


NOVEMBER 2008 • VOL. 69, NO. 6

# THE ALABAMA LAWYER

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*page 443*



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## Winter Calendar 2008

<b>NOVEMBER</b>	<b>6</b>	<b>Professionalism</b> <i>Montgomery</i>
	<b>7</b>	<b>Social Security Disability</b> <i>Birmingham</i>
	<b>14</b>	<b>Bankruptcy Law Update</b> <i>Birmingham</i>
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	<b>21</b>	<b>Employment Law</b> <i>Birmingham</i>
<b>DECEMBER</b>	<b>5</b>	<b>Estate Planning</b> <i>Birmingham</i>
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	<b>9</b>	<b>Alabama Update</b> <i>Huntsville</i>
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	<b>11</b>	<b>Domestic Practice</b> <i>Birmingham</i>
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	<b>17</b>	<b>Law Practice and Depositions: Tips From the Masters</b> <i>Birmingham</i>
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	<b>19</b>	<b>Alabama Update</b> <i>Birmingham</i>

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ON THE COVER

Frank M. Johnson, Jr., Federal Building and U.S. Courthouse (Annex), as seen from the Montgomery campus of Troy University

The original courthouse was completed and occupied in 1933. The annex, shown on the cover, was completed in 2002 and has a radial design that is stylistically compatible with the original building.

Photo by Paul Crawford, JD,  
[crawfordpaul@ac.com](mailto:crawfordpaul@ac.com)

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# CLE COURSE SEARCH

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



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MARK W. ITE

# They Were Lawyers

Each year, during the opening of court ceremony, the president of the Alabama State Bar is tasked with the sobering opportunity to honor the memory of those lawyers who passed during the preceding year. It was a humbling experience and a fine tradition to read through the names of those we've lost. They are men and women who hail from big cities and small towns, from Dothan to Huntsville, and Demopolis to Anniston. They served as jurists and general practitioners. While I didn't know them all, I was fortunate enough to know many of them and my life and practice are better for it. They all shared the calling of the practice of law and I had many an occasion to ponder that special bond this past month.

Honoring the recently departed members of our bar is a solemn and well-deserved tradition. The fact that we do this in a session of the Supreme Court of Alabama signifies the value of the separate and collective service rendered to our system of justice by each of those we honor. The lives we celebrated during that ceremony were worthy of that recognition, and it is my privilege to share a taste of that celebration with you here in these pages.

## PRESIDENT'S PAGE Continued from page 395

We honored Scout leaders, Sunday School teachers, PTA members, Little League coaches, community and neighborhood leaders, Red Cross volunteers, and supporters for all sorts of causes. They were members of probably every civic club known to this state; they were political and social advocates; and they were patrons of the arts. AND THEY WERE LAWYERS.

We honored fathers, mothers, brothers, sisters, children, aunts, uncles, cousins, and friends. AND THEY WERE LAWYERS.

We honored judges, litigators, corporate attorneys, law partners, plaintiff's counsel, defense counsel, those at the end of their careers, and those at the beginning. AND THEY WERE LAWYERS.

Yes, we practice law and promote justice, but we also play a critical role that often goes uncelebrated. We are strong threads in the fabric of our society and that is why it is difficult to find a good cause that is not organized or supported by one

of us lawyers. Our call to justice is a shared bond that requires much of us. We bring a special understanding of the role justice must play in the lives of those around us, even those for whom justice is a distant and vague idea. Each of us, like those who have gone before us, must continue to provide that glimpse of justice for others through involvement in our communities and in the causes that truly make a difference.

We lost some fine folks in the last year, such as:

*Judge Sam Pointer.* A former federal judge who served nearly 30 years on the bench before his retirement in 2000 to return to private practice. His courageous decisions on school desegregation, employment discrimination and prison conditions recognized the rights and dignity of all citizens. Not long before his final illness, I saw Judge Pointer. When he asked me if I was working on anything interesting, I laughed and told him that on that particular day I was working on a matter that involved a judge who wanted to use his contempt powers against a lawyer. Judge Pointer's



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response was, "I can't help you because I don't recall an occasion where I ever threatened a lawyer with contempt." He had the gift of being able to preside without relying upon the noise of the gavel or the threat of judicial power. He personified respect and never forgot HE WAS A LAWYER.

*Nat Bryan:* We lost this young attorney too soon. Nat was always a fierce protector of the rights of his clients. The judge said about him, "Win or lose, he never left my court without offering a kind word to all. He was an example to younger lawyers of the manner in which our profession should be practiced." In reading the condolences for Nat, I noticed one that really struck me. It read: "Nat was a good lawyer, but an even better man." Nat enjoyed the same distinction as his father, Judge John Bryan, in that both never had an enemy, only friends. He touched so many lives, inspired and coached many a young athlete, and he loved being a father, a husband and a son. A great man . . . AND HE WAS A LAWYER .

*Judge Michael Orizaba Emfinger:* He served the people of Bullock County as a district judge for over 17 years, retiring in January 2008. An alumnus of the University of Alabama and the Cumberland School of Law, where he was in the top ten percent of his graduating class, Judge Emfinger's tenure as district judge was marked by empathy, wisdom and great character. Judge Emfinger passed away in May, survived by his parents, wife and two children, one of whom is a practicing attorney in Montgomery. HE WAS A LAWYER .

*Margaret Childers:* She was a friend, a colleague and a great lawyer. Margaret devoted her life to ensuring that justice was a reality, not a perception. She was truly brilliant, and her opinion was revered by both judges and fellow attorneys. Yet, with mischief in her eyes, she could plot the demise of a legal opponent. Margaret's lifelong call to public service was reflected in her work with Friendship Force, Amnesty International and Zonta International, an organization

## Quality Paralegal Education



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## PRESIDENT'S PAGE Continued from page 397

that seeks to advance the status of women worldwide.

As my law partner, Bill Bowen, said, "She brightened everything she touched..." AND SHE WAS A LAWYER .

The bar members we lost in the last year were unique individuals who led unique lives, but they were joined by a common bond formed when they swore the attorney oath that made them unique instruments of and for justice.

During the opening of court, we read the oath together. I encourage you to read through the oath, reprinted below and consider the awesome privilege we all have to serve and the mighty duties that we each have undertaken:

I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or

malice and that I will support the Constitution of the State of Alabama and of the United States, so long as I continue a citizen thereof, so help me God.

*Alabama Code 34-3-15*

When celebrating the lives of those that we have lost, we should also consider what their lives mean for the future. Those who have gone on before have set the example and paid their dues. There's no doubt that we will miss them. As we move forward without them, we must not forget that we owe it to them to preserve their efforts toward a more effective and transparent system of justice. They gave us so much, and for that we will be forever thankful.

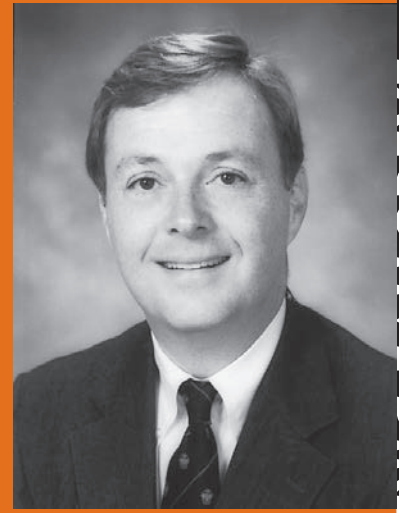
Indeed, thank be to God: They truly rendered service. And... THEY WERE LAWYERS. ▲▼▲

## 2008 DECEASED ATTORNEYS

Charles Oliver Aaron, Lanett  
Non Quincy Adams, Mobile  
David Walter Adams, Moultrie, GA  
Charles Porter Allison, Jr., Tuscaloosa  
Andrea Christiane Hurt Angell, Medfield, MA  
James Ernest Anton, Birmingham  
Ryburn Hancock Bailey, Birmingham  
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Gary Joseph Bone, Gadsden  
Nicholas Tilford Braswell, III, Demopolis  
William Styne Brewbaker, Jr., Montgomery  
David Lyle Brooks, Talladega  
John Nathanael Bryan, Birmingham  
Hubert Nelson Camp, Owens Cross Roads  
Jack Durward Carr, Montgomery  
Margaret Scholten Childers, Montgomery  
Harry Cohen, Tuscaloosa  
Walter Felix Cornelius, Birmingham  
Warren Baker Crow, III, Birmingham  
Rae Maurice Crowe, Sr., Mobile  
Russell Shannon Crowell, St. Augustine, FL  
Patricia Gail Dickinson, Cropwell  
William Louis Dickinson, Titus  
Judge Richard Henry Dorrough, Montgomery  
Stanford Harmon Downey, Jr., Sulligent  
Walter E. Duffey, Huntsville  
Judge Michael Orizaba Emfinger, Fitzpatrick  
Phillip Grant Estes, Anniston  
Derrell Otis Fancher, Jemison  
Manuel Fernandez-Casablanca, Odenville

Kathryn Dananne Ferrell, Magnolia Springs  
Judge Patricia Yeager Fuhrmeister, Birmingham  
Arthur Emmett Gamble, Jr., Greenville  
Nick John Graffeo, Jr., Birmingham  
John Edward Grenier, Birmingham  
Harold Edward Grierson, Bremen  
Judge William Hancock Griffin, Huntsville  
Patrick I. Gustin, Jasper  
Carl Bynum Hall, Hoover  
Alton Marshall Hambric, Jasper  
Judge William Brevard Hand, Mobile  
John G. Harrell, Birmingham  
Alvin Floyd Harris, Saraland  
Jessee Dean Hash, II, Birmingham  
Forest Douglas Herrington, Huntsville  
Charles Hoffman, Mobile  
Elwood Leon Hogan, Mobile  
David Grover Holmes, Troy  
Charles Mack Ingram, Alexander City  
Gorman Robinson Jones, Jr., Sheffield  
James Wynton Kelly, Geneva  
Cecil B. King, Mobile  
Reo Kirkland, Jr., Brewton  
Ronald E. Kopesky, Fairhope  
Olive Bailey Langdon, Mountain Brook  
Irvin James Langdon, Mobile  
Floyd Leo Likins, Jr., Opelika  
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Decker Lewis Terry, Jr., Enterprise  
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Luther Moorman Thompson, Jackson, MS  
Billy Gene Tune, Florence  
Rodney B. Waites, Gulfport  
Judge Gary Owen Waters, Sr., Lincoln  
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KEITH B. NORMAN

## ASB's Long-Range Plan: Direction and Accomplishment for the Profession

In 2005, the Board of Bar Commissioners ("BBC") adopted a new long-range plan ("LRP") for the Alabama State Bar. Development of the LRP came about through the efforts of many. Caine O'Rear of Mobile and Karen Bryan of Tuscaloosa served as chair and vice chair respectively and saw the work of the LRP Task Force through to completion. As you may recall, the plan has five major goals and individual strategies for accomplishing the major goals and subparts. The BBC, officers, staff and many volunteers from across the state have worked diligently the past several years to carry out the various parts of the LRP. Because much progress has been made in meeting these goals, I am highlighting some of the accomplishments in this and the next "Executive Director's Report."

***I. Assure the Highest Standards of Bar Admission, Professional Conduct and Professional Competence and Service.***

***A. With respect to admission and membership:***

- 1. Ensure that admission standards and bar examination procedures are current and consistent with the best practices nationally.***
- 2. Ensure that the bar examination is the appropriate measure of minimum competency.***

# EXECUTIVE DIRECTOR'S REPORT

Continued from page 399

- 3. Enhance the bar's liaison with in-state law schools to address issues of mutual interest, including:**
  - a. Ensuring timely student registration with the bar's admission office; and**
  - b. Considering post-law school internships for all graduates.**
- 4. Review "voluntarily inactive" and "inactive" membership categories and the rules regarding transition to active status, with particular emphasis on:**
  - a. Reinstatement costs;**
  - b. Education accountability; and**
  - c. Economic impact on the bar.**

The Board of Bar Examiners ("BBE") continues to be in the forefront of its peers regarding testing and administration of the bar exam. The Multistate Bar Exam, the Multistate Essay Exam and the Multistate Performance Test are utilized and supplement an Alabama subject matter essay exam. The Alabama essay exam is developed with the help of skilled Alabama attorneys who work with the BBE's consultant to draft questions and scoring keys that are thoroughly vetted prior to their being used. In addition, the BBE, its consultant and several panels of volunteer lawyers completed a "cut score" study to determine if the passing score of 128 should be changed. After the study was completed, the BBE recommended that the 128 score be retained.

Although a post-law school internship is an issue which has not been directly addressed, the bar continues to work closely with all the in-state law schools on many issues of mutual interest. All the law school deans have attended BBC meetings to share ideas and to keep the bar apprised of developments at the law schools. At the bar's suggestion, the Alabama Supreme Court recently increased registration fees to encourage timely filing of the student registrations with the bar's admissions office. Finally, the issue of competency concerns about lawyers who re-enter the practice of law after being inactive or suspended from practice for a considerable time is being actively discussed.

## **B. With respect to professional conduct and regulation:**

- 1. Periodically review and make recommendations regarding disciplinary rules and procedures.**
- 2. Consider aspects of uniformity and expediency in disciplinary rules, utilizing the national model as a resource.**
- 3. Especially address the regulation of lawyers not licensed to practice law in Alabama.**

The BBC approved the recommendations of the Committee on Disciplinary Rules and Enforcement for a number of revisions to the *Rules of Disciplinary Procedure*. The supreme court recently approved many of these changes, including rule changes to restructure disciplinary panels and eliminate the disciplinary appeals board. Rule change recommendations concerning lawyer advertising will be considered by the supreme court following a public comment period. The court, at the bar's suggestion, also adopted a reciprocity rule which now allows lawyers from other states to be admitted on motion without taking the bar exam as long as that individual's home jurisdiction allows our bar members a similar privilege. Finally, the bar's Unauthorized Practice of Law Committee continues to investigate and pursue cases of unauthorized practice.

## **C. With respect to professional competence and service:**

- 1. Partner with local bars to encourage creation of mentoring or buddy programs.**
- 2. Review existing CLE requirements and needs, with special focus on:**
  - a. Effectiveness of carry-over of hours provision;**
  - b. Exemption at age 65 and above;**
  - c. Number, availability and quality of programs; and**
  - d. Course on professionalism for new lawyers to ensure that content, length and presentation are appropriate and effective.**

3. **Continue to work cooperatively with the Chief Justice's Commission on Professionalism.**
4. **Continue the bar's "road show" to maintain and increase awareness of opportunities afforded by the bar staff, Programs and CLE.**
5. **Develop programs for lawyer training on personal finances, law practice management and quality of life.**
6. **Encourage lawyers to pursue public service and seek public office.**

Law Professor and Commissioner Pam Bucy of Tuscaloosa has worked diligently the last two years to develop a model that would offer a mentoring experience to young lawyers, particularly those from smaller bars. An extensive revision of the MCLE Rules and Regulations are underway. This would be the first major review and revision of these rules since their adoption more than 25 years ago. This past February, the bar co-sponsored, with the Chief Justice's Commission on Professionalism, the first ever professionalism consortium at Cumberland Law School. Other cooperative ventures are in the works.

Last year, the bar's road show made 52 visits to local bars. One of immediate past President Sam Crosby's major initiatives during his term was to establish a program that would assist lawyers who have been in practice five years or less with financial and law firm management issues. Similarly, the bar's Practice Management Assistance Program (P-MAP) has expanded its services and assistance to bar members and firms. A program on personal finance was held at this year's annual meeting to address this need. Another initiative of Mr. Crosby's presidency was increasing lawyer pro bono activities statewide by encouraging local lawyers to take part in the "Wills for Heroes" program in their communities.

The results of the Quality of Life Survey were made available in the fall of 2005. Those results led the BBCs to authorize the endorsement of the e-magazine, *Complete Lawyer*, as a free member benefit to address practice and quality-of-life issues. With articles that feature Alabama lawyers as well as national writers, this electronic digest of

articles has been well received by Alabama lawyers for its helpful and timely advice. Finally, the Leadership Forum has graduated four classes of approximately 30 lawyers each, providing them with training in the concept of "servant-leadership" and encouragement to render public service to their communities, the state and the profession.

## II. **Advance improvements in the administration of justice.**

### A. **Support the selection of justices and judges in a manner that removes the judiciary from political and special interests, pressures and influence.**

1. **Support and participate in efforts to implement the recommendation made by the Board of Bar Commissioners in 2004 for establishing merit selection of appellate judges.**

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# EXECUTIVE DIRECTOR'S REPORT

Continued from page 401

**2. Establish a committee or task force to study the issue of selection of circuit and district judges and, where appropriate, coordinate with the efforts of various circuit and district judges' associations.**

**3. Consider effectiveness of setting minimum standards and experience levels for judges.**

The bar has requested introduction of legislation in previous legislative sessions that would provide for merit selection and retention of appellate judges. Although the legislation failed to gain any traction, the bar continues to promote changing the partisan method of selecting judges, including trial court judges in order to combat the negative perception that many of these high money and undignified campaigns create. In this regard, the bar has strongly supported the work of the Judicial Campaign Oversight Committee whose mission is to help ensure that partisan judicial campaigns do not become negative free-for-alls.

In the last two legislative sessions, the bar has supported the efforts of lawyer-legislator Paul Demarco of Birmingham to pass legislation that would establish minimum levels of experience for all Alabama judges.

**B. Increase public understanding and respect for the law.**

**1. Continue public service announcements and campaigns.**

**2. Build relationships and partnerships with all stakeholders (government, private, associations, foundations, etc.).**

Through a long-standing partnership with the Alabama Broadcaster's Association, we have been able to air public service announcements (PSAs) on radio and television stations across the state to help educate the public and promote respect for the law. Some of the PSAs the bar has produced and that have run on radio and television stations include "Rule of Law," "Constitutional Revision" and "Protect and Serve." At the same time, the bar has sought to work with the court system and local and specialty bar associations to promote the annual celebration of Law Day

in May to help the public gain a greater appreciation and increased respect for our legal system.

**C. Promote public access to high quality legal services regardless of financial or other circumstances.**

**1. Enhance public recognition by state and local bars for lawyers excelling in providing pro bono services.**

**2. Promote the purpose for and use of Small Claims Court through an effective media campaign.**

**3. Explore mandatory funding mechanisms for legal services for underprivileged and poor persons.**

**4. Support the creation of a structure or mechanism to oversee, improve and provide accountability for the provision of indigent legal services throughout the state.**

A concerted effort has been made to enhance public recognition of volunteer lawyers. Last year, a five-month campaign highlighting Alabama lawyers serving their communities was conducted with the publication of a number of positive newspaper articles about these lawyers. In addition to the annual volunteer lawyer awards recognizing the most outstanding individuals, firms and law students for their pro bono efforts, a new category has been added honoring a volunteer lawyer for rendering services in the area of mediation.

Last year, at the suggestion of the BBC, the supreme court approved a change in the pro hac vice rules ("PHV") (specifically Rule VII of the *Rules Governing Admission to the Alabama State Bar*), increasing the PHV fee from \$100 to \$300. The additional \$200 collected by the bar for each PHV application will go to the Alabama Law Foundation ("ALF") and be designated for grants to help meet the civil legal needs of the poor. Likewise, the bar asked the supreme court to adopt a comparability rule, along with making the Interest on Lawyers Trust Account Rules ("IOLTA") mandatory. These changes to the IOLTA rules will substantially increase the amount of interest payments to ALF which will use these funds to make grants for increasing access to civil legal services for indigent Alabama citizens.

