole and friend Leslie Ehmer.



2012 ASB ANNUAL MEETING AWARDS AND HIGHLIGHTS

SATURDAY



Attorneys, spouses and children always enjoy the annual Fun Run/Walk.



With Legal Run-Around sponsors Mickey and Mike Turner of Freedom Court Reporting is Pooja Chawla, first-place female attorney race winner.



Brett Adair, first-place male attorney race winner, and the Turners



J. Greene and Elizabeth Portia place first in the children's category.

2012 ASB ANNUAL MEETING AWARDS AND HIGHLIGHTS

SATURDAY



As promised, the “Presidential Reception” had something for everyone.



ISI Alabama President Bill Bass presents Marvin Wehl with the Grand Prize Getaway to the Hilton Club MarBrisa.



Ready to become the newest invitee to the “Past Presidents Breakfast” is Jim Pratt (center), with President-elect AJ Joseph (left) and President Phillip McCallum (right).



Fifty-year honorees in attendance are Ben Harris, James Knight and Robert Creveling.



And proving that patience does pay off was Linda Flippo, winner of an iPad2, also presented by Bill Bass, ISI Alabama. She was declared the winner after four other attorneys’ names were drawn but weren’t present at the Grand Convocation!



Winding down a year filled with travel, meetings and commitments are Marcia and Jim Pratt.



YOUR APPELLATE BRIEF: An Obstacle Course for the Court or A Clear Pathway to Your Conclusion

By *Joi T. Montiel*

Given the number and length of briefs

filed in the Alabama Supreme Court every year, an Alabama Supreme Court Justice is tasked with the equivalent of reading *The Bible* and *War and Peace* 20 times annually.² The justice not only must read all those pages, but he or she will have to *analyze* them and consider the merits of the arguments. Moreover, the justice will have to make *decisions* about what he or she reads, and then explain his or her decision in writing. And, of course, we want the justice to do it quickly, please.

What can attorneys do to help the justices trudge through briefs and make decisions more easily? In short, the best brief will go a long way to do the judge's work for him or her. If you have written a truly effective brief, the court's opinion will look much like your brief. Your brief should lay the groundwork for the judge, or at least make his or her job as easy as possible.

To lay this foundation, you should first consider the role of Alabama Supreme Court justices. They are busy. They may

be "impatient and unforgiving" but they want to reach the right result for the right reason.³ As lawyers, and particularly as judges, they are skeptical. They know that your job is to persuade them to decide in your client's favor. They are wary of that when they read your brief.

You should also consider that the judges have staff who also read your briefs and discuss them with the judges. The staff may be people who have worked for the judges for years, but just as likely, they may be recent law graduates, probably from the top tier of their law school classes. They were probably on law review, they know the *Bluebook* rules, they know how to properly use a semicolon and they are excellent researchers.

Your brief should provide these skeptics—the busy judges, staff attorneys and law clerks—with a clear path to the conclusion you want them to reach. When these decision-makers read, they question what they are reading, and they are troubled if you fail to provide the answers to their questions. They are annoyed and distracted by poor grammar and citation errors and particularly by any misrepresentation of law or fact—whether it is inadvertent or intentional. Instead of creating these

The secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical.”¹

obstacles, you should strive to lead the judges to your conclusion on a clear, unobstructed pathway. Set forth below is a list of obstacles that judges say⁴ they often encounter when reading appellate briefs, as well as some advice about how to remove those obstacles from your briefs.



Obstacle 1: A “Fat” Brief

One federal appellate judge has said that the best way to tell the court that you have a “rotten case” is to write a “fat brief.”⁵ He says: “When judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief.”⁶ Another judge has said that “[t]he more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes.”⁷

In writing an appellate brief, less is more. Maybe your client will be impressed that you wrote a really long brief, but it does not impress the court. Irritating the judge does not serve your client well.

In contrast to a “fat” brief that irritates, a brief that is concise and to the point will be read with full attention.⁸ Of course, it takes more time and effort to write a short, concise, tightly organized, well-focused brief than it does to write a long, rambling, disorganized brief full of long block quotes,⁹ but it is time well spent for your client and for your own reputation. Judges “associate the brevity of the brief with the quality of the lawyer.”¹⁰ Tightly organized, concise briefs are written by good lawyers. Poor lawyers, on the other hand, write lengthy, verbose briefs.¹¹

One way to shorten your brief is to include only winning arguments. A winning argument is a simple one. In contrast, “convoluted arguments are sleeping pills on paper.”¹² A good brief should include persuasive arguments and *only* persuasive arguments. Forcing a judge to trudge through unpersuasive arguments causes you to lose credibility and the

judge to lose interest. A sure-fire way to lose is to “bury your winning argument among nine or ten losers.”¹³ When surrounded by less persuasive arguments, strong arguments lose their edge and persuasive force.

An issue that was not properly preserved for appellate review is not a winning issue. Furthermore, when a lawyer raises an issue that was not properly preserved, he loses credibility with the judge. The judge is then less likely to trust that lawyer’s analysis when the judge considers issues that are properly reviewable on appeal. Consider the preservation question when deciding which issues to raise. Arguments on issues that were not preserved are a waste of space in your brief and a waste of the court’s time.

In addition to eliminating losing arguments, trim back your statement of the case and statement of the facts. The court needs to know only the procedural background and facts that are relevant to the issues on appeal. Facts that are not legally significant—in your view or your opponent’s view¹⁴—need not be included. Revise the statement of the case and statement of the facts at late stages of drafting the argument to shorten your brief.

You should also cut out long paragraphs, long sentences and long words.¹⁵ The judges are busy. They “simply don’t have time to ferret out one bright idea buried in too long a sentence.”¹⁶ Your brief should be clear, concise and direct; simplicity is a key to each of those—from the choice of issues to the choice of individual words.



Obstacle 2: Disregarding The Standard of Review

When choosing the issues to appeal, perhaps you should abandon those with an unfavorable standard of review and choose instead those with a more favorable standard.¹⁷ For example, if an issue is subject to the ore tenus standard of review, it may not be worth adding extra weight to your brief.¹⁸

The standard of review may not be the same for each issue you present. If you present three issues, outline the standard of review for each issue. Do not overlook the standard as you proceed through your argument. In other words, do not argue as if you and your opposing counsel are on a level playing field if you are not. If the standard of review is in your favor, weave that into your argument. If the standard of review is not favorable to you, explain why it is not fatal to your argument.



Obstacle 3: A Disorganized Brief

A disorganized brief is a burden to read. In contrast, a readable brief—that is, a helpful one—leads the reader by the hand,¹⁹ guiding him every step of the way, until the conclusion is reached. Chief Justice Rehnquist once said, “The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing, and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer’s client.”²⁰ Below are three recommendations for organizing your brief: (1) use concise argumentative headings; (2) use effective paragraphing; and (3) use transitions. A fourth organizational tool is the one just demonstrated: begin each section with an introductory paragraph setting out what you will explain.²¹

First, use concise, persuasive headings. In an organized brief, the headings and subheadings reflect a logical structure of the argument.²² If the judge were to read only your headings and subheadings, he should be able to see what you are asking for, as well as the logical structure of your argument.²³ Headings and subheadings should state legal positions in sentence form, instead of merely labeling the topic of the section. Good headings “explain where the brief is going and provide signposts along the way.”²⁴ Each heading should “bring you closer to the finish line.”²⁵ For the headings to be effective,

they should be clear and concise. Take time to revise them after completing the body of the argument.

Second, write effective paragraphs. The first sentence of a paragraph should tell the reader what will be discussed in the body of the paragraph. Discuss only one point per paragraph. Test yourself: If your paragraph is longer than a page, it is probably too long. You are probably covering more than one point in a paragraph if it is longer than a page. Consider where you need a break inside the paragraph.

Third, use transitions to guide your reader. Transitions such as *moreover*, *however*, *furthermore*, *in addition*, and *on the other hand* make your reader's job easier. They guide your reader through your thought process²⁶ and lead him or her to the conclusion you want him to reach.



Obstacle 4: One-Sidedness

Judges must approach your case objectively. They must objectively evaluate the law and the facts. Thus, to lead your reader down your path to your conclusion, you must also objectively look at the law and facts.

You must acknowledge and rebut adverse authority and unfavorable facts. Doing so accomplishes two things. First, you will strengthen the substance of your argument. By addressing adverse authority and bad facts, you have the opportunity to present them in the most favorable light and explain why they are not damaging to your case.²⁷ Second, you will enhance your credibility before the court.²⁸ Even if the disclosure of potentially adverse authority is arguably not required by ethical rules,²⁹ you should, nevertheless, disclose it to the court. If your goal is to make the judge's job easier,³⁰ and if you want to maintain credibility, then you must acknowledge adverse authority and unfavorable facts. Otherwise, you make the judge's job more difficult and, ultimately, you will weaken your case.



Obstacle 5: Failure to Show Your Work

As the brief writer, you have put a lot of thought into your brief. You know your client's facts. You have researched the pertinent law. You have thought about how that law applies to your client's facts, which cases are favorable to you, which cases are not and why. As you decided which facts and which authority to present to the court, you probably went through the mental process of legal analysis.

Some lawyers, however, tend to leave critical legal analysis out of their briefs. Instead, they simply state the law, the facts and the conclusions they want the court to reach. They force the judge to do the difficult legal analysis, without the benefit of the lawyer's guidance.

An effective brief writer must *show his work* to the judge. He must do more than simply state the law, state his client's facts and then state the conclusion he wants. He must *apply* the law to his client's facts and he must *show* the legal analysis.

You must show the court the governing rule of law in the jurisdiction. This is more than simply plucking holdings from one or two favorable cases. Instead, you must synthesize the law from all relevant governing authority, reconciling them with one another³¹ and discerning the reasoning and rationale behind them. After explaining to the court the synthesized rule of law and the rationale behind it, you then can apply the rule of law to your client's case, showing the judge how plugging your client's facts into the rule of law compels a conclusion in your client's favor.

You must also analogize and distinguish from precedent. Show the court exactly how your case, in legally significant ways, is like precedent cases that have ruled the way you want the court to rule. If there are also differences between your case and the precedent cases, do not ignore them. Show the court that those differences are not legally significant. In

addition, distinguish your case from cases on point that appear to conflict with your position. You can bet that your opponent will cite them, or that the judge's law clerk will find them, and you need to explain them.

The factual similarities and differences between your case and the precedent cases are meaningless, however, unless you explain why they are important in light of the synthesized rule of law and its rationale. Thus, perhaps most importantly, you must show the court that the conclusion you are advocating is consistent with the rationale underlying the rule of law and the holdings in the binding precedent. Appellate judges are concerned with more than just your case. They are concerned with the state of the law. Show them that ruling in your client's favor is in harmony with or advances the purposes of the law.