As far back as 1999, the bar has urged the supreme court to create a commission on civil legal services for the poor to serve as a coordinating body for all civil legal service programs in the state. In 2007, the supreme court, under the leadership of Chief Justice Sue Bell Cobb, created the Commission on Access to Justice to help coordinate and improve the delivery of civil legal services to the state's poor. In addition, the bar has worked diligently since the 1980s for the creation of a statewide indigent defense commission to help improve the administration and delivery of criminal indigent defense services in this state. Legislation introduced on several occasions to accomplish this needed reform has been unsuccessful.

**D. Be the leader in alternative dispute resolution.**

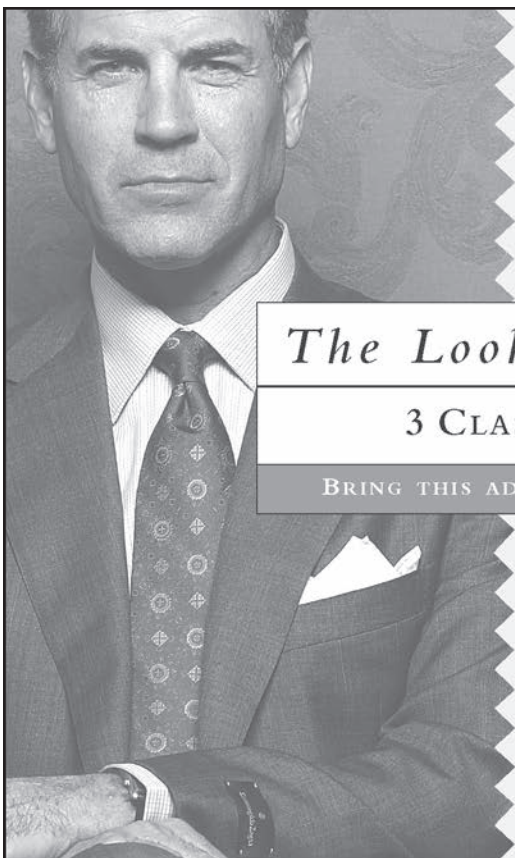
- 1. Encourage circuit judges to require mediation of domestic relation cases through appropriate court orders.**

- 2. Adopt additional rules concerning the qualifications and training of arbitrators and an Alabama Code of Ethics for arbitrators.**

- 3. Develop pamphlets directed to the public which generally explain the rights, obligations and potential costs for parties involved in arbitration.**

- 4. Explore the merits of promoting ADR for use in lawyer-to-lawyer disputes.**

As a result of the work of the Alabama Center for Dispute Resolution (Center), the Alabama Supreme Court's Commission on Alternative Dispute Resolution ("Commission") and the large number of lawyers helping support the work of the Center and Commission, great strides have been made in all areas of dispute resolution. The bar recently received a grant from the American Bar Association that will be shared with the Center to pursue a



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## EXECUTIVE DIRECTOR'S REPORT

Continued from page 403

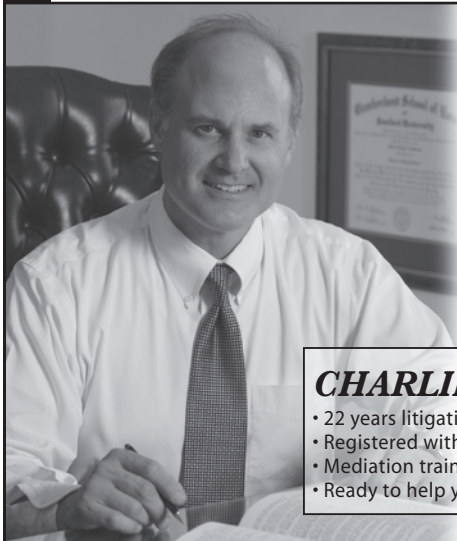
pilot criminal mediation program in Alabama. Because of the persistence and hard work of lawyer-legislators and many others, mediator confidentiality legislation was finally enacted and signed by the governor this year after being introduced every session for almost a decade. The BBC has also amended the rules of the Fee Dispute Mediation Program, originally established to provide for free mediation of fee disputes between lawyers and clients, to include mediation of fee disputes between lawyers.

### ***E. Enhance the relationship between the bar and judiciary.***

- 1. Consider setting annual meeting sites and dates to correspond with state circuit and district judges' meetings.***
- 2. Appoint a task force composed of judiciary and bar members to address both attorneys' behavior before judges and judges' behavior before attorneys.***

The Judicial Liaison Committee has worked diligently to improve bench and bar relations through joint meetings and receptions. Because of a lack of state funding, the committee spearheaded a fundraising drive last year that raised more than \$0,000 to help defray the cost of trial judges receiving training at the National Judicial College in Reno. The Quality of Life Committee has also worked with the circuit and district judges' associations to prepare a policy that would ensure a lawyer could reserve time for a vacation without trials or hearings being set during the time reserved. Finally, the Chief Justice's Commission on Professionalism and the bar are jointly considering a program that would counsel individual lawyers and judges who routinely exhibit a lack of professionalism and civility to their colleagues.

In the January issue of *The Alabama Lawyer*, I will cover the remaining LRP goals: **III.) Maintaining an effective state bar organization and structure; IV.) Serve member needs while enhancing the use of bar technology and communications; and V.) Advance the principals of diversity.** ▲▼▲



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## Charles P. Allison

Charles P. Allison, 69, died July 16, 2008 at Hospice of West Alabama in Tuscaloosa. Charlie was born in Gadsden November 10, 1938 and attended the public schools there, graduating from Gadsden High School. He then attended Miami University in Oxford, Ohio and graduated in 1960 with a major in physics. Upon graduation he was commissioned an ensign in the United States Navy and served for three years, primarily on the brand new USS KITTYHAWK (CA63).

Following his distinguished service in the Navy, he enrolled in the University of Alabama School of Law. Charlie was a member of *Alabama Law Review* and Farrah Order of Jurisprudence, which subsequently became the Order of the Coif. Charlie finished first in his law school class.

In 1966, Charlie became a member of the Tuscaloosa County Bar Association and practiced with the firm of McQueen, Ray & Allison for ten years. He became general counsel for Gulf States Paper Corporation in 1976. In 1980, Charlie was elected vice president, secretary and general counsel of Gulf States. He retired from Gulf States in 2000 following 24 years of service with the company.

Charlie was a leader in numerous city and community activities, including as a member of the executive board of the Black Warrior Counsel of the Boy Scouts of America. Because of his leadership and dedication as the long-time chairman of the Tenderfoot Charity Golf Classic benefiting scouting in West Alabama, Charlie was recognized with the Silver Beaver Award for his exemplary service. He also served as a board member of the DCH Foundation, the Tuscaloosa Rotary Club, the Mental Health Association of Tuscaloosa County and the Tuscaloosa Symphony *Orchestra*.

Charlie was active in government affairs and was involved in the formation of the Business Counsel of Alabama, having served on the board of directors of both the Business Counsel and its predecessor organization, the Alabama Chamber of Commerce. He served on numerous governmental commissions involving tax policy, unemployment and workers' compensation.

Charlie was an avid golfer and served as secretary of North River Yacht Club board of directors for over 20 years. He was a long-time member of Christ Episcopal Church.

Charlie leaves his wife of 46 years, Sherry; his two sons, Steve (Debbie) and Jim (Theresa), both of Houston; six grandchildren, Ashley, Tyler, David, Jennifer, John, and Michael; his brother, Mike Shannon, of Gadsden; and his sister, Ann Springfield, of Tupelo.

Charlie was a gentleman of infinite patience, and was kind and considerate to all with whom he dealt whether in his law practice, his work at Gulf States, his work in all of the civic and governmental organizations which benefitted from his service or on the golf course. His friends remarked that Charlie could not be enticed to say an unkind word about another human being under any circumstances. He was a warm and wonderful friend and will be deeply missed by his family, friends and the members of this association.

—James H. Roberts, Jr., secretary, Tuscaloosa County Bar Association



CHARLES P. ALLISON

NICHOLAS TILFORD  
BRASWELL, III

CECIL BRUCE KING

JOHN LAUTHLIN  
MOORE, III

ELLSWORTH PETER  
SCALES, III

## MEMORIALS Continued from page 405

### Nicholas Tilford Braswell, III

Nicholas Tilford Braswell, III, a well-respected and long-time member of the Alabama State Bar, died peacefully on July 14, 2008 at the age of 71. Nick was raised in Demopolis, attended Marion Military Institute and received both his undergraduate and law degrees from the University of Alabama. He served his country as an officer in the United States Army.

Nick practiced with the Montgomery firm of Rushton, Stakely, Johnston & Garrett PA for 37 years and then retired to his childhood home in Demopolis. In Demopolis, he practiced *of counsel* with the firm of Lloyd & Dinning in which his son, Alex also practiced.

Nick was an acknowledged expert in the field of workers' compensation law. His counsel and advice on workers' compensation issues were sought not only by his fellow attorneys but by judges. Nick's pronouncements in this area were taken as the gospel.

Nick could be described as "salt of the earth," humble and plain spoken, but beneath the "country boy" facade was a true man of letters. He was an avid reader, a history buff and, on occasion, a poet. In his retirement, he enjoyed hunting, fishing, farming and the company of his children and grandchildren.

Nick is survived by three children, Dr. Nicholas T. Braswell, IV of Cullman, Carol Louise Braswell of Franklin, Tennessee and Alexander F. Braswell of Demopolis, and five grandchildren.

### Cecil Bruce King

Cecil Bruce King, a member of the Mobile Bar Association, died May 30, 2008.

Mr. King, a native and lifelong resident, was born in Mobile July 16, 1927 to Charles H. and Alfreda Kudop King. He was preceded in death by his parents, his brother, Charles H. King, Jr., and his sister, Alfreda Tschmann.

Mr. King was educated in the Mobile County Public School System, graduating from Murphy High School in 1945, where he was captain of the basketball team. After service in the United States Marine Corps, he graduated from Tulane



University and the University of Alabama School of Law where he was awarded the degree of juris doctor. Subsequently, he became a certified public accountant and was an active member of the Mobile County Society of Certified Public Accountants. He also was an active member of the Mobile Area Chamber of Commerce and the South Alabama Bridge Association and thoroughly enjoyed his experiences as a Shriner. For many years, he belonged to the Optimist Club and served with distinction as its president. For 60 years, he was a member of the Episcopal Church.

Mr. King is survived by his wife, Joyce Lowery King, and four children, Richard Lowery King, Dr. John H. King, Dr. Bruce King and Angela King McBroom, 12 grandchildren and numerous loving nieces and nephews.

—Ian Gaston, president, Mobile Bar Association

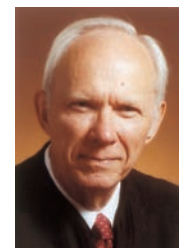
### John Lauthlin Moore, III

John Lauthlin Moore, III, a distinguished lawyer and probate judge, died May 29 at the age of 90. Judge Moore was a native of Mississippi and born September 4, 1917. He graduated from the University of Mississippi and obtained his law degree from the University of Alabama School of Law. Judge Moore practiced law in Mobile for a number of years prior to his appointment in 1963 as judge of probate of Mobile County.

He married Mary Anne Grieme and they had two children, Anne Moore Patton and John L. Moore, IV. He is also survived by four grandchildren.

Judge Moore served as probate judge from 1963 until 1982, and then served an additional 20 years as supernumerary probate judge until his retirement in 2003. Judge Moore was a lifelong Baptist and an active member of Spring Hill Baptist Church. He served as president of the Alabama Probate Judges' Association and a George F. Hixon Fellow of Kiwanis International. Judge Moore was also an avid outdoorsman and actively supported the Mobile County Wildlife and Conservation Association and the Coastal Conservation Association of Alabama.

—Ian F. Gaston, president, Mobile Bar Association



## Ellsworth Peter Scales, III

Ellsworth Peter Scales, III a member of the Mobile Bar Association, died May 15, 2008.

Peter Scales was a native of Nashville, and a longtime resident of Mobile. He was preceded in death by three children, Steven William, Katelyn Anne and Lauren Bailey.

Peter Scales was a graduate of Vanderbilt University where he majored in business and English. He also served as a pilot in the United States Air Force, attaining the rank of captain. After being discharged from the Air Force, he attended Tulane School of Law where he earned his juris doctorate in 1984. He has practiced law in Mobile for 24 years. Prior to attending law school, he worked in computers for IBM and then went to Aspen and bought a hotel, which he managed while teaching skiing on the side. Subsequent to that, he worked in New

York City with an investment banking firm and, in 1979, moved to Mobile to set up a financial development office. He then decided that he loved the Gulf Coast, so, in 1981, he headed to law school. After graduation in 1984, he commenced his law practice in which he was very active until the day of his death.

Peter and his wife, Kristen B. Scales, have nine living children, William Beasley Scales, of Austin; Ellsworth Stevens Scales, of Germantown, Tennessee; Elizabeth Scales Barry of Franklin, Tennessee; Thomas Kirkpatrick Scales and Catherine Scales Johnson of Lakewood, Colorado; and Emily Bailey Scales, Robin Ciriello and Stacey Adams, all of Mobile. He has 29 grandchildren and nine great-grandchildren.

Peter Scales was a longtime member of St. Mary's Catholic Church.

*—Ian Gaston, president, Mobile Bar Association*

### **Bryan, John Nathanael**

Birmingham  
Admitted: 1985  
Died: August 25, 2008

### **Griffin, William Hancock, Hon.**

Huntsville  
Admitted: 1958  
Died: August 10, 2008

### **Harrell, John Guessna**

Birmingham  
Admitted: 1966  
Died: August 27, 2008

### **Kelly, James Wynton**

Geneva  
Admitted: 1950  
Died: August 5, 2008

### **Kopesky, Ronald Edward**

Fairhope  
Admitted: 1974  
Died: June 23, 2008

### **McDougal, Jackie Murrell**

Bessemer  
Admitted: 1969  
Died: August 14, 2008

### **Relfe, Charles Perry**

Homewood  
Admitted: 1975  
Died: August 27, 2008

### **Stokes, Benjamin Franklin, III**

Mobile  
Admitted: 1954  
Died: July 11, 2008

### **Waters, Gary Owen Sr., Hon.**

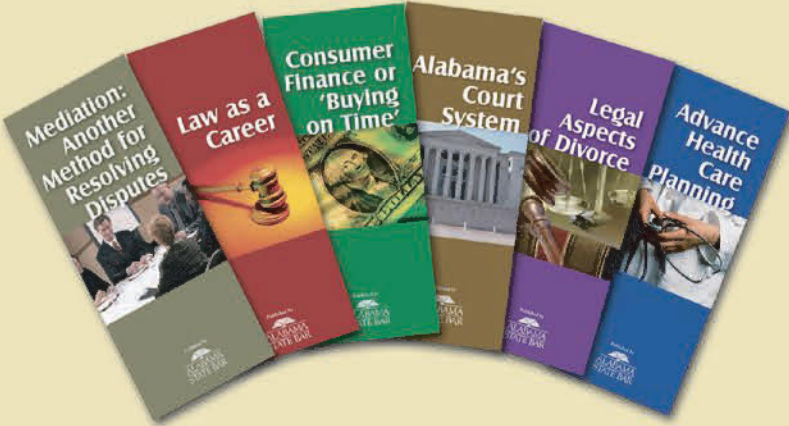
Lincoln  
Admitted: 1989  
Died: August 24, 2008

### **Weaver, Fred Seldon**

Arab  
Admitted: 1949  
Died: November 21, 2007

# Alabama State Bar Publications Order Form

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



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<i><b>Abogados Y Honorarios Legales</b></i>	\$10.00 per 100	Qty _____	\$ _____
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<i><b>Arbitration Agreements</b></i>	\$10.00 per 100	Qty _____	\$ _____
Answers questions about arbitration from the consumer's perspective.			
<i><b>Advance Health Care Directives</b></i>	\$10.00 per 100	Qty _____	\$ _____
Complete, easy to understand information about health directives in Alabama.			
<i><b>Alabama's Court System</b></i>	\$10.00 per 100	Qty _____	\$ _____
An overview of Alabama's Unified Judicial System.			
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## Judicial Award of Merit

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the state bar's Judicial Award of Merit through March 16, 2009. Nominations should be mailed to:

Keith B. Norman  
Secretary  
Board of Bar Commissioners  
P. O. Box 671  
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement. ▲▼▲



JUDICIAL AWARD  
OF MERIT

IMPORTANT ASB NOTICES



# The Farm Bill Opens Doors for Black Farmers

By Alyssa N. Daniels and  
Kristian Rasmussen

In May of this year, Congress approved new legislation opening the doors for black farmers across the country. The Food, Conservation and Energy Act of 2008,<sup>1</sup> appropriately labeled the “Farm Bill,”<sup>2</sup> provides black farmers with an opportunity to seek legal compensation for illegal discrimination by the United States Government.

Black farmers are eligible to seek relief under the Farm Bill if they previously filed a claim under *Pigford v. Glickman*.<sup>3</sup> In *Pigford*, class members asserted claims for discrimination by the U. S. Department of Agriculture

(“USDA”). The lawsuit was brought on behalf of black farmers across the country who were denied loans, disaster relief and other aid frequently given to white farmers. The discriminatory practices of the USDA put many black farmers out of business. Due to inadequate notification provisions of the settlement, an estimated 73,000 farmers were denied relief despite filing suit because they missed the six-month window to have their cases heard on the merits.

Adding insult to injury, claimants who would have been entitled to relief as part of the *Pigford* settlement were denied

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recovery because they were never notified of their option to participate in the settlement and submit their claim.

The Environmental Working Group, a Washington research group, identified gaps in the USDA's payments to farmers. In 1995, the USDA reportedly paid \$1,841 in federal farm aid to black farmers and \$4,066 to other farmers; in 2005, black farmers received \$4,291 and others \$13,846.<sup>4</sup>

The Farm Bill does not open the door for new claims, but allows "late-filers" a chance to have their claims heard. The original deadline to file a claim was September 15, 2000. *Pigford* claimants who originally filed suit but missed the settlement and never had their claim reviewed will now have that opportunity. Each claim will be resolved individually based on the merits and heard by an approved adjuster.

According to the Farm Bill and the non-profit community organization, The National Black Farmers Association, three eligible groups of farmers who previously submitted claims can seek relief under the bill's provisions. Eligible claimants include farmers who:

- Farmed or attempted to farm between January 1, 1981 and December 31, 1996;
- Applied to the USDA during that time period for participating in a federal farm credit or benefit program and believe that they were discriminated against on the basis of race in the USDA's response to that application; or
- Filed a discrimination complaint on or before July 1, 1997 regarding the USDA's treatment of such farm credit or benefit application.

Once a farmer's eligibility has been decided, the farmer's claim can be filed under Track A or Track B relief. Claimants filing for Track A relief must prove they were racially discriminated against by the USDA by substantial evidence. Relief provided under Track A includes:

1. \$50,000 cash payment;
2. Forgiveness of all debt owed to the USDA incurred under the program;
3. Tax to IRS 25 percent debt forgiveness of cash payment;
4. Immediate termination of foreclosure; or

#### 5. Time priority loan consideration.

Claimants filing for Track B relief must prove racial discrimination by a higher standard—preponderance of the evidence. This track provides uncapped damages.