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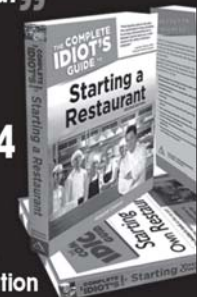
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Obstacle 6: Assuming Summary of the Argument

As the brief writer, you probably will write the summary of the argument last, but a judge may read it first—before he reads the argument.³² Thus, the challenge for you as the writer is to write the summary so that it is clear and understandable to a judge who has not yet read your argument section. One trick is to set aside your brief for a few days, and write your summary after you have not looked at your argument for a while. You are less likely to write it in a way that assumes familiarity with the argument section.³³



Obstacle 7: Thoughtless Block Quotes

Should you or should you not include block quotes in your brief? One federal appellate judge says that he never reads them, assuming they say nothing important:

“Whenever I see a block quote I figure the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer. Let’s face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.³⁴”

Another judge has said that quoting is a “lazy way of writing a brief.”³⁵ Justice Scalia and Bryan Garner interpret a block quote to mean that the brief writer didn’t bother to do any independent legal analysis.³⁶

Some judges and staff attorneys, however, take the opposite viewpoint. One judge indicated that he is actually “suspicious” when a brief writer does not

include quotations: perhaps the case doesn’t really stand for the writer’s stated proposition. Block quotes could make the job easier of the judge, staff attorney and law clerk. By placing the relevant language of the authority in your brief, you allow the reader to see for himself what the case says without his having to pull the case, which might interrupt his journey down your pathway.

So, the brief writer has a dilemma: do you write the brief for the judge who views block quotations as a lazy way of writing a brief or for the judge who appreciates block quotes? You can accommodate both. First, include meaningful block quotes, but introduce them with language that “sets up” for the reader the point of the block quote.³⁷ That approach will satisfy the judge who appreciates block quotes, and the judge who skips the quote will not miss your point. Second, in any block quote, draw attention to the most significant phrases by underlining or otherwise emphasizing them.³⁸ Third, for a quotation that isn’t long enough to block quote,³⁹ incorporate it into your own written text. Or, fourth, include shorter quotations inside parentheses following the citations that support your proposition.⁴⁰

If you use them to reinforce your written analysis, block quotations can be useful in equipping the judge to write the opinion. Block quotations cannot be used, however, as a substitute for analysis. You must do the hard work of showing the judge how the quoted passage applies to your case.



Obstacle 8: A Non-Conforming (Ugly) Brief

Just as no one likes a fat brief, no one likes an ugly brief, either. Will the judge begin reading your brief with the impression that you know what you are doing or that you do not? Non-conforming font, spacing or cover pages indicate that you have never seen, much less written, a good appellate brief. The judge will wonder: if

you can’t follow the rules of the court, can you be trusted to properly analyze the law and apply it to your client’s facts?

Follow the rules of the court on format, font size and page limitation. They are not arbitrary. The court can more effectively decide cases if briefs are in the correct format. Failure to follow the rules will annoy and irritate the judges. Worse, your credibility may be destroyed. While our Alabama judges are often too kind to speak harshly about attorneys who ignore the rules, Judge Kozinski has gone so far as to say the following about an attorney who will play games with fonts and margins to circumvent the court’s rules:

“It tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.⁴¹”

Don’t be that guy!



Obstacle 9: Grammar And Punctuation Errors

As one judge cautioned, “We judges tend to become suspect of any argument advanced by an advocate who produced shoddy work . . . I have little trust in an advocate who files a document that contains misspellings [or] poor grammar . . .”⁴² The readers of your appellate brief are writers and also editors; on a daily basis, they write, critique and edit the work of others. The process of reading a brief that is replete with grammatical and punctuation errors is bumpy and frustrating for them. Such readers have to resist the temptation to mark these errors.⁴³ Even if they do resist, your distracting errors have slowed down their work. Worse still, judges may focus on the errors and miss completely the persuasiveness of your argument.

It is difficult to proofread your own work. Research shows that when reading a product that you wrote, your brain will subconsciously read in missing words.⁴⁴

To avoid this phenomenon, reach the final draft stage of your brief in time to put it down for a day or two before you proofread. To catch your errors, you might read your brief out loud⁴⁵ or read it from last sentence to first sentence so that you won't subconsciously read in missing words.



Obstacle 10: Citation Problems

“Citation form is like the handshake of a secret society: it conveys important information while simultaneously announcing membership.”⁴⁶ If your citation is incorrect, it is an admission that “you really don't belong here.”⁴⁷

Take time to proofread your citations. I suggest a proofreading “session” dedicated to only citation. Cite every assertion of authority. If a proposition of law is well settled, cite one case. There is no need to string cite five cases that state the same point of law on which all will agree. Use pinpoint cites—that is, include the precise page number in the record or the case on which the material you are citing appears. The judges and their law clerks will read the cases. You will make their jobs easier if you show them exactly where your supporting point appears in a lengthy case.

Conclusion

Obstacles that frustrate the judge or that make his or her job more difficult undermine the goal of the appellate brief. To provide the judge a clear pathway to the legally correct conclusion, your brief must be well-organized, clear and concise. It should project to the judge that you are credible, objective and conscientious. Clearing your brief of the obstacles discussed above is a step the right direction. | [AL](#)

Endnotes

1. Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 310 (2002).
2. The Supreme Court of Alabama disposed of 749 direct appeals between

October 2009 and September 2010. Alabama Unified Judicial System, *Fiscal Year 2010 Annual Report 13* (available at www.alacourt.gov). Each appeal could involve three briefs. Assuming each of those three briefs was the length allowed by ALA. R. APP. P. 28, and assuming each brief page was approximately 200 words long, a justice sitting on all of those cases would read more than 26 million words. Of course, not all of the briefs reach the page limit and every justice does not sit on every case. However, my estimate does not include the hundreds of petitions for the writ of certiorari or mandamus, which, if granted, result in even more briefs or amicus briefs. So, 26 million words is a fair enough estimate to make a meaningful comparison: *War and Peace* is half a million words long; *The Bible* has around 775,000 words.

3. Antonin Scalia and Bryan A. Garner, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 24* (Thomson/West 2008) (explaining that judges have “no desire to spend more time on your case than is necessary to get the right result”).
4. Much appreciation to Alabama Supreme Court Justices Woodall, Parker, Murdock and Shaw for providing input for this article. Of course, any statements made herein are not necessarily reflective of the views of all or any one of them.
5. Judge Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325, 326 (1992). Judge Kozinski is the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit. Justice Scalia and Mr. Garner call these briefs “flabby.” Scalia and Garner, *supra* note 3, at 98.
6. Kozinski, *supra* note 5, at 327.
7. Judge Patricia Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 9-10 (1999). Judge Wald is the former chief judge of the U.S. Court of Appeals for the D.C. Circuit.
8. Scalia and Garner, *supra* note 3, at 98.
9. “I have made this letter longer than usual, because I lack the time to make it short.” Blaise Pascal. Similar quotations have been attributed to Benjamin Franklin and Mark Twain.
10. Scalia & Garner, *supra* note 3, at 98.
11. *Id.*
12. Kozinski, *supra* note 5, at 326.
13. *Id.* at 327.
14. You must include “bad facts” that are arguably legally significant. *See infra* Obstacle 4, Loss of Objectivity.
15. “Short words are best and the old words when short are best of all.” Winston Churchill.



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16. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999) (quoted in Ross Gruberman, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 279 (Oxford University Press 2011)).
17. Scalia and Garner, *supra* note 3, at 11-12.
18. *E.g., Raidt v. Crane*, 342 So. 2d 358, 360 (Ala. 1977) (“[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court’s conclusion on issues of fact, and this Court will not disturb the trial court’s conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence.”).
19. Chief Justice John Roberts has said that, as a brief writer, “[y]ou want to take the judge by the hand and lead them along. . . .” Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts Jr.*, 13 SCRIBES J. LEGAL WRITING 5, 11 (2010).
20. William H. Rehnquist, *From Webster to Word Processing: the Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1 (1999) (cited by Ross Gruberman, POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 75).
21. In a survey of federal judges, 76 percent of them said that it is very important to include an introductory paragraph that explicitly outlines the arguments to follow. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 264 (2002)).
22. David R. Cohen, *Writing Winning Briefs*, 26 LITIG. 46, 48 (2000) (“Tell the reader where your argument is going. Briefs with few headings can seem disorganized; frequent headings make the brief seem more logical.”); Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 SCRIBES J. LEGAL WRITING 1, 16 (2001-02) (quoting the advice of the Hon. Daniel M. Kolkey, California Court of Appeals, that “[s]ections and subsections should be liberally used to focus a busy court on the key components of the argument, and only one point per subsection should be made”).
23. These will, of course, all appear in your table of contents. If the table of contents does not make sense or is difficult to follow, chances are that the brief is disorganized. Judge Stephen J. Dwyer, et al., *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 422 (2008).
24. Judge Dan Friedman, *Winning on Appeal*, 9 LITIG. 14, 17 (Spring 1983) (cited by Ross Gruberman, POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 76).
25. Ross Gruberman, POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 76.
26. *See, e.g.,* Scalia & Garner, *supra* note 3, at 111.
27. Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material In Legal Advocacy*, 60 RUTGERS L. REV. 381, 389 (2008).
28. *Id.*
29. ALA. R. PROF. CONDUCT 3.3(a) provides that a lawyer shall not knowingly make a false statement of law to a tribunal. Regarding misleading legal argument, the comments to Rule 3.3 state: “Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.” In addition, “[a] lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.”
30. Stanchi, *supra* note 27, at 389.
31. Do not be afraid to ask the court to overrule a prior case where appropriate.
32. Scalia and Garner, *supra* note 3, at 97 (stating that some judges consider the summary to be “indispensable—indeed the most important part of the brief”).
33. *See* Beazley, *infra* note 44.
34. Kozinski, *supra* note 5, at 327.
35. Judge Daniel Friedman, *Winning on Appeal*, 9 LITIG. 15, 17 (spring 1983) (quoted by Gruberman, *supra* note 25, at 277). Judge Friedman was a judge on the U.S. Court of Appeals for the Federal Circuit.
36. Scalia & Garner, *supra* note 3, at 128 (“You want the court to develop confidence in your reasoning—not in your ability to gopher up supporting quotations.”) (emphasis added).
37. *See* example at the beginning of Obstacle 7.
38. Indicate that you have added the emphasis, pursuant to BLUEBOOK Rule 5.2. *See* example at *infra* note 36.
39. BLUEBOOK Rule 5.1 calls for block quotation only if the quotation is 50 or more words in length.
40. *See* example at *infra* note 36.
41. Kozinski, *supra* note 5, at 327.
42. Robbins, *supra* note 21, at 278.
43. Some judges go so far as to redline the lawyers’ work. *See, e.g.,* Sean T. Carnathan, *Judge Denies Motion and Redlines Mistakes*, LITIGATION NEWS (Nov. 19, 2009) [available at http://apps.americanbar.org/litigation/litigationnews/top_stories/presnell-redlined-motion.html].
44. Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175, 181 (1997) (“The short-term memory then ‘tells’ the brain the complete message, and the writers presume that the words they wrote contained the message.”).
45. A useful tool can be found at Readplease.com. You can paste your text into a window and have it read aloud to you by the voice of your choice.
46. Dwyer, et al., *supra* note 23, at 428.
47. *Id.* As Justice Scalia and Bryan Garner remind, it is also critical that you use proper signals. *See* Scalia & Garner, *supra* note 3, at 123. The absence of a signal indicates that the authority cited directly supports your proposition. BLUEBOOK Rule 1.2. If it doesn’t, you’ve misled the court.