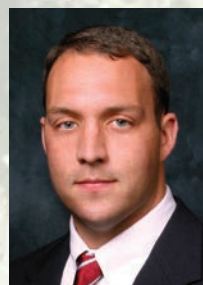
Congress has budgeted \$100 million but estimated damages will be greater than that amount. If their suits are successful, the Environmental Working Group believes the cases could cost several billion dollars along with the \$980 million previously paid to claimants in the original settlement. Already taking advantage of the Farm Bill's provisions, over 900 black Alabama farmers filed new lawsuits against the USDA and more filings are expected. ▲▼▲

### Endnotes

1. Food, Conservation and Energy Act of 2008, § 14012(b).
2. *Id.*
3. 185 F.R.D. 82 (D.D.C. 1999), *aff'd* 206 F.3d 1212 (D.C. Cir. 2000).
4. Evans, Ben. "800 Black Farmers File New Lawsuit." *The Jackson Clarion Ledger*.



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# Alabama State Bar Responds to Mortgage Foreclosure Crisis

*By Thomas J. Methvin*

**F**or some Alabamians, the American dream of owning a home has become a nightmare. One in 60 Alabama homeowners is projected to experience foreclosure on their home as a result of a high-cost loan. In Alabama, foreclosure proceedings can be concluded in as few as 21 days.

Since foreclosure filings continue to increase throughout the state, Alabama State Bar President Mark White of Birmingham recognized that we need more lawyers to assist consumers with foreclosure issues in these tough economic times. I was asked to chair a six-member Mortgage Foreclosure Task Force to focus on ways lawyers could deliver pro bono assistance to distressed homeowners. Task Force members include:

Bowdy J. Brown, Montgomery;  
Gail Hughes Donaldson, Montgomery;  
Robert Edward Kirby, Jr., Columbiana;  
Henry Callaway, Mobile; and  
Kenneth James Lay, Birmingham.

I must acknowledge the considerable efforts of task force member Gail Hughes Donaldson who assisted in the preparation of this article. All task force members worked hard and did a great job. We conducted weekly meetings because of the “crisis” nature of the situation. I would also be remiss if I did not acknowledge the considerable efforts of state bar employees Laura Calloway, Linda Lund, Tracy Daniel, Brad Carr, and Keith Norman in

tackling this problem. They were dedicated to this cause and did great work.

We clearly understood borrowers’ concerns about financial issues such as foreclosures. To make matters worse, many homeowners threatened with foreclosure cannot afford to hire a lawyer.

The task force was faced with a dilemma. Clearly, the problem called for pro bono work. However, the time window for concluding a foreclosure is very short. Therefore, the task force was concerned the state bar’s Volunteer Lawyers Program could not be mobilized in time to be effective.

The solution came through Legal Services Alabama (LSA). LSA already had received a grant from NeighborWorks America to provide counseling and assistance to consumers faced with foreclosure (NeighborWorks America was created by Congress in 1978 as the Neighborhood Reinvestment Corporation). Additional support and funding came from the Alabama Civil Justice Foundation and the Alabama Access to Justice Commission which allowed LSA to employ the services of a full-time staff attorney to assist with litigation. We thank them for their support.

After discussion with LSA Executive Director James Fry, the task force recommended that the state bar support the LSA’s existing pro bono efforts by producing a series of broadcast messages alerting homeowners to the assistance available







through LSA. The state bar will tap into its partnership with the Alabama Broadcasters' Association (ABA) to run these announcements on the ABA's 400-member TV and radio stations. Though the messages will ultimately be broadcast throughout the state, the task force decided to concentrate on the Huntsville/Madison County area to start.

Listeners are advised to call a toll-free number (1-877-393-2333) so they can talk to a LSA staff attorney who can assist them in negotiating with their lenders. For homeowners who have a claim to be litigated, LSA can also provide them with pro bono representation in court.

Meanwhile the task force also has produced a brochure which addresses commonly asked questions about foreclosure. This title has been added to the state bar's public information pamphlet series and is available on the bar's Web site, [www.alabar.org/brochures/foreclosure](http://www.alabar.org/brochures/foreclosure).

So, what can we do to help our clients understand the foreclosure process? First, know that there are more options available to a client the earlier he or she addresses the delinquency of the mortgage payments. In addition, penalties and fees will be kept to a minimum the earlier a pending foreclosure is addressed. Many mortgage companies are open to some alternate payment plans that will enable a client to avoid foreclosure. Lenders are eager to help, because when they foreclose on a house, they typically lose a great deal of money.

Bankruptcy is one option available that will stop foreclosure. Since the bankruptcy laws changed in 2005, there is more required of filers to get the protection bankruptcy provides. Many bankruptcy practitioners who represent consumer debtors will file a Chapter 13 bankruptcy

with only a small portion of their fee being paid prior to the petition being filed. A Chapter 13 bankruptcy allows a consumer to stop a foreclosure and cure the arrearage owed over a period of time, sometimes up to 60 months. Finally, attorneys should make sure that the foreclosure process is carried out according to the terms of the mortgage or deed of trust.

In Alabama, the borrower has the right to redeem the property after the foreclosure sale, up to one year after the foreclosure sale date. This right to redemption can be waived, however, if the borrower fails to vacate the premises within ten days of receiving a written demand to do so following the foreclosure.

Of course, prevention is the best medicine. That's why Congress is now demanding that lenders help educate borrowers about such things as how to choose a mortgage loan or a refinance strategy that's appropriate, manageable and, more importantly, affordable.

The state bar's motto, "Lawyers Render Service," is very meaningful here. Our lawyers are committed to ensuring that equal access to justice is not a hollow expression. The sub-prime mortgage crisis has presented us with yet another opportunity to experience firsthand the satisfaction that comes with helping someone in need by providing pro bono assistance. The Volunteer Lawyers Program is seeking to create a panel of attorneys who will agree to handle foreclosures in an attempt to augment Legal Services Alabama. Please take the time to complete and return the VLP enrollment form that accompanies this article.

See: *Alabama Code* (1975) Title 35 (Property) Articles 1, 1A, 2, 3 §35-10-1 *et. seq.* ▲▲▲



*Thomas J. Methvin is a managing shareholder in the Montgomery firm of Beasley, Allen, Crow, Methvin, Portis & Miles PC. He is currently president-elect of the state bar. He is a Fellow of the Alabama Law Foundation and is also president of the Montgomery Cumberland Law School Club. He serves on the Finance Committee for the Access to Justice Commission, which was founded by Chief Justice Sue Bell Cobb of the Alabama Supreme Court to find new ways to provide access to justice for the poor in Alabama.*



## You can help respond to the Mortgage Foreclosure Crisis.

Volunteer to assist Alabamians in need through the Volunteer Lawyers Program. Complete the enrollment form below or go the Alabama State Bars Web site and enroll online.

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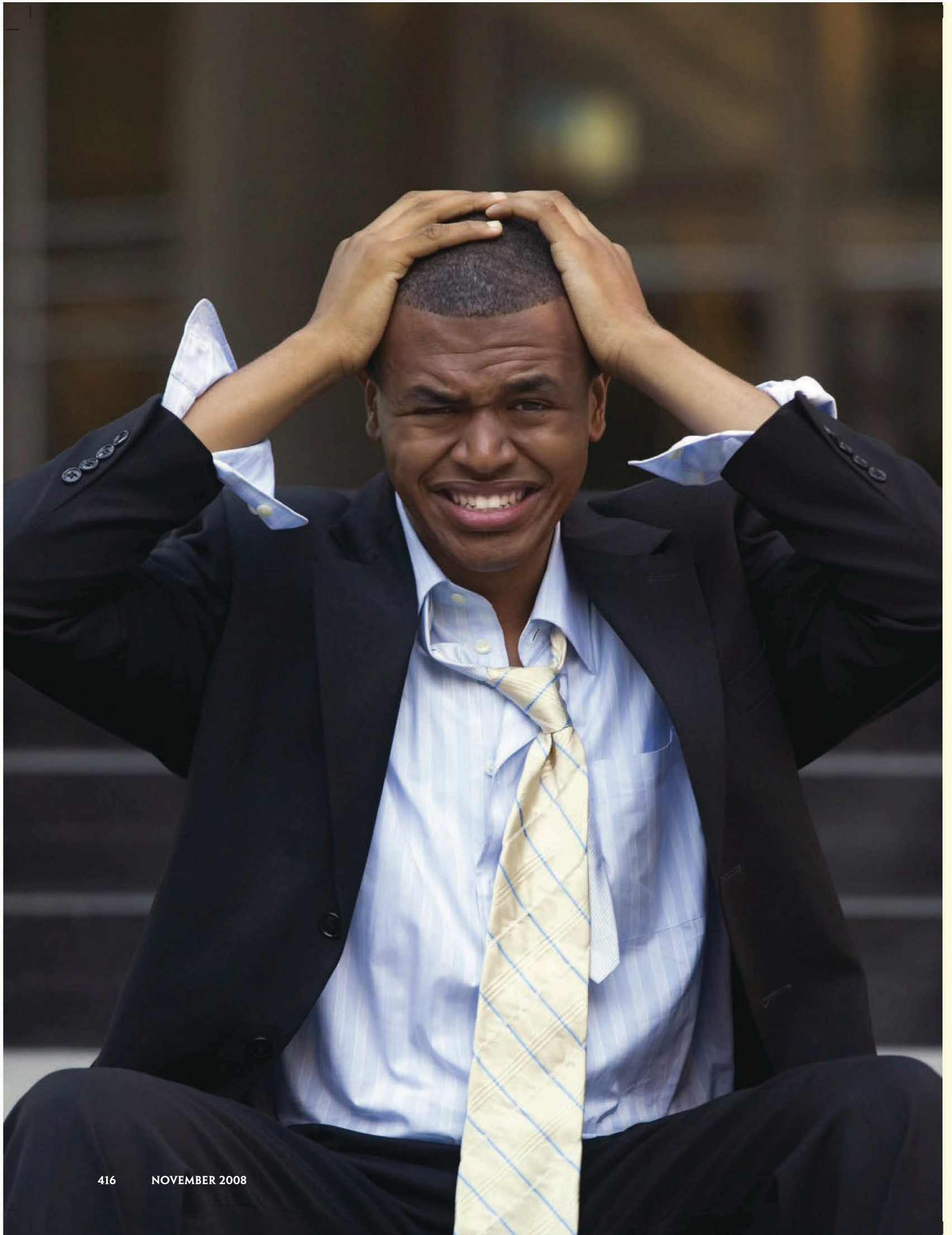
IKE GULAS

ANTHONY A. JOSEPH

- The United States Senate recently confirmed President Bush's nomination of **Constance Smith Barker** to the Equal Employment Opportunity Commission. Barker will serve as a Commissioner in Washington, D.C. for a term expiring in 2011. She has practiced law for 31 years and has been a shareholder with Capell & Howard since 1996.
- **William C. Byrd, II**, a partner in the Birmingham office of Bradley Arant Rose & White LLP, has become an adjunct professor at Samford University's Cumberland School of Law, teaching commercial real estate finance.
- **R. Scott Colson**, with the City of Birmingham Mayor's Office, has been named the United States' first honorary consul for Alabama. Consulates are established to help promote economic, political and cultural ties between two countries. An honorary consul is a citizen or permanent resident of the United States who has been authorized by a foreign government to perform official functions on its behalf in the U.S.
- **Michael I. Fish** of the Birmingham firm of Fish Nelson LLC will serve as chair-elect of the ABATIPS Workers' Compensation and Employer Liability Committee for a one-year term. Fish will be named the chair in August 2009. The section unites plaintiff, defense, insurance and corporate counsel to advance the civil justice system.
- Birmingham attorney **Ike Gulas** was recently chosen by the national Hellenic magazine *Neo* as "Person of the Year." The honor comes in response to his accomplishments as president of the American Hellenic Educational and Progressive Association, as well as his recent professional accomplishments. AHEPA is the leading association for the nation's 1.3 million people of Greek ancestry.
- **Anthony A. Joseph**, a shareholder in the Birmingham firm of Maynard, Cooper & Gale PC, has been elected chair of the American Bar Association Criminal Justice Section. The section's more than 20,000 members are made up of prosecutors, defense attorneys, judges, law enforcement officials, and academics and serves as the association's principal entity concerned with criminal justice and its fair, speedy and efficient administration. ▲▼▲



Fish



# The Insurance Tripartite Relationship: “Who Is My Client Anyway?”

**By Stephen E. Whitehead  
and Jennifer W. Wall**

**I**nsurance-appointed counsel should be familiar with the “tripartite” relationship. Those who defend under a reservation of rights (“ROR”) especially should be aware of the potential conflicts that befall such representation. One commentator aptly described the ROR defense as “deeply and unavoidably vexing.”<sup>1</sup> The Supreme Court of Mississippi has recognized the “tripartite” relationship creates problems that would “tax Socrates.”<sup>2</sup>

The “tripartite” relationship refers to the relationship among an insurer, its insured and defense counsel retained by the insurer to defend the insured against third-party claims. This relationship can present actual or potential conflicts between the insurer and the insured, placing defense counsel in difficult, and often confusing, positions. This article examines the tripartite relationship in the context of an ROR defense, and some of the potential conflicts of interest defense counsel may face.

## *What is an ROR defense?*

Liability policies typically require insurers to defend insureds against covered claims. The duty to defend usually is determined at the outset of litigation when coverage issues are still unresolved. Alabama law, like most jurisdictions, provides that the defense obligation in a duty-to-defend policy is triggered by comparing the policy language to the allegations of the complaint.<sup>3</sup> If the complaint alleges an incident within the coverage of the policy, the insurer is obligated to defend, regardless of the insured’s ultimate liability.<sup>4</sup> In Alabama, once the duty to defend is triggered, the insurer has an obligation to defend both covered and non-covered claims.<sup>5</sup>

An ROR defense allows the insurer to comply with its defense obligation without waiving its right to withdraw the

defense at a later date, nor waiving its right to refuse indemnity for non-covered claims. An ROR defense typically is employed when some, but not all, allegations in the complaint trigger the duty to defend, or when the complaint is so vague there is doubt as to whether the defense obligation has been triggered. The insurer's rights are preserved by issuing a letter to the insured (an ROR letter) reserving the insurer's right to later deny coverage, or withdraw its defense despite its initial agreement to defend. The purpose of an ROR letter is to place the insured on notice that even though the insurer is providing a defense in the lawsuit, certain claims ultimately may not be covered by the policy.

## Who has the right to control an ROR defense?

Most insurance policies give the insurer the right to control the defense and settlement of claims against the insured. Notwithstanding these contractual rights, courts and legislatures often limit the insurer's control over the defense where conflicts of interest exist between the insurer and the insured.

Potential conflicts of interest are inherent in an ROR defense. Insureds sometimes argue defense counsel appointed by the insurer may attempt to steer the defense toward coverage results that are favorable to the insurer. For obvious reasons, insureds have vested interests in ensuring that the claims asserted remain covered. These interests of the insurer and insured may conflict. While most states have addressed the potential conflicts of interest created by an ROR defense, there is no clear consensus among them on how potential conflicts are to be resolved.

Some states, like California and Florida, have enacted legislation addressing how potential conflicts affect the insurer's defense obligation.<sup>6</sup> According to Section 2860 of the *California Civil Code*, "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist." If a conflict exists, which is a factual determination, the statute requires the insurer to provide independent counsel to defend the insured at the insurer's expense, unless the insured waives, in writing, the right to independent counsel after disclosure of the conflict. This statute codifies to some extent the landmark ROR decision rendered in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 208 Cal. Rptr. 494 (Ct. App. 1984), which set the stage for future debate on this issue. Unlike the prior *Cumis* decision, the

California legislation stops short of presuming that a conflict of interest is present in every situation involving an ROR defense.

Florida, on the other hand, has enacted legislation that assumes a conflict of interest between the insurer and insured whenever the insurer asserts a coverage defense through an ROR letter. Section 627.426 of the Florida Claims Administration Statute requires the insurer either to: (1) obtain a non-waiver agreement from the insured after "full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation" or (2) retain independent counsel "which is mutually agreeable to the parties."<sup>7</sup>

Most states, including Alabama, address through case law the potential conflicts created by an ROR defense, and the duties of the insurer and defense counsel in that regard. For example, the Mississippi Supreme Court has taken an approach similar to California and Florida legislation requiring independent counsel. In Mississippi, a conflict of interest exists between the insurer and insured when (1) a defense is offered under an ROR and/or (2) only some of the claims asserted against the insured are covered. *Moeller v. American Guar. and Liability Ins. Co.*, 707 So.2d 1062, 1069 (Miss. 1996). According to *Moeller*, the insurer has an obligation to explicitly notify the insured of its right to select its own independent counsel when the insurer defends under an ROR, or when certain claims are not covered. If the insurer properly notifies the insured of its right to independent counsel, and the insurer only defends the covered claims, then the insured's independent counsel is retained at the insured's own expense. If the insurer elects to defend non-covered claims under an ROR, then the insurer must also pay the legal fees reasonably incurred by the insured's independent counsel.

The *Moeller* decision was elaborated on further in *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002). The *Twin City* court held "the insured should be immediately notified of a possible conflict of interest between his interests and the interest of his insurance company so as to enable him to give informed consideration to the retention of other counsel." If the insured is not timely advised of the possibility of a conflict of interest, and the right to independent counsel, the insurer may be estopped to deny coverage, even where valid coverage defenses exist.

## Alabama allows the insurer to control the defense under an ROR if certain criteria are met

In Alabama, an ROR defense creates a potential conflict of interest between the insurer and insured. Like many states, however, Alabama allows the insurer to choose defense counsel when defending under an ROR. In other words, Alabama does not require the insurer to pay for separate independent counsel simply because a potential conflict of interest exists between the insurer and insured. However, because potential conflicts of interest exist in an ROR defense, the insurer has an enhanced



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duty of good faith.<sup>8</sup> Under the enhanced duty of good faith set forth in the seminal Alabama case on the issue, *L&S Roofing*, the insurer must:

- Thoroughly investigate the claims asserted against its insured;
- Fully inform the insured of all developments relevant to policy coverage;
- Allow the insured to make the ultimate choice regarding settlement; and
- Pursue a course of action that is advantageous to the insured.<sup>9</sup>

The failure to satisfy the foregoing criteria can result in the insurer's loss of coverage defenses.

In *Shelby Steel Fabricators, Inc. v. United States Fidelity & Guaranty Co.*,<sup>10</sup> insurance-appointed counsel defended the insured for more than two years under an ROR. During this time, defense counsel failed to keep the insured informed about the progress of its defense. Because defense counsel did not keep the insured informed, the court found that the insurer failed to meet its enhanced obligation of good faith. This breach estopped the insurer from denying coverage. The court reasoned that such a result would not unfairly burden insurers, stating that:

We point out that the obligation now placed on insurance companies is not an onerous one. It merely requires that if an insurer intends to defend a case pursuant to a . . . reservation of rights, then that insurer not only must provide notice to its

insured of that fact, but also must keep its insured informed of the status of the case.<sup>11</sup>

The court concluded that enforcing a reporting requirement protects insureds and compels insurers to meet their acknowledged duties to insureds when coverage is at issue.

## So, if you defend under an ROR, who is your client?

Under Alabama law, when the insurer retains counsel to defend the insured subject to an ROR, counsel represents the insured as well as the insurer in furthering the interests of each.<sup>12</sup> This is significant because, by virtue of the dual representation, the necessary privity for the attorney client relationship is established, so that defense counsel may be subject to malpractice claims both by the insured and the insurer.<sup>13</sup> Hence, here is the cloud of confusion that hangs over the head of counsel defending under an ROR.