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What to Do When a Client Receives A Federal Grand Jury Subpoena

By William C. Athanas

Introduction

Those unfamiliar with the federal criminal process feel understandable anxiety when served with a grand jury subpoena. Lawyers representing subpoena recipients often experience a similar reaction, especially when they lack familiarity in handling such matters. While Federal Rule of Criminal Procedure 17—which governs grand jury subpoenas—provides some guidance, representing a client based solely on a review of its contents leaves counsel ill-equipped to deal with the challenges at hand. The seemingly simple and straightforward language of that provision conceals the practical realities of the grand jury subpoena response process, which are far more complicated and nuanced than might appear at first blush. With those challenges in mind, this article endeavors to serve as a primer for lawyers, especially those uninitiated to the federal criminal process, to protect the interests of their clients by identifying and dealing with the key legal, factual and ethical issues potentially triggered by the issuance of a grand jury subpoena.

Understanding the Applicable Legal Framework

The Relevant Provision

None of the Federal Rules of Criminal Procedure apply specifically to grand jury subpoenas. By its terms, Federal Rule of Criminal

Procedure 17 relates to trial proceedings, and authorizes the issuance of subpoenas to either “command the witness to attend and testify” or “order the witness to produce any books, papers, documents, data, or other objects the subpoena designates.”¹ Nevertheless, courts have regularly applied Rule 17 in the context of evaluating grand jury subpoenas for testimony and documents, focusing on the rule’s language empowering the court to “quash or modify the subpoena if compliance would be unreasonable or oppressive.”²

The Scope of the Grand Jury’s Authority

Oft-quoted language by the Supreme Court notes that the grand jury “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”³ When exercising this authority, the grand jury has a right to “every man’s evidence.”⁴ This means, as a practical matter, that subpoenas issued during the grand jury’s investigative process are subject to few limitations.

A party seeking to demonstrate that compliance with a grand jury subpoena would be “unreasonable or oppressive” because the information sought is irrelevant has a steep hill to climb. A relevancy challenge will be denied unless the objecting party can meet the onerous burden of showing that “there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.”⁵

Beyond its broad authority to collect information, the grand jury’s power is also aided by the absence of jurisdictional and procedural limitations often present in other contexts. The grand jury is not constrained by procedural or evidentiary rules and claims of privacy or competence are not valid bases to defeat a subpoena.⁶ Grand jury subpoenas need not be supported by probable cause, and those issued through normal channels enjoy the presumption of validity.⁷

The grand jury's powers are not unlimited, however. Courts have rejected subpoenas which are designed to conduct a civil investigation, or to harass or intimidate the subpoena recipient.⁸ Subpoenas designed to allow the government to use the grand jury to gather evidence against a defendant post-indictment are also subject to being invalidated.⁹ Valid claims of privilege, including the privilege against self-incrimination, the attorney-client privilege, and the marital privilege, also serve to limit the grand jury's reach.¹⁰

How to Represent a Grand Jury Subpoena Recipient

Examine the Language of the Subpoena

The starting point in determining how to respond to a grand jury subpoena is to understand fully its content. The body of the subpoena will identify what it seeks: "Ad testificandum" subpoenas require a witness to testify; "duces tecum" subpoenas require the production of documents or objects. To evaluate a duces tecum subpoena, counsel should focus on the scope of the requested information. The face of the subpoena form provides space for a listing of the requested documents or objects, but often—particularly when the case is complex—the subpoena will append a listing of additional materials sought. A typical subpoena attachment will not only detail the type of documents or objects sought, but also define key terms, designate the relevant time period and require that claims of privilege be detailed.

It is important to understand that in many federal districts, subpoenas in criminal cases are served without the court's prior review. Simply because the subpoena has been signed by clerk does not mean that a judge has even reviewed its contents beforehand, much less concluded that the information sought falls within the scope authorized by law. Subpoena recipients are expected to challenge those requests that are objectionable. In the absence of such an objection, courts typically do not even examine grand jury subpoenas, much less opine on their legitimacy.

Gather Information to Allow for Informed Decision-Making

1. Meet Threshold Obligations

Once counsel understands what the subpoena seeks, it is important to prevent the client from making the situation worse. Subpoena recipients should be instructed to refrain from having any substantive communication with anyone other than counsel until the landscape of the investigation can be appropriately surveyed. Even seemingly innocuous conversations between individuals can have serious consequences when examined through the lens of a grand jury investigation. At this stage, counsel

should communicate in terms which are absolute and unequivocal: the client should not talk to anyone about anything even remotely related to the investigation, until further information can be gathered and analyzed.

In the context of a request for documents, an additional prophylactic measure is appropriate to ensure that the client avoids altering or destroying potentially relevant information. Depending on the structure and sophistication level of the client, this directive can be issued in a number of ways. In the corporate context, the most common is a "litigation hold" advising relevant individuals of the existence of the subpoena and the need to retain potentially responsive documents in their original form, regardless of how or where they are maintained. Recipients of this directive should be advised that destruction of documents will not only diminish the company's credibility in the government's eyes, but may also lead to criminal charges against individuals for obstruction of justice.

2. Establish Communication with the Government

Next, it is important to determine, to as great an extent possible, what the underlying case is about and where the client fits. This process is not without challenges. At the grand jury stage, the Assistant U.S. Attorney handling the matter may be prohibited by law from disclosing certain details about the nature of the investigation.¹¹ Even if the prosecutor is not constrained from sharing particular information, he or she may nevertheless decline to divulge particulars for fear of revealing the investigation's focus or comprising litigation theories and strategies.

Nevertheless, certain measures can and should be employed in an effort to learn the layout of the case, and the client's place in it. Upon receipt and review of a grand jury subpoena, counsel should contact the Assistant U.S. Attorney handling the matter.¹² No harm results from asking all types of questions about the case, including the type of conduct being examined, which individuals or entities are under investigation and the statutes being considered. The prosecutor can simply decline to answer those questions deemed out of bounds for legal or strategic reasons.

At a minimum, during this conversation counsel should seek to determine where the government views the client on the spectrum of culpability. At the grand jury stage, parties fall into one of three groups: target, subject or witness. A "target" is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."¹³ A "subject" is "person whose conduct is within the scope of the grand jury's investigation."¹⁴ The term "witness" is not formally defined, but is generally understood to mean a person who has knowledge of facts relevant to the investigation, but who is not deemed likely to have criminal liability.

Whether or not the government is forthcoming about the underlying grand jury investigation, counsel for other parties involved in the investigation may serve as a source of information. Counsel should endeavor to learn, whether from the client or other sources, who else might have information or be involved. From there, counsel can consider whether it would be mutually beneficial to contact counsel for other interested parties and seek to share information either informally or via a joint defense agreement.¹⁵

During this analysis, counsel should also remain mindful of a seemingly basic question: does the client have responsive information? If not, the process of responding often can be short-circuited since no one has an interest in expending resources to summon a witness with no relevant knowledge. Understand that identifying this question is much easier than answering it, and recognize that bare representations that “my client says he doesn’t know anything” are likely to be met with great skepticism, especially where the individual is implicated in potential wrongdoing. In those instances where counsel can credibly demonstrate to the government at the outset that the client lacks the necessary volume and quality of information, however, the expenditure of significant resources can often be avoided.

3. Evaluate Potential Privilege Claims

Assuming the client does possess at least some information of value, the next step is to determine whether reasons exist to decline to respond to the subpoena. In the grand jury context, the most common reason is because testifying or producing documents may increase the chances that the client will be charged with a crime. Individuals possess a constitutional right not to incriminate themselves, and may assert that privilege in any setting.¹⁶ Corporate entities have no self-incrimination protections, however.¹⁷

Understand that the existence of viable privileges will not necessarily excuse performance under the grand jury subpoena. When the witness intends to assert a privilege against self-incrimination, most prosecutors will not require an appearance before the grand jury. Claims of privilege may not be asserted in blanket fashion, however, and, as a result, on occasion it may be necessary for the witness to invoke the privilege on a question-by-question basis. This is a challenging, fact-dependent process, and counsel should be exceedingly careful when traveling this route. Where certain documents are subject to claims of privilege, counsel will almost always be required to generate a privilege log detailing a sufficient basis for an evaluation of such claims. On occasion, the government may seek *in camera* review by the court in order to ensure thorough evaluation of the issue.

4. Maintain an Ongoing Dialogue with the Government

Regardless of whether the grand jury subpoena seeks testimony or documents, communication with the government is essential to allow for informed decision-making. The discussion above referenced the need to establish communication with the government at the outset of the process, but counsel should recognize that ongoing interaction with the prosecutor plays an essential role in protecting a client’s interests. Information is a precious commodity in this context, and counsel should take advantage of any opportunity to gather facts which shed light on matters of concern. Moreover, to the extent it is in the client’s best interest to work cooperatively with the government, communication is vital to ensure that the efforts undertaken have been fully vetted by the Assistant U.S. Attorney handling the matter. No prosecutor likes surprises, and embarking on a course of action which undermines the grand jury’s efforts is likely to evoke a swift and sharp response from the government.

In the document production context, open communication with the government can bring an additional advantage: a reduc-

tion in the burden otherwise associated with responding to the subpoena. Counsel experienced in responding to *duces tecum* subpoenas understand all too well that the ability to store massive quantities of information electronically can be a curse as well as a blessing. Any company forced to spend the resources required to sift through all of its stored data to find documents relating to a particular topic and individuals would likely agree. Grand jury subpoenas to corporate entities are often expansive in scope, and, by their literal terms, can require production of huge volumes of documents at considerable expense.¹⁸ The subpoenas are seldom limited to specific types of documents (e.g., “all accounts payable journals”); usually the requests seek all information relating to a particular subject matter (e.g., “all documents relating to consulting contracts or payments”).

In an environment where literally millions of pages of material can be stored electronically, often the prospect of full compliance with the subpoena in its original form means spending a fortune to gather, review for privilege and produce the information. Sometimes, the government either cannot or will not agree to narrow the scope of the subpoena. More often, however, prosecutors are amenable to a dialogue about ways for the grand jury to get the information it needs and for the subpoena recipient to avoid spending huge sums to comply. Usually there is only one way to determine if the government is open to negotiating the contours of the subpoena: by raising the issue.

The chances for success increase dramatically when a company seeking to narrow a subpoena’s scope can point to specifics about the burden imposed. The ability to show that production of all e-mails relating to a particular subject matter will cost \$400,000 means far more than generalized complaints about the breadth of the subpoena. In this context, genuine attempts to strike a balance between the grand jury’s right to information and the company’s financial health will almost always be considered by the government; efforts to avoid producing responsive information simply because the company does not want to spend the time or the money will not.

To maximize the likelihood of obtaining concessions, counsel should be prepared to make a specific, credible proposal to the government. This can include suggesting an incremental approach: e.g., the company will produce certain types of documents (“everything but e-mails initially”), and, if the government is not satisfied with the information produced, the scope can be expanded. The company may also suggest eliminating certain requests that are likely to be disproportionately expensive, especially where it offers the prospect of far more relevant materials in the short term (e.g., “the company will provide all consulting invoices for the past year within two weeks; you agree to hold in abeyance the request for the previous five years since they are in offsite storage and available only on microfilm”). Each situation will depend on its own facts, but the strategy of engaging the government on the issue makes sense in virtually every scenario.

5. Create a Methodology for Review and Production of Documents

Once the scope of what the company must produce is relatively clear, counsel must develop a plan for how the documents will be gathered and produced. Efforts invested on the front end—making clear the methodology of how documents will be searched for, reviewed and produced—will pay huge dividends down the line. Few

outcomes are more frustrating to a lawyer, or more infuriating to a client, than having to repeat steps in the subpoena response process.

Depending on the scope of the subpoena and the client's financial wherewithal, counsel may be heavily or hardly involved in the process of gathering and reviewing documents. Regardless, counsel should endeavor to ensure uniformity, and confirm that all individuals gathering and reviewing documents for production are applying the same standards. Counsel might also consider vetting its proposed review and production methodology with the government before investing substantial efforts in review and production: better for everyone to be on the same page at the outset, with the ability to negotiate and adjust as necessary, than for time and money to be wasted due to a misalignment of expectations and performance.

Counsel should also be mindful that the government may demand detail—via testimony under oath—about how documents were searched for and produced. The concern underlying this request is that documents exist within the subpoenaed party's possession, custody or control, but their contents were not reviewed either because they were carelessly overlooked or because someone purposefully decided not to expend the effort to do so. In the grand jury context, accounting for the production process involves presenting a witness, designated as the “custodian of records” of the entity, to provide the necessary details of the document production effort. If required to testify, that witness must be prepared to provide information on topics including:

- where and how the entity stores documents;
- which documents and other information are maintained;
- how available materials were searched to determine if responsive documents existed;
- who participated in the search for responsive documents;
- what measures were employed to ensure that potentially responsive documents were not destroyed, altered or otherwise not produced in the original format;
- whether the entity expected to find certain documents but did not; and
- whether claims of privilege were being made as to any otherwise responsive documents.

Not every company employee can fulfill the obligations of the custodian of records, so counsel should be circumspect in identifying potential candidates. The individual chosen should be prepared with the understanding that he or she will serve as the voice of the company in the grand jury.

6. Prepare Testifying Witnesses

However little experience counsel may have with the grand jury process, the client will most likely have even less. Because the errors associated with a lack of preparation can be amplified and misinterpreted in the grand jury context, it is absolutely essential that counsel take the time to prepare those witnesses who will testify before the grand jury. This means undertaking a comprehensive and painstaking review of both the procedural and substantive aspects of the process.

Counsel should not only review relevant factual information with the client, but also explain basic concepts such as how the grand jury functions, how the questioning will occur and the ability of the witness to leave the grand jury room to confer with

counsel. Testifying before the grand jury is unlike anything most civilians—particularly those who have had limited interaction with the judicial system—will ever experience. Taking the time to explain the process goes a long way toward removing uncertainties and reducing the stress otherwise caused by having to testify.

As part of this effort, counsel should take pains to make clear the witness's overriding obligation: to tell the truth. If a truthful answer would tend to incriminate the witness, the solution is invocation of the privilege against self-incrimination, not providing a non-truthful answer. While this (hopefully) seems obvious to every lawyer, it may not be to clients. Counsel who fails to make clear that a witness who testifies falsely in the grand jury creates (or compounds, as the case may be) serious problems has failed in virtually every facet of the representation. Whatever methods are required to convey this message—repetition, detailed explanation of the consequences, mock questioning designed to expose such intentions on the client's part—should be employed.¹⁹ The potential ramifications of a witness testifying falsely are simply too great.

Conclusion

Navigating a client through the process of responding to a federal grand jury subpoena can be a challenging process. The prospect of incurring the government's wrath for doing too little to respond weighs heavily, as does the possibility of inviting the client's dissatisfaction for doing too much. Beyond the financial concerns, counsel must be mindful of the scope of the client's exposure and constantly evaluate how strategic choices impact possible outcomes.

The task of representing a client in this context is not an impossible one, though, even for those who lack substantial experience in the grand jury matters. Despite the potential pitfalls which mark the legal landscape, reliance on certain core principles can guide counsel through the process. Understanding the importance of vigilance in gathering information, both from the client and from outside sources, recognizing the need to develop a plan at the outset and modify it as circumstances warrant, establishing and maintaining a credible dialogue with the government and taking the time to prepare witnesses for testimony are vital elements in fulfilling counsel's responsibilities. By approaching the task of representing those subpoenaed to the grand jury with these considerations in mind, counsel will be best equipped to safeguard the best interests of their clients. | [AL](#)

Endnotes

1. Fed. R. Crim. P. 17(a), [c][1]
2. Fed. R. Crim. P. 17(c)[2]; *see, e.g., United States v. Burgeson*, 425 F.3d 1221, 1225 (9th Cir. 2005) (affirming quashal of subpoena to target's attorney where information sought was unnecessary); *In re Grand Jury Matters*, 751 F.2d 12, 16 (1st Cir. 1984) (upholding quashal of subpoenas to defense attorneys where there intended to harass and impair attorneys' ability to defend clients).
3. *United States v. Morton Salt Co.*, 338 U. S. 632, 642-643 (1950).
4. *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972).
5. *R. Enterprises, Inc.*, 498 U.S. at 301.
6. *United States v. Calandra*, 414 U.S. 338, 343-45 (1974).
7. *United States v. R. Enterprises*, 498 U.S. 292, 297, 301 (1991).


8. *Id.* at 301 (1991).
9. Justice Department guidelines, drawing on reporting cases, proscribe using the grand jury “solely for pre-trial discovery or trial preparation.” United States Attorney’s Manual, § 9-11.120.
10. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 574 (1976) (recognizing right of grand jury witness to invoke privilege against self-incrimination); *In re Grand Jury Subpoena (Bierman)*, 788 F.2d 1511, 1512 (11th Cir. 1986) (upholding assertion of attorney-client privilege in grand jury); *In re Witness before Grand Jury*, 791 F.2d 234, 236-37 (2d Cir. 1986) (affirming validity of spousal privilege claim in grand jury).
11. Under Fed. R. Crim. P. 6(e), an attorney for the government “must not disclose a matter occurring before the grand jury” without prior approval from the court.
12. The grand jury subpoena will typically identify the individual prosecutor handling the case in the lower left right corner. In the event only the U.S. Attorney’s name is listed, simply contact the U.S. Attorney’s office, provide the subpoena number and ask to be directed to the appropriate individual.
13. United States Attorney’s Manual, § 9-11.151.
14. *Id.*
15. A joint defense agreement is a mechanism that allows parties with common interests to extend the scope of the attorney-client privilege in order to share information amongst them. *See United States v. Schwimmer*, 892 F. 2d 237, 243 (2d Cir. 1989). While such agreements need not be reduced to writing, the Eleventh Circuit has recommended doing so in order to “allow[] each defendant the opportunity to fully understand his rights prior to entering into the agreement.” *United States v. Almeida*, 341 F.3d 1318, 1326 n. 21 (11th Cir. 2003).
16. Under the Fifth Amendment, “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const., Amdt. 5. Acknowledgement of wrongdoing is not a prerequisite to asserting this protect. As the Supreme Court has held, “one of the Fifth Amendment’s basic functions . . . is to protect innocent men . . . who might otherwise be ensnared by ambiguous circumstances.” *Ohio v. Reiner*, 532 U.S. 17, 21 (2001).
17. *See Braswell v. United States*, 487 U.S. 99, 105 (1988) (“a corporation has no Fifth Amendment privilege”).
18. The grand jury has the ability to demand production of original documents, but also the discretion to accept copies. In most situations, prosecutors are willing to accept copies, especially when produced in electronic format. Regardless of how the documents are produced, in all but the most unusual situations the cost of production (as distinguished from travel costs and witness fee for testifying) are borne by the subpoena recipient.
19. Comprehensive review of the issues involved in preparing a witness to testify exceeds the scope of this article. Those who seek to improve their understanding of those issues would do well to review literature on the subject, including the collected works of the foremost authority on the topic: Daniel I. Small of Holland & Knight, LLP. Attorney Small has published and spoken frequently on the issue, and his efforts serve as an invaluable resource to those lawyers representing testifying witnesses.

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U. S. Supreme Court Resolves Bankruptcy Circuit Split in Favor of Secured Creditors: Holds Credit-Bidding May Not Be Denied

By Eric L. Pruitt and Scott S. Frederick

“If you find yourself in a hole, stop digging,”

quipped Will Rogers.¹ Luckily for secured creditors, the United States Supreme Court’s decision in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank* allows just that.² Rather than deepen their predicament by throwing good money after bad, secured creditors facing cram-downs can credit-bid in a bankruptcy sale of assets through a plan of reorganization. *RadLAX* settles a circuit split on the cramdown issue and, in today’s bleak economic climate, provides a bright spot for secured creditors.