With respect to the insured, defense counsel's duties include providing the insured with competent representation, and disclosing any and all information relevant to the insured's case. Defense counsel has the obligation to act loyally to the insured in compliance with Rule 5.4(c) of the *Model Rules of Professional Conduct*. That rule prohibits an attorney, employed by a party to represent a



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third party, from allowing the employer to influence his or her professional judgment. Defense counsel also has a duty of confidentiality to the insured. Rule 1.8(f)(3) of the *Model Rules of Professional Conduct* states that a lawyer shall not accept compensation from the insurer unless information relating to the representation of the insured may be adequately protected as required by Rule 1.6. Rule 1.6 provides that, "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation." Finally, defense counsel must disclose all settlement offers to the insured as those offers are presented.<sup>14</sup>

Defense counsel also owes certain duties to the insurer, on behalf of the insured, many of which are outlined in the insurance policy. These duties include cooperating with the insurer in its investigation of the claims asserted against the insured, reporting developments to the insurer and disclosing any settlement offers to the insurer. Defense counsel's failure to comply with the conditions outlined in the insured's policy could adversely affect the insured's rights under the policy. Therefore, it is necessary for defense counsel to be familiar with the insured's obligations under the policy, and comply with those obligations after consultation with the insured, to the extent those obligations do not conflict with rules 5.4(c), 1.8(f)(3), and 1.6 of the *Model Rules of Professional Conduct*.

Although defense counsel owes duties both to the insured and the insurer, the Disciplinary Commission of the Alabama State Bar has addressed in several opinions the conflict of interest issues raised by dual representation of the insured and the insurer. In one opinion, the commission describes defense counsel's obligations as follows:

Although you were retained to represent the insured by the insurance company and are paid by the company, your fiduciary duty of loyalty to the insured is the same as if he had directly engaged your services himself ... Since the interests of the two clients, the insurance company and the insured do not fully coincide, the attorney's duty is first and primarily to the insured.<sup>15</sup>

It is of utmost importance that counsel defending under an ROR keeps these obligations in mind when the interests of the insurer and the insured potentially conflict.

The pitfalls existing for Alabama attorneys defending insureds under an ROR were delineated by the Honorable Judge Guin in a 1994 federal opinion from the Northern District of Alabama. In *Carrier Express, Inc. v. Home Indemnity Company*,<sup>16</sup> Judge Guin elaborated extensively on the obligations of defense counsel defending under an ROR. In *Carrier*, a trucking company filed suit against its liability insurer alleging bad faith in failing to settle several wrongful death and personal injury lawsuits. The lawsuits arose from an accident resulting in five deaths and two serious personal injuries. The insurer defended the insured under an ROR, and retained defense counsel. A copy of the ROR was sent to defense counsel.

During the course of the defense, deposition testimony was elicited indicating the claims against the insured were not covered. Defense counsel sent a letter to the insurer summarizing this deposition testimony; however, a copy of that letter was never sent to the insured. The insured subsequently requested the insurer tender its policy limits to settle the cases. The insurer responded that on advice of counsel it did not want to enter into settlement negotiations until the insured's summary judgment motion was addressed by the court.

The plaintiffs later made a written settlement demand that was to remain open until the date set for oral argument on the insured's summary judgment motion. At the time of the demand, most of the other defendants (not insured by Home Indemnity) had tendered their limits. The insured made multiple demands on its insurer and defense counsel to tender policy limits to plaintiffs' counsel. On several occasions, the insured expressed its concern over exposure to a judgment in excess of policy limits. In one letter to defense counsel, the insured explicitly stated, "We are your client. The insurance company is not."<sup>17</sup> The insurer's file notes indicated defense counsel consistently advised it to wait until the insured's summary judgment motion was decided before considering whether to tender its limits, despite the insured's requests to the contrary.

The insured's summary judgment motion was denied. Plaintiffs' demand then increased substantially above the policy limits. The insured attempted to terminate the insurer-appointed defense counsel. However, the insurer would not agree and continued to allow defense counsel to represent the insured's interests. The insured



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nevertheless retained separate counsel, and reached a settlement with the plaintiffs that required the insured to pay sums in excess of its policy limits.

The insured filed suit against the insurer alleging negligent or bad faith refusal to settle. The case went to trial, and the jury awarded the insured compensatory and punitive damages against the insurer. On a post-trial motion by the insurer, the court stated the “award was well supported by the record and frankly, [it] would have been astounded by a lesser result.”<sup>18</sup> The court found that defense counsel assisted the insurer in gambling with the insured’s welfare by making recommendations that were in the insurer’s best interests, and by failing to communicate crucial information to the insured. The court concluded that defense counsel was rendering legal advice to the insurer at the expense of the insured.

Judge Guin’s opinion in *Carrier* demonstrates that defense counsel was confused as to his role in defending under an ROR. During the trial, defense counsel testified he was employed by the insurer. He later stated his “first duty” was to the insured. When asked how he justified not telling the insurer to settle in the face of a demand by the insured to do so, defense counsel stated he was being paid by the insurer, although he recognized that the insured was his client. Judge Guin ultimately concluded the insurer’s ROR charged defense counsel with certain duties. These duties included giving the insured the ultimate choice regarding settlement.

The *Carrier* case highlights the importance of defense counsel understanding his or her role when defending under an ROR. Defense counsel’s confusion in *Carrier* clearly contributed to both the insurer’s and the insured’s overall liability exposure.

## Other Ethical Dilemmas Faced by Counsel Defending under an ROR

The Restatement (Third) of the Law Governing Lawyers says a conflict of interest exists “if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to ... a third person.”<sup>19</sup> A host of situations may pose actual or potential conflicts between the interests of the insurer and its insured, which raise ethical dilemmas for defense counsel.

### 1. Can defense counsel move for summary judgment if the result would be that only non-covered claims remain?

Assume a claim is asserted against the insured that involves both covered and non-covered claims. In Alabama, the insurer owes a duty to defend all claims as long as there remain potentially covered claims. However, if covered claims are later dismissed, the insurer may withdraw from the insured’s defense if it has reserved its right to do so.<sup>20</sup> One question to ponder is how should defense counsel proceed if summary judgment is appropriate only as to covered claims? The answer depends on the facts of each case. A summary judgment, while benefiting



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the insured as to liability, would also leave it without a defense to the remaining claims. Considering the potential ramifications, defense counsel should fully disclose to the insured the coverage risks associated with a summary judgment motion under these circumstances. In some cases, it could be more beneficial to the insured not to file a summary judgment motion if a positive ruling leaves the insured without a defense from the insurer. In other cases, it could be more beneficial to proceed with a summary judgment motion in spite of coverage ramifications. The key for defense counsel defending under an ROR is that it is a decision that can be made only by the insured after consultation. Defense counsel faced with this dilemma might also consider approaching the insurer with a proposal whereby the insurer agrees not to withdraw its defense of non-covered claims in the event the covered claims successfully are dismissed on summary judgment.

## 2 Can defense counsel disclose information to the insurer that provides a basis to deny coverage?

How should defense counsel proceed when he or she discovers information that affects coverage, or provides the insurer with a basis to deny coverage? Defense counsel's options include: (1) disclosing that information to the insurer; (2) withholding that information from the insurer; or (3) analyzing whether that information is protected by the attorney-client privilege before disclosing it to the insurer. The Disciplinary Commission of the Alabama State Bar cautions attorneys to err on the side of non-disclosure to the insurer if, in the exercise of defense counsel's professional judgment, there is a reasonable possibility that waiver of the attorney-client privilege could result.<sup>21</sup> In other words, if defense counsel has *any* reasonable basis to believe that disclosure could result in waiver of client confidentiality, then defense counsel should decline to disclose that information to the insurer.

## 3 What if the insured has a large deductible or SR and the insurer wants to settle with the insured's lawyer?

Another ethical dilemma arises where the insured has a large deductible or self-insured retention. A potential conflict of interest exists because the insurer presumably would prefer to settle the

case for an amount within, or close to, the deductible while the insured presumably would prefer to try the case in the hope of avoiding liability altogether. In most jurisdictions, the insurer has authority to settle claims or lawsuits without the insured's consent absent policy wording to the contrary. In Alabama, however, the insured must be given the ultimate choice regarding settlement when there is an ROR defense. Otherwise, the enhanced duty of good faith owed to an insured has not been satisfied. From defense counsel's perspective, it is important he or she keep the insured apprised of all settlement discussions, and seek the insured's consent before agreeing to any settlement.

## 4 What about consent to settle provisions and hammer clauses?

Many liability policies contain provisions requiring the insured's consent to settle. Other policies expressly provide the insured's consent is not necessary. An interesting dilemma is presented where counsel is defending under an ROR, and the policy provides the insurer may settle without the insured's consent. Remember, Alabama courts have said in an ROR defense, "It is the insured who must make the ultimate choice regarding settlement."<sup>22</sup> Does that mean *L&S Roofing* trumps the contractual policy language allowing the insurer to settle, when the insured does not consent? It seems the rationale behind the *L&S Roofing* ruling was to give the insured the ultimate choice where it has the greatest exposure, not the other way around.

Another interesting twist to this dilemma arises when liability policies (particularly professional liability policies) contain "hammer" or "suicide" clauses. These clauses shift financial responsibility from the insurer to the insured for a judgment in excess of an amount the insurer is prepared to settle for when the insured refuses to settle. Very little has been written about the enforceability of "hammer" clauses, and Alabama courts have not addressed them.<sup>23</sup> That said, defense counsel should be cautious not to be perceived by the insured as acting on behalf of the insurer in recommending a settlement in the event the insurer decides to "bring down the hammer." On the other hand, if the policy contains a "hammer" clause, defense counsel should advise the insured of the potential repercussions associated with refusing to settle when the insurer is prepared to do so. The key for defense counsel is to give the insured enough information so that it can make an informed decision regarding potential settlements.

## 5 "Scorched Earth" defense versus cost-effective defense

The interests of the insurer and insured also may conflict when the insured expects the best (and sometimes most expensive) possible defense and the insurer expects a cost-effective defense. Under this scenario, extreme cost constraints potentially expose defense counsel to malpractice liability for inadequate defense preparation. The Alabama State Bar Office of General Counsel has made it clear that defense counsel may not permit an insurer to influence his or her exercise of professional judgment in rendering legal services to the insured.<sup>24</sup> This view is in accord with the Restatement (Third) of the Law Governing Lawyers as well as the ABA *Model Rules of Professional Conduct*. Both of those authorities prohibit a third-party, such as

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an insurer, from interfering with defense counsel's independent professional judgment, irrespective of the tripartite relationship. The best way to resolve this potential dilemma is through open communication with the insurer. By keeping the insurer apprised of the status of the litigation, along with the steps necessary to protect the insured's interests, defense counsel reduces the risk of the insurer imposing significant cost restraints on his or her litigation plan.

## 6. Damages in excess of policy limits

Cases in which potential damages exceed available insurance coverage may also create conflicts of interest between the insurer and the insured. As discussed in the *Carrier* case, a conflict arises when the insured demands that an insurer tender policy limits to avoid a judgment in excess of policy limits. As soon as this demand is made by the insured, or a demand within policy limits is made by a plaintiff, the insurer's interests and those of the insured diverge. The insured wants to avoid excess exposure and potential financial ruin. However, a policy-limits settlement is not always in the insurer's best interests, particularly where significant coverage issues are involved. To avoid this problem, the Alabama Supreme Court has held that an insurer must allow an insured to make the ultimate choice regarding settlement as part of its enhanced duty of good faith. Defense counsel must assist the insurer in fulfilling this obligation.

## Recommendations for Defending under a Reservation of Rights

There are several steps defense counsel can take to minimize the ethical dilemmas faced in the context of an ROR defense. One, defense counsel should be familiar with the insurer's coverage position. Defense counsel should always remember that he or she is never an advocate for the insurer's coverage position. Nevertheless, defense counsel may unwittingly lead the defense toward a path of non-coverage if he or she is not aware of coverage issues. The insured's policy, as well as any reservation of rights letters, should be reviewed. Two, defense counsel must be careful about obtaining information from the insured and passing it along to the insurer with recommendations. Defense counsel owes a duty of confidentiality to the insured, regardless of the tripartite relationship with the insurer. Three, if the insured has questions concerning coverage under the policy, defense counsel should refer the insured to the insurer. Four, defense counsel should keep the insured and the insurer informed of any settlement discussions. Failure to do so could result in ramifications for both parties. Finally, if there is the possibility for damages in excess of policy limits, defense counsel should advise the insured

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of this danger and suggest the insured retain counsel at its expense to advise on the issue.

The foregoing is by no means an exhaustive list of precautions defense counsel should take when defending under an ROR. Each case must be examined on an individual basis to ensure that defense counsel is carrying out his or her duties to the insurer and, most importantly, the insured.

## Conclusion

One author describes the tripartite relationship as an “‘ethically sanctioned’ duality of representation.”<sup>25</sup> Another author notes that “the Restatement’s analysis of the relationship was ‘conceptually impoverished.’”<sup>26</sup> The bottom line is that conflicts of interest are inevitable when an insurer appoints defense counsel to defend an insured under an ROR. In order to avoid breaching obligations both to the insurer and the insured, defense counsel must keep all parties informed, while being mindful of the confidential relationship he or she has with the insured.

Ultimately, when an ROR defense is provided, all parties involved must be careful to segregate the handling of coverage matters from the defense of the lawsuit against the insured. Otherwise, any assistance given by defense counsel to the insurer may expose defense counsel to a malpractice claim by the insured, and result in a waiver of the insurer’s coverage defenses. ▲▼▲


## Endnotes

1. See, Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tex. L. Rev. 1583, 1587 (1996).

2. *Hartford Acc. & Indem. Co. v. Foster*, 528 So.2d 255, 273 (M ss. 1988).
3. *USF&G v. Armstrong*, 479 So.2d 1164 (Ala. 1985).
4. *Ladner & Co. v. Southern Guaranty Ins. Co.*, 347 So.2d 100 (Ala. 1977).
5. *Universal Underwriters Ins. Co. v. East Central Ala. Ford Mercury, Inc.*, 574 So.2d 716 (Ala. 1990).
6. See, Laura A. Foggan and Elizabeth Eastwood, *Assessing Conflicts of Interest in the Tripartite Relationship* (October 1, 1997), for a thorough discussion of the way in which various states have treated potential conflicts of interest created by a reservation of rights defense.
7. Alaska and Guam also have statutes that address an insured’s right to independent counsel in the context of a reservation of rights defense.
8. *Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.*, 839 So.2d 614 (Ala. 2002).
9. *L&S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298 (Ala. 1987).
10. 569 So.2d 309 (Ala. 1990).
11. *Id.* at 313.
12. *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988).
13. See, Amber M. Ca mecki, *Ethical Considerations within the Tripartite Relationship of Insurance Law—Who is the Real Client?*, *Defense Counsel Journal* (April 2007) for a thorough discussion of this issue.
14. *L&S Roofing Supply Co., Inc.*, 521 So.2d at 1303 (Ala. 1987).
15. RO-98-02. (internal citations omitted).
16. 860 F.Supp. 1465 (N.D. Ala. 1994).
17. *Id.* at 1471.
18. *Id.* at 1480.
19. Restatement (Third) of the Law Governing Lawyers 121 (1998).
20. *Tapscott v. Allstate Ins. Co.*, 526 So.2d 570 (Ala. 1988) (Alabama law is clear that an insurer’s withdrawal may not prejudice an insured’s case).
21. RO-98-02.
22. *L&S Roofing Supply Co., Inc.*, 521 So.2d at 1303 (Ala. 1987).
23. See, Daniel J. Pope, *Hammered by the Hammer Clause: Does It Mean What It Says?* 68 Def. Couns. J. 236 (April 2001) for a discussion on “hammer” clauses.
24. RO-98-02.
25. See, Amber M. Ca mecki, *Ethical Considerations within the Tripartite Relationship of Insurance Law—Who is the Real Client?*, *Defense Counsel Journal* (April 2007) (quoting Michael J. Brady and Heather A. M e e, *Ethics in Insurance Defense Context: Isn’t Cumis Counsel Unnecessary?*, 58 Def. Couns. J. 230 (1991)).
26. *Id.* (quoting Charles Silver and Michael Sean Quinn, *Are Liability Carriers Second-Class Clients?*) *Coverage* (Vol. 6, No. 1, Jan.-Feb. 1996).


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*High moral principle is  
(the lawyer's) only safe guide;  
the only torch to light his way  
amidst darkness and  
obstruction.*



# The Current Status of Judicial Accountability

By J. Douglas McElvy

By a 2005 order of the Alabama Supreme Court and in conjunction with the Alabama State Bar, the Chief Justice's Commission on Professionalism was established. The mission of the commission, as stated in its charter, is to "support and encourage judges and lawyers to aspire to and to exercise the highest levels of professional integrity in their relationships with litigants, lawyers and their clients, the courts and the public." Consisting of judges, citizens, law school deans, the state bar president, and others, the commission's desire is to promote public confidence in our legal system by ensuring integrity, professionalism and high ethical standards in the legal profession, including the Alabama judiciary. Former Chief Justice Drayton Nabors was appointed as chairman.

In 2007, Chief Justice Sue Bell Cobb asked the Commission on Professionalism to review the Rules of Procedure of the Judicial Inquiry Commission ("JIC"). These rules were originally promulgated by the court in 1975 but were substantially amended in 2001. In conjunction with this review, the Commission on Professionalism was to consider the JIC's suggested modifications to the 2001 amendments, which had been submitted to the supreme court's "Standing Advisory Committee on Rules of Procedure for the Court of the Judiciary and the Judicial Inquiry Commission" after its creation in 2002. After reviewing the original rules, the 2001 amendments and the JIC's proposals, the Commission on Professionalism made a number of findings and recommended the adoption of the JIC's suggestions. In addition, the Commission on Professionalism urged the supreme

court to hold public hearings on proposed changes to the rules. As of this date, the Standing Committee on Rules of Conduct and Canons of Judicial Ethics is reviewing the recommendations of the Commission on Professionalism and the proposed modifications made by the JIC. This article is designed to shed light on the status of the rules addressing judicial accountability, the inadequacy of those rules and the need for substantial modification of those rules.

## Judicial Responsibility to the Public

It is most fitting for the Alabama bench and bar to periodically review the mechanisms in place to ensure the public of the integrity and independence of its judiciary. Alabama took the lead in promoting professionalism in the bar when, in 1887, the *Alabama Code of Ethics* became the model for the ABA *Code of Professional Responsibility* and subsequent state bar codes of ethics. The *Alabama Code of Ethics* was written by Thomas Goode Jones, who not only served as a federal judge but also as governor of the State of Alabama and as president of the Alabama State Bar. The *Code of Ethics* quoted George Sharswood:

There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising . . . High moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."<sup>1</sup>

These words, written in 1854, remain no less important and applicable today to our legal profession and legal system. Lawyers and judges serve a crucial and critical role in American democratic life. They are entrusted with the stewardship of America's rule of law. They must be worthy stewards.

Lawyers and judges have an obligation to wisely govern themselves. The Alabama State Bar is committed to an effective and rigorous system of regulating its members. Plus, pursuant to constitutional authority, the Supreme Court of Alabama formulated the Canons of Judicial Ethics to govern judicial conduct. Canon 1 states, "An independent and honorable judiciary is indispensable to justice in our society." Canon 1 further requires judges to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. Our supreme court has made it clear as to why a rigorous enforcement of the Canons of Judicial Ethics is necessary.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. Therefore, he must accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

Commentary to Canon 2.