The story of the *RadLAX* case is not unfamiliar or unlikely. The debtors owned an airport hotel and parking garage, which was pledged as collateral for a \$142 million loan. Battered by the tough economy and facing insolvency, the debtors filed for Chapter 11 bankruptcy in 2009. The debtors ultimately proposed a plan of reorganization with a stalking horse bidder that expressly prohibited secured creditors from “credit-bidding” at the auction and, instead, required them to bid cash.

Why does this matter? For secured creditors, bidding cash may be bad business or even impossible. Few creditors desire to sink new money into bankrupt ventures. Plus, creditors have their own cash flow issues that may prevent them from bidding cash in bankruptcy auctions—especially government creditors with limited appropriations authority.

This often leaves third parties to buy the properties at auction at deep discounts,

forcing secured creditors to satisfy themselves with returns far below the collateral’s full value. In contrast, if creditors are allowed to credit-bid, they can step in and bid the amount of their lien.³ Often, they can take the property without additional cash outlays, thus protecting themselves from being shortchanged by opportunistic third parties.

RadLAX tells us once and for all that, in Chapter 11 plans of reorganization, debtors cannot stop creditors from credit-bidding.⁴ How did we get here, though? The path begins in Chapter 11 of the Bankruptcy Code⁵ and specifically in 11 U.S.C. § 1123 and 11 U.S.C. § 1129.⁷ Under Chapter 11, bankruptcy cases follow a “plan,” typically proposed by the debtor, which divides claims against the debtor into separate ‘classes’ and specifies the treatment each class will receive. Generally, a bankruptcy court may confirm a Chapter 11 plan only if each class of creditors affected by the plan consents.⁷ If creditors do not consent, courts may still confirm the plan—colloquially called a “cramdown” plan—“if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims.”⁸

To be fair and equitable to a secured creditor, a cramdown plan must satisfy one of three requirements in Bankruptcy Code § 1129(b)(2)(A). That means (i) the creditor must be able to retain a lien on the property⁹; (ii) if the property is sold free of the original lien, the creditor must be able to credit-bid at the sale or otherwise take a lien on the sale proceeds¹⁰; or (iii) the plan must provide the secured creditor with the “indubitable equivalent” of its claim¹¹.

Prior to *RadLAX*, courts disagreed on how to read these requirements. In *In re Philadelphia Newspapers, LLC*, for example,

the Third Circuit Court of Appeals focused on the statute's use of "or" and construed the requirements as alternatives.¹² A debtor could *choose* one without having to satisfy the others.¹³ Even if a debtor conducted a sale (as in subsection (ii)), it need not allow credit-bidding as long as it permitted the secured creditor to receive the indubitable equivalent of its claim (as in subsection (iii)). Cash payouts, liens on real estate and exchanges of collateral may all serve as indubitable equivalents, meaning creditors had no right to credit-bid if those or other alternatives sufficed.¹⁴

In reaching this conclusion, the Third Circuit rejected the argument that subsection (ii) – a narrow provision – should control subsection (iii)¹⁵ – a catchall – despite the interpretive canon that specific provisions govern general ones.¹⁶ Looking to *Varity Corp. v. Howe*¹⁶ for support – a Supreme Court case holding that a specific provision of ERISA § 502(a) did not limit a general one – the court said that the Bankruptcy Code provides "no statutory basis to conclude that [subsection (ii)] is the only provision under which a debtor may propose to sell its assets free and clear of liens."¹⁷

Congress, the court reasoned, may have instead included "the indubitable equivalence prong [of subsection (iii) to] intentionally le[ave] open the potential for yet other methods of conducting asset sales, so long as those methods sufficiently protected the secured creditor's interests."¹⁸ Since they are distinct alternatives, one

section cannot govern the other. Furthermore, the court concluded, allowing subsection (ii) to restrain subsection (iii) would cause "an outcome at odds with the fundamental function of the asset sale, to permit debtors to 'provide adequate means for the plan's implementation.'"¹⁹

Similarly, in *In re Pacific Lumber Co.*, the Fifth Circuit found that secured creditors had no right to credit-bid at a sale.²⁰ Stressing substance over form, the court read Bankruptcy Code § 1129(b)(2)(A) flexibly, concluding that a debtor need only satisfy one of the three requirements to be fair and equitable. If a debtor's plan provided the creditor with the indubitable equivalent of its claim, the creditor had no right to credit-bid.

Like *Philadelphia Newspapers*, the court in *Pacific Lumber* held that the statute's use of "or" meant that it provided debtors with three alternatives.²¹ And because the statute prefaced them with the word "includes," the court concluded that these alternatives were "not even exhaustive."²² There may be times when none of the options provided a fair and equitable result, at which point debtors would need to propose yet other ways to satisfy the Bankruptcy Code.²³ Under *Pacific Lumber's* facts, the court nevertheless found that the debtor did not need to propose additional options; instead, by paying the secured creditor the cash value of the collateral, the debtor gave it the indubitable equivalent of its claim.²⁴ This was true, according to the court, even if the secured

creditor "forfeited the possibility of later increases in the collateral's value," since the "Bankruptcy Code . . . does not protect a secured creditor's upside potential; it protects the 'allowed secured claim.'"²⁵

In issuing their decisions, the Third and Fifth circuits went against the clear weight of authority at the time. Bankruptcy courts in places as diverse as New York, Florida, California, Oregon, and Pennsylvania had all ruled that Bankruptcy Code § 1129(b)(2)(A) gave secured creditors a right to credit-bid at auction.²⁶ The New York court in *In re Kent Terminal Corp.* stated, for example, that "[i]f a plan proposes the sale of a creditor's collateral free and clear of liens, the lienholder has the unconditional right to bid in its lien."²⁷ Likewise in *In re SunCruz Casinos, LLC*, the Florida court held that a debtor's attempts to eliminate credit-bidding violated the plain language of § 1129(b)(2)(A)(ii) which expressly gave creditors that right.²⁸

The Seventh Circuit agreed with the bankruptcy courts in *In re River Road Hotel Partners, LLC*, a 2011 case that declined to follow *Philadelphia Newspapers* and *Pacific Lumber* and upheld a secured lender's right to credit-bid when property is sold under § 1129(b)(2)(A). The resulting circuit split helped ensure Supreme Court attention to the matter.

With its decision in *RadLAX*, the Court put an end to the debate. In a unanimous opinion²⁹ that stands out for its brevity and clarity, the Court stated that secured creditors do have a right to credit-bid based on a simple statutory construction of § 1129(b)(2)(A).³¹ Describing the debtors' reading of § 1129(b)(2)(A), as adopted by the Third and Fifth circuits, as "hyper-literal and contrary to common sense," the Court instead applied the interpretive canon that the specific governs the general – the very canon rejected by the Third Circuit.³² Noting that § 1129(b)(2)(A)(ii) applies specifically to sales of secured assets while § 1129(b)(2)(A)(iii) applies to all cramdown plans generally, the Court held that subsection (ii) must take effect when there is a sale of secured assets in order to give secured creditors a right to credit-bid.³³ Only when subsection (ii) does not apply will subsection (iii) come into play as an option to provide a secured creditor with the indubitable equivalent of its claim.

Notably, the Court's opinion avoids taking a stand on related bankruptcy issues,



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such as whether credit-bidding supports the goals of the bankruptcy system.³⁴ Those issues, the Court says, are for Congress to decide.³⁵ What the Court does take a stand on is nevertheless important—that secured creditors have a right to credit-bid at bankruptcy auctions. For creditors who want to protect their collateral and keep their cash, this is a decision they can stand behind. | **AL**

Endnotes

1. THE FRIAR'S CLUB BIBLE OF ROASTS, TOASTS, POKES AND JOKES 316 (Nina Colman ed., 2001).
2. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. ____ (2012).
3. *RadLAX*, 566 U.S. at 3.
4. *Id.* at 10.
5. 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code").
6. See generally 11 U.S.C. § 1123, 11 U.S.C. § 1129.
7. *RadLAX*, 566 U.S. at 2.
8. 11 U.S.C. § 1129(b).
9. 11 U.S.C. § 1129(b)(2)(A)(i). (insert full text?)
10. 11 U.S.C. § 1129(b)(2)(A)(ii). (insert full text?)
11. 11 U.S.C. § 1129(b)(2)(A)(iii). (insert full text?)
12. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 305 (3d. Cir. 2010).
13. *Id.*
14. *Id.* at 311.
15. *Id.* at 307.
16. *Id.*
17. *Varity Corp. v. Howe*, 516 U.S. 489 (1996).
18. *In re Philadelphia Newspapers, LLC*, 599 F.3d at 308.
19. *Id.*
20. *Id.* at 309 (quoting 11 U.S.C. § 1123(a)(5)(D))
21. *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009).
22. *Id.* at 245.
23. *Id.* In particular, the court notes that, "The introduction to § 1129(b)(2) states that the 'condition that plan be fair and equitable includes the following requirements The Bankruptcy Code specifies that the term 'includes' is not 'limiting.'" *Id.* (quoting 11 U.S.C. § 102(3)).
24. *Id.*
25. *Id.* at 246-49.
26. *Id.* at 247.
27. *In re Matrix Dev. Corp.*, 2009 WL 2169717 *8 (July 16, 2009 Bankr.

D. Or.); *In re SunCruz Casinos, LLC*, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003); *In re River Village*, 181 B.R. 795, 805 (E.D. Pa. 1995); *In re Kent Terminal Corp.*, 166 B.R. 555, 566-567 (Bankr. S.D.N.Y. 1994); *In re Orfa Corp. of Philadelphia*, 1991 WL 225985, *6 (October 31, 1991 Bankr. E.D. Pa.); *H & M Parmely Farms v. Farmers Home Admin.*, 127 B.R. 644, 648 (D.S.D. 1990); *In re 222 Liberty Associates*, 108 B.R. 971, 978 (Bankr. E.D. Pa. 1990); *In re Realty Investments, Ltd.*, 72 B.R.

- 143, 146 (Bankr. C.D. Cal. 1987).
 28. *Kent Terminal Corp.*, 166 B.R. at 566-567.
 29. *In re SunCruz Casinos*, 298 B.R. at 839.
 30. Kennedy, J. recused.
 31. *RadLAX*, 566 U.S. ____
 32. *Id.* at 5.
 33. *Id.* at 7, 9.
 34. *Id.* at 10.
 35. *Id.*

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The Malignant Mystique of “Standing”

By Jerome A. Hoffman

I believe we must take care not to convert every failure to state a claim [under Rule 12(b)(6)] into a jurisdictional standing issue—else every time a court addresses the legal issue of whether a plaintiff’s theory of relief is cognizable under Alabama law, a jurisdictional issue will be created. . . .

—Murdock, J.

Langham v. Wampol¹

Occasionally, a judge-made invention turns cancerous. Certainly “standing” has, at least in Alabama, but probably much more widely. So much so that “standing”—noxiously hybridized with runaway notions about the legitimate domain of Rule 12(b)(1)—threatens to swallow Rule 12(b)(6) whole.

I cherish my grievances with the abracadabra the United States Supreme Court worships as “standing.” It comprises nothing not more easily understood under the rubric of Rule 12(b)(6). And it should never have been confounded with the rightful realms of Rule 12(b)(1) and void judgments. A proper understanding of “standing” encompasses the beneficial view that “standing” properly applied may extend a grievant’s access to federal judicial relief in public law cases beyond that afforded to one “in the position of a traditional Hohfeldian plaintiff.”² This, of course, also bears discussion most appropriately under Rule 12(b)(6). Let all that rest for now, though.

The grievance I now crave “standing” to assert here is this: Our Alabama state appellate courts have not only adopted the federal language of “standing”—although, with certain possible exceptions,³ it can never bind them—but have catalyzed its spread into parts of the *corpus juris* where it has no healthy part to play.

The Alabama Supreme Court has arrived at its insidious trap for plaintiffs and their counsel by a two-step process. First, it has confounded standing with subject matter jurisdiction. Second, it has confounded standing with a number of challenges to the merits of a controversy over which trial courts have unquestionably had subject matter jurisdiction. Among these are the Rule 12(b)(6) motion to dismiss on the merits for failure to state a claim upon which relief can be granted, or the Rule 17(a) motion to dismiss or substitute on the ground that the present plaintiff is not the real party in interest. Occasionally, Rule 17(b) and Rule 19(a) have, unfortunately, also been dragged into the mix.

Confounding Standing and Subject Matter Jurisdiction

The most problematic, perhaps, of the cases in point is *State v. Property at 2018 Rainbow Drive*.⁴ In that case, six members of the Alabama Supreme Court signed on to an opinion saying, “Because the City had no standing, the trial court had no subject-matter jurisdiction [to entertain a pleading purporting to amend a complaint. A complaint filed by a party without standing cannot relate back to the filing of the original complaint, because there is nothing ‘back’ to which to relate], and, consequently, [the trial court had] no alternative but to dismiss the action.”⁵

The opinion fails to state enough record facts to determine if even the disposition of the appeal was justified. Everyone agreed that the City had no statutory authorization to bring this forfeiture action. Why the State of Alabama needed to rely upon being brought in by amendment or upon the doctrine of relation back of amendments does not appear in the opinion. What need the opinion’s adherents found to equate lack of statutory authorization with lack of “standing” also does not appear. Lack of statutory authorization best supports analysis as the lack of a claim upon which relief can be granted, that is, a claim under Rule 12(b)(6), not a claim over which the forum court lacks subject matter jurisdiction, that is, not a claim under Rule 12(b)(1). To invoke the word “standing” with all of its federal constitutional law baggage, creates the risk that this public law proposition will spread to private law contexts where it never belongs, rendering the filing of ill-conceived but not irredeemable private law complaints not merely mistaken acts, reparable by amendment, but void acts, not reparable by amendment. The proposition is dangerous because, by the same kind of casual thinking, the word “standing” unnecessarily invoked in the proposition can be erroneously equated with “real party in interest” or “failure to state a claim.” This simple, though doctrinally unjustified, extension could swallow up Rule 12(b)(6), Rule 17 and the whole law of amendments.

In *Nix v. McElrath*⁶, as another example, the Alabama Supreme Court said that

“standing,” like jurisdiction, is necessary for any valid judgment. So must a plaintiff’s complaint allege a claim upon which relief can be granted, that is, the plaintiff’s complaint must withstand a motion to dismiss under a Rule(b)(6) motion before having any hope of obtaining a valid judgment?

Confounding Standing with a Number of Challenges to the Merits of a Controversy over Which Trial Courts Have Unquestionably Had Subject Matter Jurisdiction

Some Alabama appellate decisions have invoked “standing” where they should have relied upon Rule 12(b)(6). In *Carey v. Howard*,⁷ for example, it said: “[S]tanding turns on whether the party has suffered an actual injury and whether that injury is to a legally protected right,” but stating a claim under Rule 12(b)(6) turns on those same two prerequisites! And in *The Cadel Co. v. Shabani*,⁸ it said: “Because the Cadel Company lacked standing to maintain the ejectment [that is, private law] action [no mention of Rule 12(b)(6) or Rule 17(a)!], the trial court lacked subject-matter jurisdiction over this case, and its resulting judgment is therefor void.” In *Dunning v. New England Life Ins. Co.*,⁹ the Court said that the insured’s employees lacked “standing” to sue the insurer for breach of contract and fraud—another private law action. It did not even cite Rule 12(b)(6), which would have been the proper motion to challenge the plaintiff. Other decisions have also relied upon “standing” alone.¹⁰ In *Newson v. v. Protective Industrial Ins. Co.*,¹¹ the Court reversed the circuit court’s order granting defendant’s Rule 12(b)(6) motion as to all but one count, because plaintiffs had “standing” to assert those counts. In *Nix v. McElrath*¹², the Alabama Supreme Court said that “standing,” like jurisdiction, is

necessary for any valid judgment. So, must a plaintiff’s complaint allege a cause upon which relief can be granted, that is, the plaintiff’s complaint must withstand a motion to dismiss under a Rule 12(b)(6) motion? In *Langham v. Wampol*¹³, majority of the Alabama Court of Civil Appeals also got it wrong.

Other Alabama appellate decisions have invoked “standing” where they should have relied upon Rule 17(a).¹⁴ Others have treated “real party in interest” and “standing to sue” as synonyms.¹⁵ To say, though, that a person has *standing* is to say that that person is a *proper party* to bring the action. And to be a *proper party*, the person must have a *real tangible interest in the subject matter of the lawsuit*. And that’s just what a plaintiff must have to state a claim upon which relief can be granted. Consider, also, the following examples. In *Town of Cedar Bluff v. Citizens Caring for Children*,¹⁶ the Alabama Supreme Court said: “To say that a person has *standing* is to say that that person is the *proper party* to bring the action.” In *Frazer v. Alabama State Policemen’s Ass’n*,¹⁷ the court spoke uncritically of both “*real party in interest*” and “*standing*”. And in *Nix v. McElrath*,¹⁸ the Alabama Supreme Court said: “To say that a person has standing is to say that that person is the proper party to bring the action.”

Other bad examples of these regrettable misuses of the concept of “standing” unfortunately continue to abound.¹⁹ Indeed, in one breath-taking case, for aught that appears in the report, the appellants mischaracterized the appellee’s failure to state a claim under Rule 12(b)(6), or alternatively, the appellee’s failure to be the real party in interest under Rule 17(a), as a lack of capacity under Rule 17(b).²⁰ The example dramatizes the truism that mislabeling can have consequences, and in this case, arguably, fatal consequences. The appellants “raised this issue for the first time in their post-trial motion.”²¹ Had they properly identified their objection as a failure to state, and subsequently to prove, a claim upon which relief could be granted, they would have asserted it as a ground in support of a motion for JNOV.²² Thus, properly characterized, the court of civil appeals could not have brushed it off as waived because untimely raised.²³

One expects to find lack of “standing” asserted most justifiably, perhaps, in public law actions, for example, actions challenging the constitutionality of statutes²⁴ or asserting a personal constitutional right.²⁵ One finds it as well in actions challenging the decisions of administrative agencies²⁶ and county commissions²⁷ and also in actions challenging the validity of annexation ordinances²⁸ and other public laws generally.²⁹ Additional possible places to find it include in other public law cases in which a court might better say that the plaintiff lacked a claim upon which relief can be granted under the statutory source relied upon.³⁰

What’s the Solution?

First, the Alabama Supreme Court must recognize the problem: The concept of “standing” has no legitimate part to play in private law cases. It might have a place in public law cases, although I’m not ready, at present, to concede even that. Although there may be other members of the court who have done so (but less than a majority), research has revealed only one present member of the court who has spoken specifically to it. Although the majority of the court of civil appeals once more got it wrong in *Langham v. Wampol*,³¹ Judge Murdock, in his partial dissent, got it right. His words bear repetition: “I believe we must take care not to convert every failure to state a claim [under Rule 12(b)(6)] into a jurisdictional standing issue—else every time a court addresses the legal issue of whether a plaintiff’s theory of relief is cognizable under Alabama law, a jurisdictional issue will be created . . . [Contrary to the majority’s opinion,] the trial court had jurisdiction to consider the Langham’s claims. Those claims, however, simply were not viable under Alabama law. They were therefore due to be dismissed under Rule 12(b)(6) for failure to state a claim [not under Rule 12(b)(1) for lack of subject-matter jurisdiction]. Accordingly, I would affirm, rather than dismiss the appeal from that portion of the trial court’s judgment denying the Langham’s individual claims arising from the malicious persecution of their son.”³²

If it so wishes, the court need not acknowledge its misunderstanding in print. It need only quietly follow the good

example set in *Rhodes Mutual Life Insurance Company v. Moore*.³³ Although the parties had asked the court to determine whether a co-plaintiff had “standing” to join in an action to recover damages for the desecration of his great-great-grandfather’s grave (a private law action),³⁴ the court eschewed the use of that term, writing instead of the contested party’s “right to bring an action.”³⁵ That is all the present court need do: kill the cancer with silence. | AL