In 1983, the court affirmed the importance of judicial integrity and responsibility by stating in one of its opinions, "*Noblesse oblige*—From one to whom much is given, much is expected."<sup>2</sup>

Public confidence is essential for the proper functioning of our legal system. A civilized society cannot function without public confidence in the rule of law. As the court noted in *Hughes v. Board of Professional Responsibility of Supreme Court of Tennessee*:

The Preamble to the American Bar Association's *Model Rules of Professional Conduct* provides that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." Lawyers must be aware of the duty owed to the public, the judicial system and the bar. Every applicant for admission to the bar takes a solemn oath "to truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God."

Tenn. Sup.Ct. R. 6 (2007)

No. M2007-01562-SC-R3-BP,  
2008 WL 2687436, at \*14 (Tenn.  
July 10, 2008).

It has been postulated that a judicial system without accountability will ultimately become a corrupt judicial system. As the Alabama Court of the Judiciary recently observed, "Our legal system can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions."<sup>3</sup>

## Regulating the Judiciary

Prior to 1972, the only method for discipline and removal of state judges in Alabama was by impeachment.<sup>4</sup> In January 1972, the voters of Alabama overwhelmingly approved a new method for disciplining state judges by creating the Alabama Judicial Commission. The Judicial Commission had the authority to investigate allegations of judicial wrongdoing, conduct hearings, adjudicate facts and accountability and make final recommendations to the Alabama Supreme Court, i.e., carrying out both the investigative and adjudicative functions in one body. In 1973, Alabama's entire judicial system was revised with the ratification of the Judicial Article.<sup>5</sup> Amendment 328 of the Alabama Constitution separated the investigative and adjudicative functions, thereby creating a

completely new, two-tiered system of judicial discipline. The legislature and the people of Alabama gave the investigative function solely to the JIC and the adjudicative function to the Court of the Judiciary.

Under this two-tiered system, currently in effect, the JIC is "convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state" and to:

file a complaint with the Court of the Judiciary in the event that a majority of the members of the Commission decide that a reasonable basis exists (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties."<sup>6</sup>

Furthermore, "[a]ll proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary."<sup>7</sup> The Court of the Judiciary, also created by Amendment 328, is charged with the adjudicative responsibility to publicly hear and decide complaints filed by the JIC and is authorized to impose sanctions for violation of a canon, judicial misconduct or failure to perform his or her duties. Sanctions may include removal from office and suspension or retirement of a judge who is physically or mentally unable to perform his or her functions.<sup>8</sup> Amendment 328 also authorized the supreme court to adopt rules "governing the procedures of the Commission" and also rules "governing the procedures of the Court of the Judiciary."<sup>9</sup> The court adopted such procedural rules for the Court of the Judiciary on March 11, 1974 and for the JIC on April 25, 1975.

Amendment 328 and the original procedural rules for the JIC envisioned a simple, efficient process to handle complaints, investigations and, if necessary, prosecution of inappropriate conduct by judges—a process that was fair to any judge who was the subject of a complaint. The process also promoted public confidence in the integrity and independence of the judiciary. The original rules for the Court of Judiciary and for the JIC were not weighted in favor of or against those accused of inappropriate conduct, but were considered fundamentally fair so as not to stifle complaints, impede investigations or hinder prosecutions.

In the 26 years of the JIC's existence prior to the 2001 amendments, thousands of inquiries were made to the JIC but only 3,939 inquiries resulted in the filing of formal complaints before the JIC. Obviously, the vast majority of inquirers did not pursue their concerns after gaining information from the JIC's staff about judicial ethics, the JIC's authority and the requirements for a complaint. Of the inquiries that resulted in formal complaints, only 27 complaints progressed to charges being filed with the Court of Judiciary. This represents only 68 percent of the formal complaints filed by the JIC before the Court of the Judiciary. The 1975 rules for the JIC enabled the JIC to expeditiously handle the numerous frivolous or unfounded inquiries or complaints and to fairly handle complaints that necessitated further inquiry or warranted actual charges being filed with the Court of the Judiciary.<sup>10</sup>

## 2001 Amended Rules

The JIC and the Court of the Judiciary operated under their original respective procedural rules for 26 years until October 9 and 10, 2001, when the Alabama Supreme Court substantially amended the rules of the JIC and the Court of the Judiciary. These amendments were without notice or opportunity for comment from the bar, the judiciary, the public or even the supreme court's own Standing Committee on Rules of Conduct and Canons of Judicial Ethics. The JIC and then Attorney General Bill Pryor immediately asked the court to reconsider its amendments and filed specific objections. Those objections asserted that several of the amendments were substantive rather than procedural and thus beyond the court's constitutional authority, that other fundamental changes were in direct contravention of the constitutional provisions, and that the court expanded its jurisdiction beyond that conferred by the constitution. Former Governor Albert P. Brewer, former Chief Justice C.C. "Bo" Torbert and individual judge members of the JIC joined in General Pryor's request for reconsideration.

The court made no changes to its 2001 amendments to the JIC's rules and to date, to my knowledge, has not ruled on General Pryor's request. However, on February 1, 2002, the court issued an order establishing the "Standing Advisory Committee on Rules of Procedure for the



Court of the Judiciary and the Judicial Inquiry Commission” to review the amended rules, all motions and comments on file with the court relating to said rules and any additional input the Advisory Committee deemed appropriate. The supreme court also authorized the committee to advise the court on appropriate action with respect to such matters. That Advisory Committee, whose members were appointed February 25, 2002, held at least two public hearings and met a number of times. However, to my knowledge, the Advisory Committee has not publicly disclosed any of its work product or its recommendations, if any, made to the court.

Almost six years later, on November 29, 2007, the court appointed new members to the Standing Committee on Rules of Conduct and Canons of Judicial Ethics (which had been established December 30, 1975). The court charged that standing committee to review the Rules of Procedure of the JIC and the rules of the Court of the Judiciary and to make recommendations to the court. Considering this history it seems clear that, by creating the Standing Advisory Committee on Rules of Procedure for the Court of the Judiciary in 2002 and by charging the Standing Committee on Rules of Conduct and Canons of Judicial Ethics in 2007 to also review the rules, the court has expressed intent to reconsider its 2001 amendments. However, no action has been taken yet by the court. The time has come for the supreme court to revisit the question of whether the 2001 amended rules provide the best vehicle to accomplish the constitutional mandates of Amendment 328.

### The Need for Review

As argued by Attorney General Pryor in his request for reconsideration, the 2001 amendments changed the rules substantially. It is now more difficult for a citizen to file a meritorious complaint and for the JIC to consider such a complaint. As structured, the existing rules may give the appearance of favoring the individual judge while seemingly ignoring the integrity of the judiciary as an institution.

A most glaring example is the amendments’ disregard for the clear mandate of confidentiality in the investigative process, a linchpin of Constitutional Amendment 328. The constitution wisely mandates confidentiality in the investigative process

before the JIC with a view toward protecting the identity of complainants who may be party litigants, witnesses, attorneys, fellow judges, or court employees. Citizens were to have direct, uninhibited access to judicial disciplinary procedures without fear of reprisal.<sup>11</sup> Just as importantly, the confidentiality provision protected the reputation of a judge from unfounded assertions and shielded the judge from public and political exposure. Prior to the 2001 amendments, the JIC was prohibited from any disclosure that would identify the name, position and/or address of any judge, complainant or other person involved in any inquiry before the JIC.<sup>12</sup> In addressing any complaint of apparent substance, the JIC provided (and still provides) a judge under investigation with every opportunity to address the allegations by informing the judge of the substance of those allegations and inviting the judge to meet with the JIC and discuss the allegations. However, under the “old” rules, the complaining party was not identified.

The constitutional mandate of confidentiality in the investigative stage of the process is similar to the work of a grand jury.<sup>13</sup> However, unlike a grand jury, the JIC must now, pursuant to the 2001 amendments, follow a cumbersome and

expensive procedure for considering even the most seemingly unfounded complaints or accusations made to the JIC. First, under Rule 6.A., the JIC can no longer “initiate complaints,” as explicitly provided for in Article VI, Section 156(b). Ignoring the issue of confidentiality mandated by Article VI, Section 156(b), the 2001 amended rules now require the JIC to serve the judge, who is the subject of the complaint, with a copy of the complaint along with “all documents, photographs, tape-recordings, transcripts, notes, and other materials of any nature whatsoever constituting, supporting or accompanying the complaint.”<sup>14</sup> This must be accomplished within ten days of receipt of a verified complaint. The verification is a new requirement under amended Rule 6.A.).

Contrary to the constitutional provision that the JIC is “convened permanently with authority to conduct investigations,”<sup>15</sup> the JIC then must meet within 42 days from the date the complaint is filed and determine whether or not to investigate the complaint.<sup>16</sup> A majority of all members of the JIC, rather than a quorum, must vote to investigate even though Article VI, Section 156(b) requires a vote by a majority of the JIC’s members only

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for charges to be filed with the Court of the Judiciary.<sup>17</sup> Within ten days of instituting an investigation, the JIC must notify the judge who is the subject of the complaint of the initiation of the investigation, accompanied by a full description of the conduct to be investigated along with all information and materials in the possession of the JIC.<sup>18</sup>

The JIC is under further obligation, every four weeks after serving notice of the commencement of an investigation, to provide to the judge all additional information and materials of whatsoever nature in the possession of the JIC and a statement of whether it then intends to continue the investigation.<sup>19</sup> Failure to disclose the complaint and all information and materials accompanying that complaint (within ten days of receipt), or failure to disclose instigation of an investigation and all information and materials in the JIC's possession at the times required bars the continuation of the investigation and requires the dismissal of the complaint *with prejudice*.<sup>20</sup> For example, if the JIC's staff inadvertently fails to notice a slight malfunction of the copier machine while copying a bulky complaint, resulting in the failure to serve one page of the bulky complaint on the judge, the complaint is rendered null and void, requiring dismissal with prejudice, without any showing whatsoever of prejudice to the judge. Likewise, failure to strictly meet any of the rigorous time requirements bars the continuation of the investigation and requires the dismissal of the complaint with prejudice.<sup>21</sup>

Such a result occurred when the staff mistakenly served another judge who had the same name as the judge who was the subject of the complaint, except the served judge had a different middle initial and a one-letter difference in his surname. By the time the staff was notified of the error, the ten-day period had expired. The complaint, on its face, presented a *prima facie* ethical violation. However, due to an inadvertent error, that complaint can never be reviewed by the JIC.

If the JIC fails to provide investigative materials every four weeks during an investigation, the judge can request the information required and the JIC has seven days to comply or any prosecution for the conduct being investigated will be barred.<sup>22</sup> These requirements fail to recognize or give credence to the confidentiality of the JIC proceedings by requiring the

JIC to serve the judge with a copy of the complaint filed against him or her, thereby revealing both the identities of the complainants and all witnesses in support of the allegations and the results of the JIC's investigation before any formal complaint has been made to the Court of the Judiciary. The potential publicity of this type of information before violations are reasonably substantiated by the JIC can be damaging to the reputation of the judge involved, invites political manipulation and certainly has an impact on the credibility and integrity of the profession.

Similar observations are applicable to the 2001 amendments regarding the JIC's authority under Article VI, Section 156(d), to issue subpoenas. Subpoenas can now be issued only upon the affirmative vote of the *majority* of all of the members of the JIC, rather than a quorum, taken at a duly called meeting of the JIC.<sup>23</sup> The amended rules provide that, prior to or simultaneously with the serving of a subpoena, the JIC must also serve the subpoena on the judge under investigation.<sup>24</sup> Failure to abide by these provisions results in a complete bar to the admissibility of all information and materials sought by the subpoena, obtained in response to the subpoena and discovered as a result of information or material obtained in response to the subpoena.<sup>25</sup>

In a nutshell, the 2001 amendments took away the JIC's constitutional authority to initiate a complaint. Upon receipt of a complaint, the JIC has a ten-day window to provide the judge who is the subject of the complaint, not only with the complaint, but also with all names and materials associated with the complaint. Now the JIC must meet within 42 days and determine, by majority of the entire commission rather than a quorum, whether to investigate. After a ten-day notice, the JIC must provide the judge with any documents and/or information uncovered in its investigation. If these timelines are not strictly met, the complaint must be dismissed with prejudice. After deciding to investigate and notifying the judge of this decision, the JIC then, every four weeks, must provide the judge with a statement as to whether the JIC will continue the investigation and, again, all new materials received by the JIC as part of the investigation must be provided to the judge. If the JIC fails to provide investigative materials every four weeks during an investigation, the judge can

request the information required and the JIC has seven days to comply or any prosecution for the conduct being investigated is barred. The JIC must also serve every subpoena on the judge before or simultaneously with its serving of the subpoena in order to avoid having any resulting evidence excluded.

## The Original Rules Revisited

Prior to the 2001 amendments, the JIC had a reasonable and traditional procedure for carrying out its constitutional responsibilities to investigate that allowed unfounded complaints to be disposed of quickly, efficiently and with complete confidentiality. Under that procedure, the JIC dismissed most complaints as obviously frivolous or unfounded. Now any complaint must be served on the judge. Prior to the amendments, the JIC efficiently disposed of such meritless complaints without notification to the judge and without investigation. Between the JIC meetings, the chairman with the concurrence of the executive committee could authorize the institution of investigations and the issuance of subpoenas. This mechanism allowed the JIC to dispose of its constitutional duties in a timely and efficient manner.

For example, in regard to a complaint that a judge rendered a default judgment for failure to appear when allegedly the judge had not issued an order for the hearing, the Executive Committee under the pre-2001 rules could have authorized the JIC's executive director to ask the circuit clerk for the routine docketing information. If the judge had in fact issued a scheduling order, the JIC could have dismissed the complaint without further investigation. However, under the 2001 amendments, after receipt of a complaint, the complaint must be served on the judge within ten days. Then, a majority of the JIC must meet within 42 days and vote to investigate and direct that the simple question be asked of the circuit clerk or that a case action summary be obtained. Within ten days of the vote to investigate, the judge must be served with notice of "an investigation," even though the "investigation" may consist merely of one question to the circuit clerk or the procurement of a case action summary. Then, the answer to the sole question is presented to the entire JIC at the next meeting, which must be held within another 42 days and will be

the JIC's first opportunity to consider the merits of the simple allegation. Any attempt to obtain the single necessary fact before the vote for investigation results in an unauthorized investigation that renders the complaint null and void under Rule 6.B.

Noncompliance with the 2001 amended rules could result in the dismissal on procedural grounds of serious and substantial questions involving a judge's ethical conduct. Complaints alleging a judge's importation of marijuana, coercing a divorce litigant to have a vasectomy, promising favorable treatment in litigation in exchange for sexual relations with a litigant, sexual abuse of a child at a judicial conference, or inappropriate physical contact during *ex parte* meetings with juveniles appearing before a judge could be dismissed with prejudice simply because a time requirement was not met. Each of the above allegations constituted an actual charge the JIC has filed with the Court of the Judiciary. Each charge resulted in either resignation or suspension without pay until the expiration of the term of office.<sup>26</sup> It is sobering to consider what allegations might be permanently barred from investigation but for the vigilance of the JIC and its staff of three.<sup>27</sup> If the notification, discovery and stringent time requirements, along with the severe result of dismissal with prejudice for failure to meticulously follow each requirement, result in the dismissal with prejudice of a serious case of wrongdoing, such as those noted above, the public could not be expected to understand or accept the judiciary's failure to police itself.

Due to the onerous notice and open discovery provisions of the amended rules for the JIC, both the design and purposes of the confidentiality provisions of Article VI, Section 156 of the constitution are emasculated. The purposes of the constitutional provision are to promote judicial accountability and public safety, ensure an excellent judicial system and give the public confidence in our courts, judges and legal system. These important objectives are also recognized in the comments to the Canons of Judicial Ethics.<sup>28</sup> Yet, these principled objectives are diluted by the tedious and overbearing provisions of the 2001 amended rules. This state's citizens and its legislature, via Amendment 328, deliberately divided the disciplinary

process between two entities, separating the investigative and adjudicative functions to protect both the integrity of the investigative process and the due process rights of the judge during the adjudicative process. Under Amendment 328, confidentiality was required during the investigation by the JIC and public access was required during the adjudicative process in the Court of the Judiciary.<sup>29</sup>

## Just and Efficient Procedures

The amended rules are unique among the judicial disciplining processes in all other states in numerous respects, but especially in regard to their notice and disclosure provisions and the consequences of a violation of those rules, i.e. (1) providing not only notice of the filing of a complaint, but a copy of the actual complaint and all



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accompanying materials, thereby obviously informing the subject judge of the identity of the complainant(s) and supporting witnesses; (2) providing notice of the investigation and its substance; (3) requiring that the JIC maintain complete, open discovery during the entire investigation; and (4) mandating dismissal with prejudice of any violation of those provisions as to service of the complaint and of the notice of instigation of investigation, regardless of any egregious nature of the complaint's allegations or the absence of any prejudice to the judge.<sup>30</sup>

It is unparalleled for a purely investigative body—whether a grand jury or a judicial conduct investigative commission—to give a person suspected of wrongdoing advance notice of an accusation and investigation, including the names of witnesses and informants as well as all evidence produced during the investigation while that investigation is pending.<sup>31</sup> The implications of such a rule are clear. First, it provides the opportunity for the subject of the complaint to intimidate witnesses, destroy evidence and obfuscate the effectiveness of an investigation. Additionally, statistics suggest that, since the court's adoption of the amended rules, the notice provisions are stifling the filing of complaints by litigants, users of the court systems, attorneys, fellow judges, and court personnel. Statistics support the facts since the court's adoption of the amended rules, inquiries to the JIC have decreased 16 percent and the filing of complaints has decreased approximately 37 percent.<sup>32</sup>

While it is understandable that the subject judge or anyone else might like to know if a complaint is pending, the real question should be whether that desire to know should trump the constitutional and practical purposes of the confidentiality provision? When measured by the constitutional requirement of confidentiality, the notification and open discovery provisions are inordinate and simply improper. From the practical standpoint, citizens are reluctant to complain when they know the judge will be informed of their identity.<sup>33</sup> In addition, the investigation becomes unnecessarily more burdensome, complicated and expensive, providing the person accused of wrong conduct the opportunity to destroy or affect the integrity of potential evidence, e.g. intimidate witnesses, backdate orders and emulate seemingly rehabilitative behavior.

In reality, it seems the unforgiving notice requirements and technicalities required by the 2001 rules are more likely to protect those few judges who are engaging in particularly egregious conduct. As indicated earlier, the JIC has complied with its constitutional charge by investigating allegations, many of which have ultimately been made public by the filing of charges in the Court of the Judiciary, dealing with sexual misconduct, a wide range of criminal activity and other serious conduct. In contrast, the unfounded and frivolous accusations against judges—the vast majority of the complaints—are now more difficult to summarily dispose of. Contrary to the constitutional directive that the JIC be convened permanently and despite the constitutional authority to initiate complaints, the JIC's chair cannot even direct the JIC's director to make a simple telephone inquiry without the JIC first receiving a verified complaint and then meeting to vote to initiate “an investigation.”