Endnotes

- 902 So. 2d 58, 62-63 (Ala. Civ. App. 2004).
- Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 part 2 STAN. L. REV. 1371, 1464 (April 1988).
- Perhaps when called to rule upon the federal constitutionality of a federal statute, or less supportably perhaps, the federal constitutionality of a state statute.
- 740 So. 2d 1025 (Ala. 1999).
- 740 So. 2d at 1028 (*italics* and brackets added).
- 952 So. 2d 1107, 1110 (Ala. 2006).
- 950 So. 2d 1131, 1135 (Ala. 2006).
- 950 So. 2d 277, 279 (Ala. 2006).
- 890 So.2d 92 (Ala. 2003).
- See, e.g., *Mason v. Prudential Ins. Co.*, 783 So. 2d 821, 823 (Ala. 2000); *McLaughlin v. Pannell Kerr Forster*, 589 So. 2d 143 (Ala. 1991).
- 890 So. 2d 81 (Ala. 2003).
- 952 So. 2d 1107, 1110 (Ala. 2006).
- 902 So. 2d 58, 62-63 (Ala. Civ. App. 2004).
- See, e.g., *RLI Ins. Co. v. MLK Ave. Redevelopment Corp.*, 925 So. 2d 914, 918-19 (Ala. 2005).
- See, e.g., *Nix v. McElrath*, 952 So. 2d 1107, 1110 (Ala. 2006).
- 904 So. 2d 1253, 1256 (Ala. 2004).
- 346 So. 2d 959, 961 (Ala. 1977).
- 952 So. 2d 1107, 1110 (Ala. 2006).
- Lowe v. American Medical Internat’l*, 494 So. 2d 413, 415 (Ala. 1986) (Beatty, J., concurring); *City of Tuscaloosa v. Alabama Retail Assoc.*, 466 So. 2d 103, 107 (Ala. 1985) (repeating but rejecting appellant’s argument); *Green v. Bradley Const., Inc.*, 431 So. 2d 1226, 1229 (Ala. 1983) (opinion speaks uncritically of plaintiff’s lack of “standing to sue” in a stockholder’s derivative suit); *Alabama Hosp. Ass’n v. Dillard*, 388 So. 2d 903, 907-08 (Ala. 1980) (Beatty, J., dissenting).
- Rikard v. Lile*, 622 So. 2d 413 (Ala. Civ. App. 1993). The appellants asserted on appeal that the appellant “was without capacity to bring the action because the evidence was undisputed that she was not the owner of the property.” *Id.* at 414.
- Rikard v. Lile*, 622 So. 2d 413 (Ala. Civ. App. 1993).
- Only if they had moved for a directed verdict at the close of all the evidence, of course, but it seems reasonable to suppose, customary practice being what it is, that they did so.
- 622 So. 2d at 414: “The lack of capacity to sue is an affirmative defense which must be specifically pled. Failure to timely raise the defense constitutes waiver.”
- See, e.g., *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253 (Ala. 2006) (“[A] litigant has no standing to assert a vagueness claim against a statute if that litigant’s conduct is clearly proscribed by that statute.”); *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783 So. 2d 792 (Ala. 2000).
- See, e.g., *Kevin Sharp Enters., Inc. v. State ex rel. Tyson*, 923 So. 2d 1117, 1118 (Ala. Civ. App. 2005).
- See, e.g., *Auburn Medical Center, Inc. v. Alabama State Health Planning & Development Agency*, 848 So.2d 269 (Ala. Civ. App. 2002).
- See, e.g., *Fort Morgan Civic Ass’n, Inc. v. Baldwin County Commission*, 890 So. 2d 139, 144 (Ala. Civ. App. 2003).
- See, e.g., *Town of Elmore v. Town of Coosada*, 957 So. 2d 1096 (Ala. 2006) [At page 1102, the opinion offers two competing, and arguably inconsistent, formulas concerning how a court determines when a party has “standing.”].
- See, e.g., *Ex parte Richardson*, 957 So. 2d 1119 (Ala. 2006) (action for declaratory judgment that term of former member of Auburn University Board of Trustees had not expired).
- See, e.g., *Ex parte HealthSouth, Corp.*, 974 So.2d 288 (Ala. 2007) (one of many Alabama cases unfortunately holding standing to be jurisdictional; *Sumlin Construction Co. v. Taylor*, 850 So.2d 303 (Ala. 2002).
- 902 So. 2d 58, 62-63 (Ala. Civ. App. 2004).
- 902 So. 2d 58 at 69-70 (Ala. Civ. App. 2004).
- 586 So. 2d 866 (Ala. 1991).
- 586 So. 2d 866 at 867.
- 586 So. 2d 866 at 868.



J. Anthony McLain



Advertising on Groupon and Similar Deal-of-the-Day Websites

QUESTION:

May an attorney use websites such as Groupon or other “daily deal” websites to market discounted legal services in the form of redeemable certificates to prospective clients?

ANSWER:

No. The use of daily deal websites, such as Groupon, violates or potentially violates a number of rules of professional conduct.

DISCUSSION:

Recently, the Office of General Counsel has been asked to opine on the ethical propriety of “daily deal” websites, such as Groupon, as a marketing tool for law firms. These “daily deal” websites typically contact the consumer via e-mail and give the consumer the opportunity to purchase a certificate for services or products from a retailer at a discounted rate of 50 percent or greater. The proceeds from each sale are typically divided in a 50-50 split between the website and the retailer. For example, a law firm would agree to sell a coupon entitling the purchaser to \$500 worth of legal

services for a discounted rate of \$250. The purchaser or prospective client would pay the website \$250 and would receive a certificate for \$500 to redeem for legal services with the law firm. The certificate may or may not have an expiration date. From the sale, the website would keep 50 percent of the revenue, \$125 in this case, and remit the remaining \$125 to the law firm.

Several bar associations have recently issued opinions concerning the ethical propriety of lawyers using these “daily deal” websites. New York, North Carolina and South Carolina have issued ethics opinions approving the use of websites like Groupon, while Indiana has issued an opinion disapproving of them.¹ All acknowledge, however, that marketing discounted legal services through these sites is fraught with ethical landmines. First and foremost among the issues raised is whether the use of Groupon to market and sell legal services constitutes the sharing of legal fees with a non-lawyer in violation of Rule 5.4(a), *Ala. R. Prof. C.*²

In Formal Ethics Opinion 10, North Carolina found that the portion of the

fee retained by the website is merely an advertising cost since “it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee . . .” In Ethics Advisory Opinion 11-05, South Carolina also determined that the website’s share of the fee paid by the purchaser was an “advertising cost” and not the sharing of a legal fee with a non-lawyer.³ The Disciplinary Commission finds these arguments unconvincing. In *Alabama State Bar Association v. R.W. Lynch Company, Inc.*, the Supreme Court of Alabama addressed whether a television advertisement touting the “Injury Helpline” was a for-profit referral service in violation of Rule 7.2(c), *Ala. R. Prof. C.* 655 So. 2d 982 (Ala. 1995). While there is no claim that sites like Groupon are for-profit referral services, *R.W. Lynch* is instructive on whether the fees charged by such sites are truly “advertising fees.”

The supreme court concluded that R.W. Lynch’s “Injury Helpline” was not a “for-profit” referral system but rather a permissible form of group advertising. In reaching its decision, the court noted that lawyers who participate in the helpline pay a flat-rate fee for the advertising, regardless of the number of calls forwarded to them. *Id.* Pursuant to Rule 7.2(c), a lawyer “may pay the reasonable cost of any advertisement”. In this instance, Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website’s traffic. Instead, as noted by the Indiana State Bar Ass’n Ethics Committee, Groupon and other sites take a percentage (usually 50 percent) of each purchase. The percentage taken by the site is not tied in any manner to the “reasonable cost” of the advertisement. As a result, the Disciplinary Commission finds that the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer.

The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer’s trust account until earned. *See Formal Opinion 2008-03*. However, under the fee model employed by Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase, making it impossible for the lawyer to place the entire unearned legal fee into trust as required by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a) [Fees] and/or failing to return the client’s property as mandated by Rule 1.16(d) [Declining or Terminating Representation].

Another ethical dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer’s former and current clients is great.

Additionally, the Disciplinary Commission is concerned that the use of such daily deal sites could result in violations of Rule 1.1 [Competence] and/or Rule 1.3 [Diligence]. Because there is no meaningful consultation prior to the payment of legal fees, the purchaser may be retaining a lawyer who does not possess the requisite skills or knowledge necessary to competently represent the purchaser. There is no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired.

Likewise, the lawyer is also unable to judge whether he will be able to diligently represent the client. Unless the lawyer places restrictions on the type of services offered and the number of deals available for purchase, the lawyer may find that his caseload becomes unmanageable. Rule 7.2(f), *Ala. R. Prof. C.*, provides as follows:

RULE 7.2 ADVERTISING

A lawyer who advertises concerning legal services shall comply with the following:

(f) If fees are stated in the advertisement, the lawyer or law firm advertising must perform the advertised services at the advertised fee, and the failure of the lawyer and/or law firm advertising to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer or law firm advertising shall be bound to perform the advertised services for the advertised fee and expenses for a period of not less than 60 days following the date of the last publication or broadcast.

Pursuant to Rule 7.2(f), a lawyer will be bound to honor all purchases made through sites like Groupon. If a large number of purchases are made through Groupon, the lawyer may not have the time or resources to diligently represent each new client resulting in violations of rules 1.1 [Competence], 1.3 [Diligence], and 1.4 [Communication], *Ala. R. Prof. C.* [RO 2012-01] | [AL](#)



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Paul DeMarco

Constitutional Revision

On November 6, 2012 the citizens of the State of Alabama will have a historic opportunity to amend Article XII and Article XIII of the Alabama Constitution. This opportunity is notable not only because it significantly improves the portions of the Alabama Constitution which relate to banking and corporations, but, more importantly, it will provide momentum to the Alabama Constitution Commission's effort to reshape the constitution.

As more fully discussed in this column in January 2012¹, the legislature created the Constitution Revision Commission in 2011. The Commission is charged with leading the effort to revise the Alabama Constitution on an article-by-article basis. This approach is the only mechanism available to the legislature.²

The article-by-article approach has been successful twice before this. In 1973, Article VI, relating to the judiciary, was revised in an effort led by then Chief Justice Howell Heflin. This approach was followed again in 1996 when Representative Jack Venable led the effort to revise Article VIII, relating to suffrage and elections.

The endeavor to revise Article XII and Article XIII began in 2007, with proposed revised articles being introduced in the legislature each session since. The revisions actually passed one of the houses of the legislature on numerous occasions, but could not get through both houses until 2012. With the installation of the Commission, the effort was re-energized. After some minor tweaking of the proposed revisions to these articles, the Commission recommended their passage and the legislature responded with enormous support by passing both articles with near unanimous votes.

Passage by the legislature of these articles is an important step, but more important is the vote of the people which will occur November 6, 2012. In order for these revised articles to take effect, they must be adopted by the affirmative vote of the citizens of our state. The first step in the process took place June 8th when Secretary of State Beth Chapman certified the proposed constitutional amendments which will appear on the November 6th ballot. That certification placed these revisions as Statewide Amendment 9 and Statewide Amendment 10.

The changes proposed in these two revisions are viewed as non-controversial. They do not in any way affect taxes or property rights. Instead, they update antiquated language, repeal provisions that are no longer necessary and consolidate and streamline the remaining provisions.

Amendment 9–Article XII

Article XII of the Alabama Constitution deals with the governance of corporations. The article is divided into three sections: Municipal Corporations, Private Corporations and Railroads and Canals. The municipal corporations portions of the article are unaffected by the proposed revisions.

The portions of the current Article XII which relate to private corporations and railroads and canals are perfect examples of the antiquated and outdated provisions of the constitution. They provide a glimpse of a time when the corporation was the only type of statutory entity and corporate regulation was predominately the governance of railroads. The current Article includes antitrust provisions which pre-date federal antitrust laws, deal with the use of telegraph lines and one of the sections became moot by its own terms 12 months after ratification.

In today's Alabama, there are a dozen statutory entity types. The revised Article XII would ensure that the governance of these 12 entity types would be more uniform. The regulation of these entity types is governed by the Business and Nonprofit Entity Code contained in Title 10A of the *Alabama Code*. Therefore, there is no longer any need to regulate corporations via the constitution. Many of these provisions are wholly consistent. For example, the requirement that foreign entities register with the secretary of state and maintain a registered agent

is the same. On occasion, however, the constitution dictates a different result than statutory law. One example is Section 232 relating to foreign corporations. Section 232 requires registration. The penalty for failure to do so is that the corporation cannot enforce its contracts. In contrast, non-corporate foreign entities can cure any defect related to registration. This inequity would be fixed by the proposed repeal of Section 232.

In total, 11 of the current 18 sections in Article XII would be repealed, including antiquated and irrelevant provisions. Three of the current sections will be amended to update them. Currently, Section 229 provides that charitable entities cannot be taxed on their shares. Because charitable corporations and entities no longer have shares (as they presumably did when the provision was enacted), the proposed amendment removes this antiquated reference. Section 239 would be amended to remove outdated language about the consolidation of telegraph and telephone companies; as such matters are now generally regulated under federal laws. Section 236 relating to corporations' ability to sue and be sued will be retained by adding it to the end of Section 240.

The full text of the proposed amendments to Article XII can be found on the Constitution Revision Commission's website hosted by the Alabama Law Institute at www.ali.state.al.us. The summary chart below sets forth the disposition of each section in the article.

Section	Short Title	Proposed Disposition
229	Corporate Powers	Amended
230	Cancellation of Corporate Charters	Repealed
231	Forfeiture of Corporate Charters	Repealed
232	Foreign Corporations Doing Business in Alabama	Repealed
233	Business Authorized in Corporate Charters	Repealed
234	Corporate Stock and Bonds	Repealed
235	Eminent Domain	No Change
236	Dues from Private Corporations	Repealed but moved to 240
237	Issuance of Preferred Stock	Repealed
238	Revocation of Corporate Charters	No change
239	Telegraph and Telephone Companies	Amended
240	Corporations Sued Like Natural Persons	Amended to add 236 Text
241	"Corporation" Defined	No change
242	Railroads and Canals	No change
243	Regulation of Railroads	Repealed
244	Free Passes or Discount Tickets	Repealed
245	Rebates or Bonuses	Repealed
246	Future Legislation	Repealed

Section	Short Title	Proposed Disposition
247	Authority of Legislature	Amended
248	Banking Laws To Be General	First Clause Moved to 247(a), Remainder Repealed
249	Money Redeemable in Gold or Silver	Repealed
250	Preference of Creditors in Bankruptcy	Repealed in 1916
251	Duration of Charters	Moved to 247(b)
252	Maximum Rate of Interest	Repealed
253	State as Stockholder	Moved to 247(c)
254	Examination of Banks	Moved to 247(d)
255	Applicability of Article	No Change
255.01	Nonresidents Making Mortgage Loans	Repealed with Repeal of Section 232 & Statutes

Amendment 10–Article XIII

Article XIII of the Alabama Constitution governs banks and banking. Many of the provisions relating to banks are still relevant in today’s environment, but can be stated in a more up-to-date and succinct manner. As such, many of the revisions

to this article are in the nature of cleaning up the article and making it easier to read and understand.

In all, the proposed revisions to Article XIII would repeal or consolidate seven of the nine current sections. One of the major changes would be the repeal of Section 255.01 which relates to nonresidents making mortgage loans. This change is contingent upon the adoption of the amendments to Article XII so that such entities would no longer be subject to the non-curable restrictions if they failed to register with the secretary of state. Also repealed would be the requirement contained in Section 249 that all bills or notes be redeemable in gold or silver.

The full text of the proposed amendments to Article XIII can also be found at www.ali.state.al.us. The summary chart above sets forth the disposition of each section in the article.

November 6, 2012 Election

The importance of the adoption of amendments 9 and 10 on November 6th cannot be overstated: it is critical to constitutional reform efforts in Alabama. The adoption of these two articles moves the Alabama Constitution a significant step forward, both in regards to the substance contained in each and the momentum it will create for the Constitution Reform Commission and its ability to complete an article-by-article rewrite of the constitution.

Judges and attorneys hold a special place of influence in the community. Please use that influence to aide in the passage of amendments 9 and 10. | AL

Endnotes

1. Robert McCurley, Jr., “Legislative Wrap-Up,” *The Alabama Lawyer*, Vol. 73, No. 1, January 2012.
2. See, *State v. Manley*. 441 So.2d 864 (Ala. 1983)(holds that the legislature cannot propose a completely new constitution but can propose amendments article by article).

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About Members

This section announces the opening of new solo firms.

Among Firms

This section announces the opening of a new firm, a firm's name change, the new employment of an attorney or the promotion of an attorney within that firm.

About Members

James A. Abernathy, II announces the opening of **Abernathy Disability Law LLC** at 2117 Jack Warner Pkwy., Ste. 5, Tuscaloosa 35401. Phone (205) 345-8255.

Jon K. Vickers announces the opening of **Jon K. Vickers PC** at 2323 2nd Ave., N., Birmingham 35203. Phone (205) 701-1010.

Robert Johnston has been named assistant general counsel.

The Atchison Firm PC announces that **Chris N. Galanos** has joined the firm.

Kasie Braswell and **Brian Murphy** announce the formation of **Braswell Murphy LLC** at 59 Saint Joseph St., Mobile 36602. Phone (251) 438-7503.

Citrin Law Firm PC announces that **Robert Hedge** has joined the firm.

Among Firms

The U.S. Department of State announces that **Frank Wilson Myers, Sr.** is now the director of field coordination and support in the Interagency Rule of Law Office, U.S. Embassy, Kabul, Afghanistan.

Akridge & Balch PC announces that **Elijah T. Beaver** and **Kimberly D. White** have become associates and **Katherine M. Klos** has become a partner.

The Alabama League of Municipalities announces that **H.**

The Cochran Firm announces that **Tyrone C. Means** and **H. Lewis Gillis** are partners in the Montgomery office and **Kelvin W. Howard**, **Cynthianther L. May** and **Shaun Pryor** have joined the Birmingham office.

Daniell, Upton & Perry PC announces that **L. Blade Thompson** has joined as an associate.

Estes, Sanders & Williams LLC announces that **M. Jeremy Dotson** has joined the firm.

Fischer Scott LLC announces that **Bobby L. Scott** is now a partner and **Martin H. Drake** is an associate.

Hand Arendall announces that **Andrew C. Knowlton** joined as an associate.

Harrison, Gammons & Rawlinson PC announces that **Charles G. Robinson** has joined the firm of counsel.

Johnston Barton Proctor & Rose LLP announces that **John H. McEniry, IV** has been named a partner.

Morgan & Weisbrod LLP of Dallas announces that **Melissa N. Tapp** has joined as an associate.

Porterfield, Harper, Mills & Motlow PA announces a name change to **Porterfield, Harper, Mills, Motlow & Ireland PA**.

Randall K. Richardson and **Bill Pruitt** announce the opening of **Pruitt & Richardson PC** at 113 20th St., N., Pell City 35125. Phone (205) 338-6400.

Rushton, Stakely, Johnston & Garrett PA announces that **Amanda Craft Hines** has joined as an associate.

Sasser, Sefton, Tipton & Davis PC announces that **Bowdy J. Brown** has joined as a shareholder and the firm name is now **Sasser, Sefton, Brown, Tipton & Davis PC**.

Sherrer & Sherrer PC announces it has merged with **Massey, Stotser & Nichols PC** and the firm name now is **Massey, Stotser & Nichols PC**.

Zieman, Speegle, Jackson & Hoffman LLC announces that **Jennifer S. Holifield** has become a member, and **Lester M. Bridgeman, W. Benjamin Broadwater** and **Brian F. Trammell** have become of counsel. | [AL](#)

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I am interested in returning to my hometown in Madison County. I have 13 years of experience in litigation and, since 2009, have managed my own small practice (part-time). The bulk of my experience is in insurance litigation defense. I have conducted numerous hearings and trials in the lower courts and have conducted jury trials. I am well-versed in managing a case and preparing a case for trial from start to finish. I am happy to furnish a resume and references upon request. Contact Monica Jayroe at mjayroelaw@gmail.com or (334) 462-7509.

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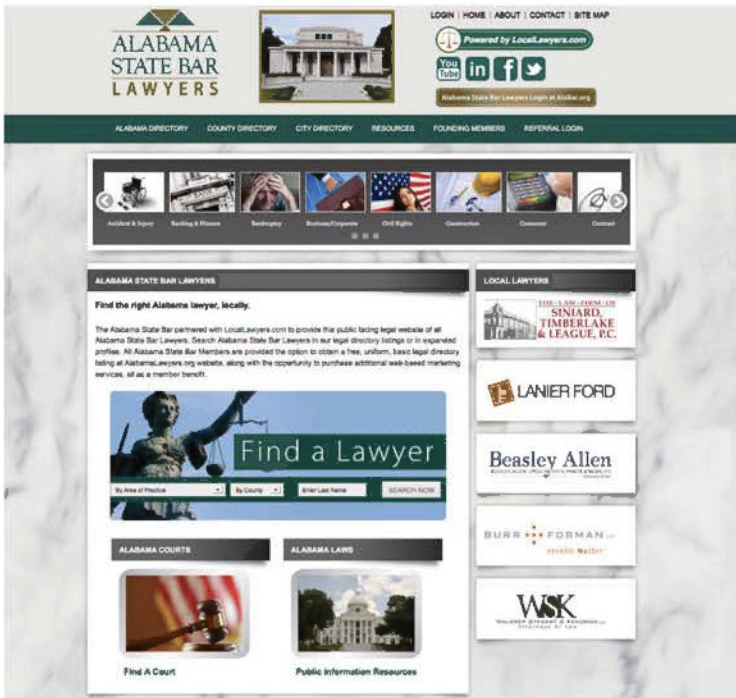
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