Because of the 42-day requirement for the JIC's decision whether to investigate a complaint and the requirement that only a majority of its members may approve the issuance of a subpoena, the JIC has increased its meeting frequency from bimonthly to approximately monthly without a corresponding increase in the budgetary resources of the JIC to pay the actual travel expenses of its members and a stipend for its non-judicial members, as required by Section 12-6-1, *Code of Alabama* (1975).<sup>34</sup> In 2000, the JIC had the ability to limit, and did in fact limit, the number of meetings per year due to budgeting constraints. This is no longer possible. However, even more fundamental is the effect the restriction has had on the flexibility necessary to effectively and efficiently carry out and manage the JIC's business. Finally, and possibly most perplexing, is the requirement that a subpoena be issued only upon the vote of a majority of the entire the JIC. As is obvious, the need for specific subpoenas ordinarily arises in the course of the investigation, yet under Rule 9, the JIC's prosecutor must wait for a duly called meeting to submit specific subpoena requests.

In October 2001, the same month the supreme court amended the JIC's rules of procedure, the court also made significant changes to the procedural rules for the Court of the Judiciary. The Court of

the Judiciary, the adjudicative body, acts only after the JIC has investigated a complaint and filed a formal charge with the Court of the Judiciary. At that point, the proceedings of the Court of the Judiciary become public. It is not the purpose of this article to review the rules related to the Court of the Judiciary or the October 2001 amendments thereto. However, it is noteworthy that the rules were changed to require “conviction” of a judge only with the concurrence of no fewer than six of its nine members, and to allow removal from office only with the concurrence of *all* of the members of the Court of the Judiciary.<sup>35</sup> The current rule further provides that a failure to “convict” within ten days after the conclusion of the hearing constitutes an “acquittal.”<sup>36</sup> While the investigations of the JIC and the proceedings of the Court of the Judiciary are not designed to be and are separate and apart from criminal proceedings, the supreme court uses terms such as “acquittal” and “conviction.” Such terms are generally reserved for criminal or quasi-criminal proceedings. If the supreme court does view the proceedings as criminal or quasi-criminal in nature, then the requirements to notify a judge immediately upon a suggestion of wrongdoing and prior to the commencement of an investigation seem even more out of place.

## Conclusion

The Commission on Professionalism noted several deficiencies in the JIC's procedural rules and urged the Supreme Court of Alabama to expeditiously revisit the current rules of procedure. Provisions in the current rules, in which investigations become null and void and are dismissed with prejudice for failure to comply with technical limitations, certainly give the perception that the rules exist to protect judges. This article is not designed to provide a technical examination of the current rules or suggested changes, but to identify the problems encountered by the JIC, the public, litigants and attorneys and the difficulties they face in filing complaints with the JIC.

The Chief Justice's Commission on Professionalism urges the Supreme Court of Alabama to bear in mind, as the court considers revisions, the constitutional mandates that control the operations of the JIC. The Professionalism Commission

further recommends that the court modify or eliminate the current timelines and deadlines, as they create unnecessary expense for the JIC and provide draconian penalties for failure to comply, weakening the constitutional authority of the JIC. The current rules compromise the constitutionally mandated rule of confidentiality and affect the ability of the JIC to conduct fact-finding investigations. In addition, the JIC is not able to currently offer an effective program to deal with impaired judges suffering from physical, mental or drug/alcohol-related disabilities. It is hoped that these, as well as other issues, raised in this article will be taken into consideration as the supreme court reviews the rules.

The people of Alabama have entrusted the supreme court with the responsibility to adopt procedural rules that assure accountability for our judges and courts. Almost all of the judges in the State of Alabama are outstanding public servants who possess high standards of character and moral virtue. The public has a right to expect, and public confidence in the judicial system demands, that all judges conduct themselves with honesty, integrity, public respect, fairness, and moral integrity. In those few cases where there are violations of the standards of conduct required of judges, the public, as well as the judicial system, is entitled to have confidence in a process that is designed to promote fairness and confidentiality to complainants as well as judges.

The Chief Justice's Commission on Professionalism was asked to study the rules and to study proposed changes to the rules. After much study, the commission has recommended modification of the existing rules as they relate to the JIC. The commission further urged the court to conduct public hearings and invite comment on what can be done to improve the rules of procedure of the JIC for the sake of the public and the profession. ▲▼▲

6. Ala. Const. art. V, § 156(b), recompiled from § 6.17(b) of Amendment 328.
7. *Id.*
8. Ala. Const. art. V, § 157(a), recompiled from § 6.18(a) of Amendment 328.
9. Ala. Const. amend. 328, § 6.17(c) and § 6.18(c), respectively (now Ala. Const. art. V, §§ 156(c) and 157(c), respectively).
10. *State of Alabama Judicial Inquiry Commission Annual Reports*, FY 1998-2005; 2006-2007, statistics supplied by Jenny Garrett, director of the JIC.
11. Charles D. Cole, *Discipline, Removal, or Exoneration of Alabama Jurists*, 5 *Cumb. L. Rev.* 214, 231 (1974).
12. Rule 5.A.(1) and (2) provided the only exceptions to this prohibition. Subsection (1) provided that the Commission, at the request of a judge who has been publicly charged or is the subject of an investigation or in any proceeding where the subject matter is known to the public, could make a very limited statement confirming or denying an investigation, clarifying its procedure or defending the judge's right to a fair trial or to preserve public confidence in the administration of justice. Subsection (2) provided that, where the Commission has determined that allegations against a judge have no basis for the filing of charges or for further proceedings, the Commission may, at the judge's request, issue an explanatory statement. The 2001 amendments changed these provisions only by adding the requirement that the Commission's statement be approved by the judge.
13. Cole, *supra* note 13 at 226. *See also Boggan v. Judicial Inquiry Commission*, 759 So. 2d 550, 552 (Ala. 1999)
14. Rule 6.C. Rules of Procedure of the Judicial Inquiry Commission.
15. Ala. Const. art. V, § 156(b).
16. Rule 6.B.
17. Rules 6.A., 6.B. and 9.
18. Rule 6.D.
19. Rule 6.E.
20. Rules 6.F.
21. *Id.*
22. Rule 6.G.
23. Rule 9.
24. Rule 7.C.
25. Rules 7.C. and 9.
26. *See* COJ ## 12, 14, 17, 20, and 31, respectively.
27. The Judicial Inquiry Commission is budgeted for and employs an executive director, an assistant executive director and an executive secretary. It was never

envisioned that the investigations would be encumbered and complicated by the additional requirements mandated by the amended rules. The budgetary and administrative structures of the commission were not designed nor have they been increased to facilitate such investigations.

28. *See, e.g.*, Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."); Canon 2.A. ("A judge should ... conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Canon 2.B. ("A judge should at all times maintain the decorum and temperance befitting his office and should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute.");
29. Rule 10, *Rules of Procedure of the Alabama Court of the Judiciary*.
30. Cynthia Gray, director of the Center of Judicial Conduct Organizations for the American Judicature Society, appearance before the Alabama Supreme Court's Standing Committee on Rules of Conduct and Canons of Judicial Ethics, July 18, 2008.
31. In fact, the current attorney general has determined that his office, who has always provided investigative and legal services to the commission, has a conflict in continuing those services because of the commission's notification and discovery requirements, particularly in regard to the serious nature of some of the complaints filed with the Judicial Inquiry Commission, i.e. sexual abuse, sexual misconduct, bribery and other charges that could relate to criminal conduct. The commission must now incur additional expense for these services on a budget never designed to include these activities.
32. *State of Alabama Judicial Inquiry Commission Annual Reports*, FY 1998-2005; 2006-2007, statistics supplied by Jenny Garrett, director of the JIC.
33. Jenny Garrett, director of the JIC, reports that many would-be complainants refuse to follow through once they are told that the judge will be provided their identity within ten days of filing a complaint.
34. According to Peggy Groves, assistant executive director of the commission, this past year, the commission met 16 times, with only three of those by telephone.
35. Rule 16, *Rules of Procedure of the Alabama Court of the Judiciary*.
36. *Id.*

## Endnotes

1. George Sharswood, quoted in *Alabama Code of Ethics*, Alabama State Bar Annotations, 1887.
2. *Hayes v. Alabama Court of the Judiciary*, 437 So.2d 1276, 1278 (Ala. 1983).
3. *In re DuBose*, No. COJ # 36, slip op. at 25 (C.O.J. June 5, 2008) (quoting *In re Conduct of Ginsberg*, 690 N.W. 2d 539, 549 (M nn. 2004)).
4. Charles D. Cole, *Judicial Reform in Alabama: A Survey*, 4 *Cumb. L. Rev.* 41, 43 and n.3 (1973).
5. Ala. Const. amend. 328 (now Ala. Const. art. V).



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# Judicial Review of Arbitration Awards in the Alabama Courts

By William H. Hardie, Jr.

## Introduction

On June 20, 2008, the Supreme Court of Alabama in *Horton Homes, Inc. v. Shaner*, \_\_\_ So.2d \_\_\_, 2008 WL 2469364 (Ala. June 20, 2008), adopted an entirely new set of procedures for the review of an arbitration award in state court. This opinion will have significant impact on the review of arbitration awards in state court in Alabama.

In addition, on March 25, 2008, the Supreme Court of the United States issued an opinion in which it held that the grounds listed in §§ 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, for vacating or modifying an arbitration award are the exclusive grounds available when the review is sought under the “streamlined treatment” provided in the Act. *Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_ 128 S. Ct. 1396, 1401-1402 (2008). This opinion will have significant impact on the substantive grounds for future review of arbitration awards in Alabama.

The Court’s opinion in *Hall Street* raised serious questions concerning the continued viability of extra-statutory grounds for vacating an arbitration award in state court. See William H. Hardie, *Arbitration: Post-Award Procedures*, 60 Ala. Law. 314, 322-23 (1999) (discussing extra-statutory grounds created by the courts). The most prominent of these grounds is “manifest disregard of the law” which owes its origins to *dicta* in *Wilko v. Swann*, 346 U.S. 427, 436 (1953), and that ground for vacatur under the FAA was specifically rejected by the following language in the *Hall Street* opinion:

Then there is the vagueness of *Wilko*’s phrasing. Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. . . . Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” . . . We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, . . . and now that its meaning is implicated, we see no reason to accord it the significance that *Hall Street* urges.

*Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. at \_\_\_ 128 S. Ct. at 1404.

The *Hall Street* opinion was clearly limited to the procedures available under the FAA, and its rejection of extra-statutory grounds would apparently not apply to proceedings in state courts. Indeed, the Court was at pains to emphasize the continued viability of procedures other than the FAA:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

*Id.* at \_\_\_, 128 S. Ct. at 1406.

Nevertheless, the Supreme Court of Alabama in *Hereford v. D.R. Horton, Inc.*, 2008 WL 4097594 (Ala. September 5, 2008), followed the lead of the United States Supreme Court on this issue and abandoned “manifest disregard of the law” as an extra-statutory ground for review of an arbitrator’s award:

Earlier this year, the Supreme Court of the United States, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, *supra*, rejected the conclusion that it had adopted manifest disregard of the law as an additional, nonstatutory ground for relief from an arbitrator’s decision. . . . Under the Supreme Court’s decision in *Hall Street Associates*, therefore, manifest disregard of the law is no longer a proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator’s award. In light of the fact that the Federal Arbitration Act is federal law, and in light of the Supremacy Clause of the Constitution of the United States, Art. VI, we hereby overrule our earlier statement in *Birmingham News* that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator’s award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.

*Id.* at 4-5.

## Federal Arbitration Act

The Supreme Court of the United States has recognized a state court's concurrent jurisdiction under the FAA. *Moses H. Cohen Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983) ("the federal courts' jurisdiction to enforce the [Federal] Arbitration Act is concurrent with that of the state courts"). The general principle is that state courts have jurisdiction over cases arising under federal law absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state court adjudication. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-478 (1981); see also *Tafflin v. Levitt*, 493 U.S. 455, 458-460 (1990); *Howlett v. B. e.*, 496 U.S. 356, 367 (1990). Therefore, in addition to its role requiring enforcement of arbitration agreements, the FAA may have a role as a source of procedure in state court.

Federal courts hold that the petition to enforce or vacate under the FAA may be filed not only in the district in which the award was made, but also in any suitable district under general venue provisions. See *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 195 (2000). It remains an open question whether an action in state court invoking the FAA could rely on the FAA's permissive venue. In *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 939 n.6 (Ala. Civ. App. 2006) and *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720, 721 (Ala. 2001), the courts held that the restrictive rules of venue were jurisdictional, but the opinions were careful to point out that the FAA had not been invoked by the parties.

The pleading filed in federal court under § 8 of the FAA to confirm an award is a petition to confirm the award, not a complaint. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). Section 12 of the FAA provides that judicial review of an arbitration award is invoked in the trial court by "Notice of a motion to vacate, modify, or correct an award . . .". The Supreme Court of the United States has not ruled definitively whether the procedural provisions of the FAA must be applied when the FAA is invoked in a state court. See *Government of the Virgin Islands v. United Industrial Workers*, 169 F.3d 172, 175 (3d Cir. 1999). The court has said, however, that the FAA is not intended to occupy the entire field of arbitration. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989), and the Court in *Hall Street* observed similarly that the FAA is not the "only way into court for the parties wanting review of arbitration awards . . .". *Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. at \_\_\_ 128 S. Ct. at 1406.

The Supreme Court of Alabama has not considered whether review of an arbitrator's award could be commenced in state court solely by motion to vacate in reliance on the FAA procedures.

Section 9 of the FAA provides that the summary confirmation procedure is available for only one year after the award. A conflict exists among the federal circuits whether this is mandatory or permissive. Compare *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152 (2d Cir. 2003), with *Val-U Construction Co. v. B. e. bud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1988); see *General Electric Co. v. Anson Stamping Co.*, 426 F. Supp. 2d 579, 583 (W.D. Ky 2006) (discussing the permissive-mandatory issue at length).

Section 12 of the FAA provides three months for serving notice of a petition to vacate, modify or correct an award in federal court. There are no Alabama cases discussing whether the

more generous FAA time limitations would apply to proceedings brought in state court under the FAA.

The decision in *Hall Street* compels the conclusion that, at least in federal court, a motion to vacate or modify under the FAA may rely only on the grounds enumerated in the Act. Those grounds are:

### Section 10(a)(1): Where the award was procured by corruption, fraud or undue means

"Corruption" is not defined in either the state or federal acts. The dictionary defines corruption as "impairment of integrity, virtue, or moral principle." *Webster's Ninth New Collegiate Dictionary* 294 (1987). This evidently refers to corruption by a party, witness or other person as well as the arbitrator. Certainly, it would include bribery or other improper conduct intended to influence the arbitrator, but it also might include bribery of witnesses or other parties.

"Fraud" is a common concept in the law. It seems clear that in order to justify vacating an award because of fraud, the parties seeking vacation must show that the fraud was materially related to the arbitration. In *Pruett v. Williams*, 623 So. 2d 1115, 1116 (Ala. 1993), the court rejected the unsuccessful party's claim that the arbitrator had committed fraud in his award by misrepresenting his expertise in the area of construction law. In Alabama, perjury, that is, false testimony during the course of a trial, is not usually a fraud on the court sufficient to support an action to set aside a judgment. See *Hall v. Hall*, 587 So. 2d 1198, 1200-1201 (Ala. 1991) (quoting *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985)). Therefore, mere perjury, alone, is probably not a sufficient "fraud" on which to base a motion to vacate an arbitration award. On the other hand, if the successful party encouraged false testimony, then it might qualify.

The Court of Appeals for the First Circuit has defined "undue means":

The phrase "undue means" in the statute follows the terms "corruption" and "fraud." It is a familiar principle of statutory construction that a word should be known by the company it keeps. . . . The best reading of the term "undue means" under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. See *PaineWebber Group, Inc. v. Zs meyer Trusts P'ship*, 187 F.3d 988, 991 (8th Cir.1999) ("The term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' that precede it in the statute."); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C.Cir.1995) ("undue means" refers to conduct "equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator").

*National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 499 (1st Cir. 2005); see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F. Supp. 2d 1337, 1344 (M.D. Fla. 1998), *aff'd*, 214 F.3d 1354 (11th Cir. 2000) (conspiring to secure the unavailability of witnesses, suborning perjury, redacting documents by falsely asserting privilege and procedural maneuvers designed to inhibit the presentation of the adverse party's case were claimed as "undue means").

According to the prevailing formulation in federal court for vacatur under § 10(a)(1):



Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud. Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration. It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred.

*Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306-307 (5<sup>th</sup> Cir. 2004) (citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11<sup>th</sup> Cir.1988)).

### **Section 10(a)(2): Where there was evident partiality or corruption in the arbitrators, or either of them**

This ground refers to the arbitrator's "bias," and it appears in both the federal and Alabama statutory law. Unfortunately, neither act defines the meaning of "evident partiality," and the courts have had some difficulties with it. Justice Black's plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), suggested that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Thus, he concluded, arbitrators must avoid even the "appearance of bias." *Id.* at 150. This was not a majority opinion, and the concurring opinions make it clear that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are aware of the facts that the relationship is trivial." *Id.* (White, J., concurring). Most courts are reluctant to impose Justice Black's burden on arbitrators.

After reviewing numerous federal cases on the issue, the Supreme Court of Alabama adopted the following definition of "evident partiality":

We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the offered evidence pursuant to the "reasonable impression of partiality" standard, using the criteria developed in the federal cases reviewed above. The appropriate approach for the trial court to take in assessing Waverlee's allegations that Walker was biased or partial in his arbitration of the underlying dispute is to consider whether Waverlee makes a showing through admissible evidence that the court finds to be credible, that gives rise to an impression of bias that is direct, definite, and capable of demonstration, as distinct from a "mere appearance" of bias that is remote, uncertain, and speculative.

*Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493, 508 (Ala. 2003). In *Waverlee Homes* the appellate court found that the arbitrator's failure to disclose his relationship with counsel for the claimant was a sufficient basis on which the trial court should have ordered an evidentiary hearing into the claim of bias.

Partiality falls into one of two categories: either the arbitrator failed to disclose relevant facts or the arbitrator displayed actual bias at the arbitration proceeding. The standard used to evaluate a claim of evident partiality varies depending on whether the party argues nondisclosure or actual bias. *See Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.* 455 F. Supp.2d 545, 549 (N.D. Tex. 2006).

One of the most controversial recent opinions concerning bias was the vacatur entered by the district court in the course of the proceedings in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5<sup>th</sup> Cir. 2007), *cert. denied*, 127 S. Ct. 2943, \_\_\_ U.S. \_\_\_ (2007). On rehearing *en banc*, the Fifth Circuit reversed the order of vacatur and held that vacatur on an "evident partiality" theory was not warranted by an arbitrator's failure to disclose that he and the attorney for one of the parties had been two of the 34 attorneys that previously represented the same client in unrelated litigation that had concluded seven years earlier. *Id.* at 284. The court stated:

As we have concluded, the better interpretation of *Commonwealth Coatings* is that which reads Justice White's opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.

*Id.* at 283.

### **Section 10(a)(3): Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced**

Section 10(a)(3) does not mean that any refusal to postpone or refusal to hear evidence constitutes misconduct. *See National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1<sup>st</sup> Cir. 2005); *El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843, 847-848 (8<sup>th</sup> Cir. 2001). Instead, such refusals are grounds for vacatur only if they deprive a party of a fair hearing. *See Robbins v. Day*, 954 F.2d 679, 685 (11<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 870 (1992); *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399-400 (5<sup>th</sup> Cir. 2006); *El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843, 847-848 (8<sup>th</sup> Cir. 2001).

In reviewing an arbitrator's refusal to delay a hearing, a court will not vacate the award if there was any reasonable basis for declining to postpone the hearing. *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1016 (11<sup>th</sup> Cir.1998), *cert. denied*, 525 U.S. 1068 (1999).

A refusal to hear evidence will not justify a vacatur unless the party offering the evidence was deprived of a fair hearing. *National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1<sup>st</sup> Cir. 2005). The arbitrator's failure to enforce a motion to compel production of documents does not constitute a refusal to hear evidence if the arbitrator uses the party's refusal to produce

documents as the basis for negative inference. See *National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1<sup>st</sup> Cir. 2005).

The “refusing to hear evidence” ground in § 10(a)(3) does not mean that an arbitrator is prevented from entering the equivalent of a “summary judgment” if the applicable arbitration rules allow such a procedure, but in the absence of such rules, the arbitrator must hold a full evidentiary hearing. See *Sherrock Broth., Inc. v. DaimlerChrysler Motors Co. LLC*, 465 F. Supp.2d 384, 393 (M.D. Pa. 2006). In *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001), the court held that § 10(a)(3) did not prevent the arbitrator from granting a motion to dismiss “facially deficient claims with prejudice” given the broad authority of the NASD rules. *Id.* at 1206. Presumably this reasoning would apply to any arbitration rules that grant broad authority to the arbitrators over the relief available.

Prejudicial misbehavior is also difficult to define. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F. Supp. 2d 1337, 1343 (M.D. Fla. 1998), *aff’d*, 214 F.3d 1354 (11th Cir. 2000), the court found no prejudice in the alleged misbehavior of the arbitrator in striking comments from the record and failing to obtain copies of the exhibits. In *Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp.*, 978 F. Supp. 266, 306 (S.D. Tex. 1997), the court rejected the contention that an “irrational scheduling order” constituted misbehavior. In *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 730-731 (N.D. Tex. 1997), the court failed to find “misbehavior” in the arbitrator’s refusal to return exhibits produced during the hearings and in the arbitrator’s review of documents without giving an opportunity to the other party to review the documents.

In *Circle Indus. tries USA, Inc. v. Parke Construction Group, Inc.*, 183 F.3d 105, 109 (2d Cir.), *cert. denied*, 528 U.S. 1062 (1999), the court observed that an arbitrator’s violation of AAA rules could require vacatur, citing prejudicial misbehavior under 9 U.S.C. § 10(a)(3) as the basis. However, the court refused to vacate for the arbitrator’s handling of exhibits in violation of AAA rules because there was no prejudice.

These cases confirm that “misbehavior” is an attractive category to challenge any questionable conduct by an arbitrator, but the cases also confirm that such a challenge is rarely successful in the absence of compelling evidence.

### **Section 10(a)(4): Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made**

In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the court concluded that the award was indefinite, uncertain and imperfect because it did not finally dispose of all issues, and the circuit court should have set aside the award. Similarly, in *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000, 1002 (Ala. 1989), the court observed that the award must be a final determination of the matters submitted or “there is no award.” In that case the arbitrators had issued an award clearly labeled as an interim award, so it was not improper for the arbitrators to issue a second, final award.

In resolving questions concerning the authority of an arbitrator, courts construe the agreement and resolve all doubts in favor of the arbitrators who have a great deal of flexibility in fashioning

remedies. Thus, there is a heavy burden on those who claim that the arbitrators have exceeded their authority. See *H. L. Fuller Construction Co. v. Industrial Development Board*, 590 So. 2d 218, 223 (Ala. 1991). In *H.L. Fuller Construction* the appellant contended that the arbitrators had exceeded their powers because they had ruled inconsistently in favor of the petitioner on its claims and in favor of the third-party defendant on its defenses. The Supreme Court of Alabama concluded that it could not say that the arbitrators had exceeded their powers. The court declined to analyze the issues in the arbitration and observed that under the rules of the American Arbitration Association the arbitrator was empowered to grant any remedy or relief that is “just, equitable, and within the terms of the agreement of the parties.” *Id.* at 223. Similarly, in *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the unsuccessful party argued that the arbitrator had exceeded his authority by failing to award interest. The agreement out of which the arbitration arose expressly provided that interest should accrue on the escrow payments in contention. Therefore, the court concluded, the arbitrator had exceeded his authority under the agreement. *Id.*

A delay in making the award may fall within § 10(a)(4). If the arbitration agreement requires the arbitrators to make their award within a specific time, then most courts agree that the arbitrators’ failure to do so will render the award null and void when it is rendered late. See Annotation, *Construction and Effect of Contractual or Statutory Provision Fixing Time within Which Arbitration Award Must Be Made*, 56 A.L.R. 3d 815 (1974). However, more modern cases seem reluctant to employ this rule. See *King v. Stevenson*, 445 F.2d 565, 569-70 (7th Cir.1971); *Green v. Ameritech Corp.*, 12 F. Supp.2d 662 (E.D. Mich. 1998) (refusing to apply the rule because the movant failed to show that it had been prejudiced by the delay), *rev’d on other grounds*, 200 F.3d 967 (6th Cir. 2000). In *Tomczak v. Erie Ins. urance Exchange*, 268 F. Supp. 185 (W.D. Pa. 1965), the court declined to enforce a 30-day requirement incorporated by reference from the rules of the administering tribunal.

The arbitrator’s authority may be at issue if the arbitrator is not chosen in accordance with the agreement of the parties. Several courts, relying on § 5 of the FAA, have determined that arbitration awards made by arbitrators not appointed under the method provided in the parties’ contract must be vacated, but parties must insist upon the enforcement of their contractual rights before the arbitrators as they do in court or they will be waived. See *Brook v. Peak International, Ltd.*, 294 F.3d 668, 672-674 (5<sup>th</sup> Cir. 2002).

## **Alabama Arbitration Act**

The Alabama Arbitration Act (“AAA”), *Ala Code* § 6-6-1 *et seq.*, contains its own venue provisions. Section 6-6-12 provides that a proceeding to enforce an award under the AAA must be filed in the court in which the action is pending or, if no action is pending, in the circuit court of the county in which the award is made. Similarly, § 6-6-15 provides that the notice of appeal to the appropriate appellate court must be filed in the circuit court where the action is pending or, if no action is pending, then in the circuit court of the county where the award is made. The opinions in *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720 (Ala. 2001), and *MBNA America Bank, N.A. v. Bodalía*, 949 So. 2d 935, 940 (Ala. Civ. App. 2006), hold that the “venue” provisions of § 6-6-12 and § 6-6-15

are jurisdictional and if no action is pending, then the action must be filed only in the county where the award was “made.”

The AAA and the Alabama cases are vague on the meaning of “made” in this context. It might reasonably be inferred that the award is made where the hearing is held, but the issue is more complex if the award is issued without a participatory hearing, as permitted by some arbitration administrators. The courts have ruled that an award “issued in Florida” was not made in Baldwin County, *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 940 (Ala. Civ. App. 2006), and that an award by a Canadian arbitrator based on a proceeding in Canada was “made” in Canada, *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720 (Ala. 2001). In *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 196 (2000), without analyzing the issue, the court equated the location of the hearing with the district in which the award was made.

Consequently, there is room for further explanation of this jurisdictional issue under the AAA by the courts of Alabama.

Section 6-6-12 of the AAA contains what the Court of Civil Appeals of Alabama calls a “summary enforcement mechanism” for arbitration awards. See *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 939 (Ala. Civ. App. 2006). If the award is not performed within in ten days after notice, the successful party may file the award and it will have the force and effect of a judgment without further action by the court. Apparently no case has questioned the significance of the ten-day wait prescribed in § 6-6-12, but the opinion in *McKee v. Hendrix*, 816 So.2d 30, 32 (Ala. Civ. App. 2001), noted without comment that the motion to confirm had been filed before the expiration of the ten days.

The AAA does not provide for a specific period of limitations on commencing an action to enforce an arbitration award, so Alabama’s six-year limitations period for contracts is probably applicable. See § 6-2-34 *Ala. Code*. No court has held that the one year limit of the FAA applies in state courts, but it might apply if the FAA were invoked.

Section § 6-6-15 of the AAA provides a ten-day period for filing the notice of appeal to the appropriate appellate court, but in *Horton Homes, Inc. v. Shaner*, \_\_\_ So.2d \_\_\_, 2008 WL 2469364 (Ala. June 20, 2008), where the parties invoked both § 6-6-15 of the *Alabama Code* and Rule 4, *Ala. R. App. Proc.*, the court explicitly held that Rule 4 operates to expand the statutory time period for taking an appeal from ten days to 42 days after receipt of notice of the award.

Other states disagree whether the FAA period of limitations is substantive and applicable to state proceedings or procedural and not applicable. See, e.g., *Joseph v. Advest, Inc.* 906 A.2d 1205, 1210 (Pa. Super. 2006) (holding that the state procedural limits for challenging arbitration awards is not preempted by FAA); *Eurocapital Group, Ltd. v. Goldman Sachs & Co.*, 17 S.W.3d 426, 431 (Tex. App. 2000) (holding that the FAA statute of limitation is considered substantive).

Section 6-6-15 of the AAA provides that an appeal from an arbitrator’s award is effected by filing a notice of appeal to the appropriate appellate court in circuit court within ten days after

receipt of notice of the award. Unless the circuit court sets the award aside within ten days, the award becomes a judgment and the appeal is perfected. This procedure was followed in *Birmingham News Co. v. Horn*, 901 So.2d 27, 44 (Ala. 2004), where the circuit court took no action during the ten-day period following the original filing.

The AAA is silent as to the procedures in the circuit court during the ten-day interval between the original filing and the automatic finalization of the judgment. In an effort to resolve some of the confusion created by the lack of specifics in § 6-6-15, the Supreme Court of Alabama in *Horton Homes, Inc. v. Shaner*, \_\_\_ So.2d \_\_\_, 2008 WL 2469364 (Ala. June 20, 2008), overruled its prior observations about the procedure in circuit court and established that a motion to vacate the award is a precondition to an appeal:

...a proceeding to enforce an award under the AAA must be filed in the court in which the action is pending or, if no action is pending, in the circuit court of the county in which the award is made.

The judgment entered by the circuit clerk on the arbitrator’s award pursuant to § 6-6-15 is a *conditional* one; it does not become a final appealable judgment until the circuit court has had an opportunity to consider a motion to vacate filed by a party seeking review of the arbitration award. A party seeking review of an arbitration award is *required* to file a motion to vacate during this period—while the judgment entered by the circuit clerk remains conditional—in order to preserve its ability to later prosecute that appeal to an appellate court once the judgment becomes final. This is so not only

because § 6-6-15 contemplates a party’s first seeking relief from an award in the circuit court, but also because “[a]ny grounds not argued to the trial court, but urged for the first time on appeal, cannot be considered.” *Lloyd Noland Hosp. v. Durham*, 906 So.2d 157, 165 (Ala. 2005).

*Horton Homes, Inc. v. Shaner*, 2008 WL 2469364, at \*5.

The court also modified the ten-day period for acting on a motion to vacate by borrowing from Rule 59 of the *Alabama Rules of Civil Procedure*:

Section 6-6-15 provides that the judgment entered by the circuit clerk is to remain conditional for only ten days, after which it “shall become final” unless it has been, during that ten-day period, set aside by the circuit court. However, this short time span—ten days—is impractical in application and not consistent with the *Alabama Rules of Civil Procedure* that govern postjudgment motions. It is unreasonable to expect a party to file a motion to vacate, the opposing party to respond, and the circuit court to then thoughtfully consider their arguments all within a ten-day period. Accordingly, we modify that timeline established in § 6-6-15 as follows to make it consistent with the *Alabama Rules of Civil Procedure* and to allow for a more meaningful review by the trial court.

Rule 59(e), *Ala. R. Civ. P.*, provides that a party has 30 days after the entry of judgment to file a motion to alter, amend, or vacate that judgment. Accordingly, borrowing from the

spirit of Rule 59(e),<sup>FN3</sup> we hold that a party desiring judicial review of an arbitration award pursuant to § 6-6-15 must file in the appropriate circuit court a motion to alter, amend, vacate, or set aside the award within 30 days of filing the notice of appeal of the arbitration award and the clerk's entry of the conditional judgment based thereon. If that motion is timely filed, the circuit court shall then have 90 days, unless that time is extended by the consent of all the parties, to dispose of the motion. See Ala. R. Civ. P. 59.1 ("A failure by the trial court to dispose of any pending post-judgment motion within [90 days], or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.").

*Horton Homes, Inc. v. Shaner*, 2008 WL 2469364 at \*5.

Based on the opinion in *Horton Homes, Inc. v. Shaner*, the procedure for appealing from an arbitrator's award under the AAA are now as follows:

1. Within 42 days of receipt of the award, the dissatisfied party must file an appeal to the appropriate appellate court with the clerk of the circuit court in which the action was pending or, if no action was pending, with the clerk of the circuit court in the county where the award was made. The filing must include the award.
2. The clerk must then enter the award as a judgment conditional on the action of the circuit court on the dissatisfied party's motion to vacate.
3. Within 30 days of filing the notice of appeal, the dissatisfied party must file a motion pursuant to Rule 59(e) of the Alabama Rules of Civil Procedure to vacate the award.
4. The circuit court then has 90 days from the date of filing of the Rule 59 motion to rule on the motion, unless extended by agreement of the parties.
5. If no action is taken by the court within 90 days, or if the motion to vacate is denied, then the dissatisfied party's appeal will proceed on the basis of the original notice of appeal.
6. If the circuit court grants the motion to vacate, then the party whose award has been vacated has 42 days from the order in which to file a notice of appeal.

The court in *Horton Homes, Inc. v. Shaner*, did not undertake any revision of the timing for an action to enforce an arbitration award. Specifically, it did not comment on the possibility that in response to a petition for entry of a judgment on an award, the dissatisfied party might file a Rule 59 motion after the expiration of 45 days. In an analogous situation under the FAA, federal courts have held that the unsuccessful party's failure to move to vacate the award within the three months federal limit precludes him or her from later seeking that relief when a motion is made to confirm the award within one year but after the expiration of three months. See, e.g., *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 853-854 (11th Cir. 1989), cert. denied, 490 U.S. 1107 (1989); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Presumably the Alabama courts will follow this rule.

### Grounds for Appeal in the Alabama Courts

In *Birmingham News Co. v. Horn*, 901 So.2d 27, 46-47 (Ala. 2004), the court held that the grounds for appeal enumerated in

§ 10(a)(1) through § 10(a)(4) of the FAA must be applied in Alabama courts to an appeal from an arbitration arising out of a transaction involving interstate commerce. The court also acknowledged that all of the grounds contained in the AAA were replicated in the FAA. *Birmingham News Co. v. Horn*, 901 So.2d 27, 47 (Ala. 2004).

### The Arbitrator Acted in Manifest Disregard of the Law

In *Birmingham News* the court held that the award should also be vacated when the arbitrator acted in "manifest disregard" of the law. . . .

*Birmingham News Co. v. Horn*, 901 So.2d 27, 50 (Ala. 2004); see *Jenks v. Harris*, \_\_\_ So.2d \_\_\_, \_\_\_, 2008 WL 683633, \*6 (Ala. March 14, 2008).

"Manifest disregard of the law" is a ground that permits review of the merits of an award, but in *Hereford v. D.R. Horton, Inc.*, 2008 WL 4097594 (Ala. September 5, 2008), the court followed the lead of the United States Supreme Court on this issue in *Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_ 128 S. Ct. 1396, 1401-1402 (2008), and abandoned "manifest disregard of the law" as an extra-statutory ground for review of an arbitrator's award in a case "governed by the Federal Arbitration Act." *Hereford v. D.R. Horton, Inc.*, supra, at \*3. The court in *Hereford v. D.R. Horton, Inc.* found the case was "governed" by the FAA because the contract said it was and because the defendant "invoked" the FAA in its motion to compel arbitration.

In any event, the Alabama court's position that the only grounds for review are those contained in the FAA is not supported by the U.S. Supreme Court's opinion in *Hall Street*. In *Hall Street* the Supreme Court of the United States observed that judicial review of a "different scope" than the FAA "is arguable" when resort is had to state statute or common law. *Hall Street Associates, LLC v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_ 128 S. Ct. 1396, 1406 (2008). Therefore the *Hall Street* opinion did not actually compel Alabama courts to abandon "manifest disregard" as a ground for vacatur.

The court in *Birmingham News* expressly rejected a number of other grounds for examining the merits of an award, including the ground that the award was "arbitrary and capricious." 901 So.2d at 52-53. "Arbitrary and capricious" has been used as a basis for reviewing an arbitrator's findings of fact. See, e.g., *Southwestern Bell Telephone, L.P. v. Missouri Public Service Com'n*, 461 F. Supp.2d 1055, 1084 (E.D. Mo. 2006). By rejecting it as a ground for vacatur, the Alabama court implied that there is no review of the evidentiary basis for an arbitrator's award. Indeed, the court observed: "Some courts have concluded that an arbitrator's findings of fact are virtually unassailable." *Birmingham News Co. v. Horn*, 901 So.2d 27, 59 (Ala. 2004). However, the court did not adopt that view. Instead it found no need to "evaluate the evidence" because that issue was not before it as "a legitimate component of a legally cognizable ground of arbitral review." *Ibid.* The court left open just which "ground of arbitral review" would authorize it to evaluate the evidence unless evidentiary insufficiency could "constitute a manifest disregard of the law". *Id.* at 61.

### Public Policy

Another ground for vacatur recognized by many courts is that the award violated fundamental public policy. See *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993); *Hackett v.*

*Milbank, Tweed Hadley & McCoy*, 86 N.Y.2d 146, 630 N.Y.S.2d 274, 654 N.E.2d 95 (1995). The court in *Birmingham News* did not consider this ground, and the court has not had occasion to consider public policy as a ground for vacating an arbitration award.

Public policy may be created by the courts as well as the legislature:

The public policy of the state is found in its Constitution and statutes, and, when they are silent, in its judicial decisions and the constant practice of its public officials.

*City of Tuscaloosa v. Hanly*, 150 So. 499, 500 (Ala. 1933) (quoting *City of Marengo v. Rowlan*, 105 N. E. 285, 286 (Ill. 1914)). See also *Kerlin v. Ramage*, 76 So. 360, 361 (Ala. 1917); *Sears Termite & Pest Control, Inc. v. Rbins on*, 883 So.2d 153, 157 (Ala. 2003); *Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421 (Ala. 1997); *Southside Baptist Church v. Drennen*, 362 So.2d 854, 857 (Ala. 1978).

If it is presented with the issue, the Alabama courts could adopt violation of public policy as a separate ground for vacatur under Alabama procedures.

## Common Law

Regardless of statutory authority, the common law provides for the enforcement of arbitration awards. See *Restatement (Second) of Contracts* § 345(f) (1981). The common law has been adopted in Alabama by statute. See Ala. Code § 1-3-1. Moreover, § 6-6-16 states that the AAA is not the exclusive means for conducting arbitration.

The circuit courts of Alabama are courts of general jurisdiction. See Ala. Const. 1901, Art. VI, § 142(b). Therefore, they have jurisdiction of any action available at common law to enforce or to vacate an arbitration award. In any action in state court based on the common law, the standard rules for venue will apply. See e.g., §§ 6-3-2, 6-3-7 Ala. Code.

The procedure at common law for enforcing an arbitration award would be the same as the procedure for enforcing a foreign judgment. That is, a complaint would be filed reciting the existence of the contract compelling arbitration and reciting the results of the arbitration. The defendant would be served with a summons and complaint and would have 30 days to answer in accordance with existing procedure. See *Restatement (Second) of Contracts* § 345(f) (1981), comment e. A successful claimant might prefer the common law procedure over the AAA summary procedure if the common law procedure would permit enforcement in the county where the defendant is subject to personal jurisdiction rather than some remote venue where the award was made.

Many state courts have recognized a common law right to vacate or set aside an arbitrator's award. See, e.g., *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226, 1232 n.8 (R.I. 2001); *Werline v. East Texas Salt Water Disposal Co., Inc.*, 209 S.W.3d 888, 897-898 (Tex. App. 2006). However, as the Restatement has observed, common law procedures for vacating an arbitration award have largely been swallowed by statutory schemes such as the FAA and the Uniform Arbitration Act. See *Restatement (Second) of Contracts* § 345(f) (1981), comment e.

Under Alabama's interpretation of the common law there was no appeal at law from an arbitration award in the absence of statutory authority, but, according to *Moss v. Upchurch*, 278 Ala.

615, 619-620, 179 So.2d 741, 745 (1965), extra-statutory attacks on an award can be made in equity for fraud, partiality, corruption, want of requisite notice, and the like, and the award may also be assailed by a motion on the same grounds as a motion to set aside and vacate judgment or to quash execution.

Post-judgment procedure, and not the restrictive time frame of the AAA, was followed in *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala. 2003). The claimant filed the arbitration award in circuit court, and the circuit court entered judgment. Waverlee Homes did not file a notice of appeal but filed a motion pursuant to Rule 59(e), Ala. R. Civ. P., to vacate the judgment based on the arbitrator's "partiality, bias, and corruption" within the 30 days required by that rule. *Id.* at 495. The circuit court never ruled on the motion to vacate, and it was deemed denied by operation of law pursuant to Rule 59.1 Ala. R. Civ. P. The appeal was filed within 42 days of the denial of the motion, and the court accepted the appeal. The *Waverlee Homes* opinion presages the court's recognition of the *Horton Homes, Inc. v. Shaner* procedures for review of an award, but it is not so certain that this procedure could be followed to review the award on its merits as opposed to the grounds set out in *Moss v. Upchurch*.

In *Rburn v. Bailes*, 565 So.2d 122, 123 (Ala. 1990), the unsuccessful party filed a complaint against the arbitrator and the other parties alleging that the arbitration had been conducted "negligently, wantonly and fraudulently" and that the arbitration award was therefore due to be set aside. The appellate court affirmed the trial court's dismissal of the complaint because it did not allege specific acts of "fraud, corruption, collusion, partiality, and the like." *Id.* at 125 (citing *McCullough v. Alabama By-Products Corp.*, 343 So.2d 508, 510 (Ala.1977)). No reference was made to any need for compliance with the AAA.

In *MBNA America Bank, N.A. v. Boddalia* 949 So.2d 935, 939 (Ala. Civ. App. 2006), the court observed that a Rule 60(b) motion to vacate a judgment is not a substitute for an appeal on the merits under the AAA. Other courts have also held that a post-judgment motion is not appropriate to review an arbitrator's award on the merits. See, e.g., *ML Park Place Corp. v. Hedreen*, 862 P.2d 602 (Wash. App. 1993) (Rule 60(b) cannot be used as an alternative route to attack an arbitration award outside of the statutory limitations period); *Sportsman's Quikstop I, Ltd. v. Didonato*, 32 P.3d 633, 635 (Colo. App. 2001).

## Record on Appeal

As with any procedure for review, the reviewing court will need a record. Section 6-6-15 of the AAA requires that the appealing party file "a copy of the award, signed by the arbitrators or a majority of them, [together] with the file of papers or with the submission, as the case may be." Presumably the "papers" must include all the exhibits and a transcript of testimony if one was made. This was apparently done in *Birmingham News Co. v. Horn*, 901 So.2d 27, 31 (Ala. 2004), as the court recites the number of witnesses and exhibits. If the court is asked to review the arbitrator's actions during the hearing, then a transcript is necessary. See *McKee v. Hendrix*, 816 So.2d 30, 36 (Ala. Civ. App. 2001).

On the other hand, an issue of arbitrator bias may be decided without a transcript if a sufficient record is made of the bias in post-award proceedings. See *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493, 501 (Ala. 2003). The need for a

record to be developed after completion of the arbitration was at the heart of the decision in *Waverlee Homes*. The supreme court explained that the material filed with the motion to vacate the judgment compelled the trial court to hold a hearing on the issues of bias presented by the motion.

Section 13 of the FAA provides detailed instructions for the creation of a record on a motion to confirm or modify an award, but the FAA is not specific about the material to be filed in support of a motion to vacate an award.

Some of the grounds for reviewing an award invite a direct inquiry to the arbitrator, but there is a well-established rule that arbitrators may not be deposed. *See Hoeft v. ML Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (“Permitting depositions of arbitrators regarding their mental processes would make arbitration only the starting point in the dispute resolution process and deprive arbitration awards of the last word on their authors’ intentions.”); *Rbens v. Mason*, 387 F.3d 183, 191 (2d Cir. 2004); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002). There is an exception that an arbitrator may be deposed regarding claims of bias or prejudice where clear evidence of impropriety has been presented. *See Uhl v. Komatsu Forklift Co., Ltd.*, 466 F. Supp.2d 899, 910 (E.D. Mich. 2006); *Garzella v. Borough of Dunmore*, 237 F.R.D. 371, 372 (M.D. Pa. 2006); *Driskell v. Empire Fire & Marine Insurance Co.*, 547 S.E.2d 360, 388 (Ga. App. 2001).

## Remedy on Appeal

An appellate court has very limited powers to modify an award it deems erroneous. Section 6-6-14 of the AAA provides that an award made in compliance with the code is “final” if the award “determines the matter or controversy submitted . . .”. Section 11 of the FAA permits a court to modify or correct an award only where there was evidence of miscalculation, where the arbitrators issued an award upon a matter not submitted to them, or where the award is imperfect in matter of form not affecting the merits.

When an arbitrator’s award is vacated, the remedy under the FAA is to remand for further arbitration rather than reverse and render a judgment. In this context, the Supreme Court of the United States has stated, “Even when the arbitrator’s award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.” *Majr League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 511 (2001).

Without discussing its authority to do so, the court in *Birmingham News Co. v. Horn*, 901 So.2d 27, 69 (Ala. 2004), recalculated the amount of the compensatory and punitive damages after concluding that the arbitrators had manifestly disregarded the law in awarding the damages. There was no discussion of the possibility of remanding the case to the original or a new set of arbitrators.

In *Massey Brothers Chevrolet-Olds-Geo, Inc. v. W.E. & Davis Construction Co.*, 786 So. 2d 1093, 1096 (Ala. 2000), the Supreme Court of Alabama held that the circuit court “had no authority” to grant the defendant an extension of time to comply with the award.

It seems clear that any remand must be made to a new set of arbitrators. In *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997), the appellate court reversed the district court’s confirmation of the arbitration award and remanded the case to the district court with instructions to refer the matter to

a new arbitration panel. Section 10(a)(5) of the FAA does say that where an award is vacated, the court may direct a rehearing by the original arbitrators only when the time for making the award has not expired. This would seem to preclude remand to the original arbitrators in most cases. For example, Rule 43 of the American Arbitration Association Commercial Arbitration Rules requires the arbitrator to issue the award within 30 days of closing the hearings. It would be very unusual for a court to enter an order of vacatur within this period.

Remand to the original arbitrators is precluded because the original arbitrator loses jurisdiction under the doctrine of *functus officio* which refers to the termination of an arbitrator’s authority once the award has been made. Subject to exceptions, the doctrine bars an arbitrator from revisiting an award, either at the request of a party or upon remand after vacation of an award. *See Edmundson v. Wilson*, 108 Ala. 118, 19 So. 367, 369 (Ala. 1896); *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000, 1002 (Ala. 1989). Nevertheless, contrary to this rule, district courts have remanded cases to the original arbitrator with directions to enter awards in accordance with the court’s instruction. *See, e.g., Wonderland Greyhound Park v. Autotote Systems, Inc.*, 274 F.3d 34, 35 (1st Cir. 2001).

Many courts have recognized the power to remand to the arbitrator for clarification of an award, notwithstanding the doctrine of *functus officio* and the lack of such authority in the FAA. In *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000), the court discussed some of the exceptions to *functus officio* under general law and remanded the case to the original arbitrator because the parties merely sought an explanation of the award as required by the contract. In *Lanier v. Old Republic Insurance Co.*, 936 F. Supp. 839, 848 (M.D. Ala. 1996), Judge Myron Thompson concluded that neither the FAA nor the Alabama Arbitration Act would prevent the court from remanding a case to an arbitrator for clarification.

## Conclusion

As the court observed in the *Birmingham News* opinion, the AAA reflects a different era in arbitration. *Birmingham News Co. v. Horn*, 901 So.2d 27, 46 (Ala. 2004). Indeed, the court writes rather wistfully that Alabama is the only state not to adopt the Uniform Arbitration Act, or something substantially similar to it. *Ibid.* The court has also acknowledged that the procedure for review is “far from clear”. *Jenks v. Harris*, \_\_\_ So.2d \_\_\_, \_\_\_, 2008 WL 683633 \*3 (Ala. March 14, 2008) (disclosing that the court has asked its standing committees on procedure to draft appropriate rules under § 6-6-15). Nevertheless, in the cases discussed above, the courts have mapped out a fairly clear path for reviewing an arbitrator’s award. Some questions remain open, but they are not serious impediments to an effective resort to the courts. ▲▼▲

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# Ten Tips to Improve Your Case on Appeal

By Scott Burnett Smith

## 1 2 3 4 5 6 7 8 9 10

I am an appellate lawyer. That means I read law and write briefs all day, most days. I am more qualified to be a monk than a trial lawyer. My partners rarely come to me for advice before they go off to try a case before a jury. But because they don't, they have to listen to me complain when they bring me their cases to handle on appeal. So recently they asked me to give them my top ten tips to improve their cases on appeal (mainly so they wouldn't have to listen to me gripe). Here is what I told them.

### 1 Put everything in the record.

Don't tell me what really happened or what the real facts are. It doesn't matter. The only thing that matters on appeal is what is in the record. If it's not in the record, it didn't happen; it's not a fact. The record on appeal consists of those papers and exhibits *filed* in the trial court, along with transcripts of any court proceedings. *See* FED. R. APP. P. 10(a); ALA. R. APP. P. 10(b)(1). Those matters of record are the only things you can cite in an appellate brief, and most appellate rules require you to substantiate everything you say about what occurred in the trial court with citations to the record. *See* FED. R. APP. P. 28(a)(7) and (a)(9); ALA. R. APP. P. 28(a)(5), (a)(7) and (a)(10). Cites to a docket entry for a hearing where no court reporter was present will not do, nor will descriptions of a critical argument in a brief that was

never filed. And if something important might be said, be sure there is a court reporter present. This applies not only to pre-trial conferences and hearings but also to trial proceedings. Jury charge conferences and sidebars are places where reversible error happens, but too often they are not transcribed by the court reporter. Thus, be sure to get everything in writing and get it on file.

Along the same lines, please do not write letters to judges. Letter-writing is for lovers, not litigation. In the first place, letters almost never make it into the record. If your opponent sends a letter to the court, respond in a brief that you file with the court and attach the opponent's letter to your brief. More important, a letter is no way to request affirmative relief on your client's behalf. Rather, Civil Rule 7(b) requires that any "application to the court for an order . . . be by motion" which must "be made in writing" unless you are in the midst of trial or a hearing. FED. R. CIV. P. 7(b)(1); ALA. R. CIV. P. 7(b)(1). File a motion. Don't send a letter.

### 2 Tell your story.

The most important part of an appellate brief is its narrative. You must tell a number of judges your client's story. To do so, you need witnesses who tell the story in the transcript. This rule applies equally to plaintiffs and defendants, but plaintiffs rarely miss this tip. Civil defendants, however, almost always miss it. Instead, defense witnesses at trial inevitably tell

only small, discrete pieces of the tale. Stitching together a compelling narrative from such disjointed testimony makes briefing the appeal more difficult.

To improve the story—both at trial and on appeal—use storyteller witnesses. Storyteller witnesses should provide a broad perspective on the case, explaining the client's perspective in the broadest terms. If done effectively, the storyteller witness's testimony will provide much of the narrative needed to explain the case on appeal. Also, if the case involves subjects hard to visualize, have your storyteller use maps, charts or diagrams in her testimony. Those visual aids can be cut into the appellate brief later to bring the story to life.

Also, don't wait until trial to use storyteller witnesses. Most cases these days go out on summary judgment—usually on a cold paper record. Don't forget that the trial court can take live testimony on dispositive motions. Federal Civil Rule 43(e), for instance, allows the court to hold a hearing with live testimony on a motion for summary judgment. Such a hearing provides a stage for storyteller witnesses even if there is no trial.

### 3 Make proffers of excluded evidence.

Evidentiary rulings are what get a trial lawyer's adrenaline flowing, especially adverse rulings. But if you're not careful, those rulings you thought were reversible error may end up not being error at all. Just because the trial judge excludes your

critical piece of evidence does not seal your victory on appeal. To preserve that evidentiary issue, you must make a proffer of the evidence at trial. Evidence Rule 103(a)(2) requires you to make the substance of the evidence known to the trial judge through an offer of proof, or proffer. FED. R. EVID. 103(a)(2); ALA. R. EVID. 103(a)(2). Without a proffer, the error you thought you had in the bag will turn into a waiver on appeal. Usually, the trial lawyer can make a proffer on the record verbally, immediately after the judge's ruling excluding the evidence. But if the excluded evidence is a witness's testimony, don't forget that you can ask to voir dire the witness outside the presence of the jury. This technique is an effective way to tell the court of appeals exactly what the witness would have said to the jury had he not been prevented from testifying. Getting it in the witness's own words is much more effective than quoting a lawyer's summary of the expected testimony.

Also, don't overlook written proffers. Motions *in limine* are now used to control the admissibility of critical evidence before the trial ever starts. If you have important evidence that is excluded on a motion *in limine*, you should consider making a written proffer of the evidence, attaching copies of the evidence if it is documentary or an affidavit from the witness if it is testamentary. This can be done either before trial or at trial. If you are in federal court, be sure to ask the trial court to make a definitive ruling on the evidence's exclusion; if the judge makes a definitive ruling before trial, you will not need to renew your objection at trial to preserve the error for appeal. *See* FED. R. EVID. 103(a). (Note that the Alabama version of Evidence Rule 103(a) does not allow this procedure, however.) Written proffers made at trial can speed things along and also serve the same purpose as a *voir dire* of the witness outside the jury's presence.

## 4 Don't object without reasons.

Experienced trial judges know how to "bully" lawyers off their objections. Don't be bullied. A stern stare from the trial judge is nothing compared to the stare you will get from an appellate judge when she realizes you did not object to the ruling on appeal. If you

have an important objection to make, get it on the record. But for gracious sakes, don't simply "object" and then sit down. Such cursory objections fail to preserve anything for appeal. If you are going to make an objection, be sure to provide the "grounds therefore" in the words of Civil Rule 46. FED. R. CIV. P. 46; ALA. R. CIV. P. 46. Exceptions to trial rulings are no longer necessary to preserve an objection. *See id.* But what *is* required is an objection that specifies the legal basis for the objection. Without that, an objection for the sake of objecting will only frustrate the jury without helping the appeal.

## 5 Double-check your exhibits.

As fewer cases are tried, more mistakes are made—especially when it comes to exhibits. You must make sure that all exhibits offered at trial are deemed "admitted" or "excluded" on the record. Too often trial lawyers get on a roll with a witness's testimony on a critical document and forget to ever offer the document into evidence. Moreover, trial judges are frequently lazy with evidence, saying "okay" when an exhibit is offered, instead of making a definitive ruling. Use your legal assistant or second-chair trial lawyer to assure these mistakes are not made in the whirl of trial. Nothing beats a good old-fashioned chart enumerating all of your exhibits along with columns to check whether each has been "admitted," "excluded" or "reserved." And once the trial is over, confer with the courtroom deputy to make sure he has a complete set of both side's exhibits, those that are admitted and excluded. (Remember, the exhibits that are excluded will also be a part of the record on appeal.) This will not only ensure the jury has all the evidence in the jury room before they begin their deliberations, but it also assures the record is complete before the appeal.

## 6 Make written (not oral) motions for judgment as a matter of law.

The most important motion you will file at trial is your motion for judgment as a matter of law. This motion sets the stage for most of your issues on appeal.

If you forget to raise a ground in the motion made at trial you cannot raise it post-trial or on appeal. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404–05 (2006). If you typically make these motions orally, please consider filing a written motion instead. First and foremost, a written motion for judgment as a matter of law saves time with an impatient trial judge. More important, a written motion ensures you won't forget anything. Ideally, your written motion should have broad, general grounds that cover any potential issue that might come up, such as a challenge to every adverse evidentiary ruling and every adverse ruling on jury instructions. In addition, it should include grounds tied specifically to the issues raised in your case. The object is to cover every potential ground that might be raised later on appeal if you happen to lose the case. Written, not oral, motions are the best insurance under these circumstances.

## 7 Remember the verdict form.

The verdict form is another critical document for preserving issues for appeal. Before trial ever starts, trial lawyers should think as hard about the verdict form as they do about the jury instructions. In some cases you may prefer a general verdict. In Alabama, we have a good count/bad count rule that allows a defendant to obtain a new trial if it can show one of the theories submitted to a jury in a general verdict was legally insufficient (because there is no way to know whether the jury found liability based upon the bad count or the good count). *Long v. Wade*, 980 So. 2d 378, 385 (Ala. 2007). But you may not be able to make that argument on appeal unless your request for a special verdict was denied. In other cases, you may want to use a special verdict or special interrogatories. Regardless of the form you choose, getting the court to decide on the form to be used before the trial starts will help you structure your case from opening to closing arguments, telling the jury exactly what questions it must answer when it deliberates.

Giving advance thought to the verdict form has the added benefit of helping you avoid waiving important issues on appeal. Say the plaintiff in your case is seeking punitive damages. Under ALA.



CODE § 6-11-21(e), the jury must apportion punitive damages according to the fault of each defendant, but you forgot to request a verdict form that apportions fault. You may have lost your punitive damages argument before the appeal even gets started. Filing your proposed verdict form will help you avoid such procedural traps.

## 8 Watch your jury instructions.

Sorting out what jury instructions were requested by each party and refused or given by the trial judge is one of the most difficult things to reconstruct on appeal from a paper record. If you know this up front, there are a few tricks you can use to make the job easier.

First, submit your proposed instructions in writing in numbered paragraphs. Be sure to file those with the court. And if your opponent or the judge drafts proposed instructions, be sure those are also filed. Second, include boxes at the bottom of each instruction to check whether the instruction was “given” or “refused.”

This will help everyone keep track of the instructions during the charge conference. Ideally, one consolidated copy of all the instructions discussed at the charge conference, with the given or refused boxes checked, should be filed with the court at the end of the charge conference. *See* ALA. R. CIV. P. 51 (“The judge shall write ‘given’ or ‘refused’ as the case may be, on the request which thereby becomes a part of the record.”). You may forget this in the heat of trial, so assign this task in advance to your paralegal or second-chair attorney. Third, be sure to voice your objections at the charge conference and reiterate those objections after the trial judge instructs the jury. Remember to include your objections both to the instructions given and those refused. Fourth, keep an ear toward the transcript and make sure it will make sense later to an uninformed reader. Rather than refer to instructions in vague terms such as “that instruction” or “our contributory negligence instruction,” cite the specific numbered paragraph of your proposed instructions like “our proposed instruction number 17 on

contributory negligence.” If you use these tricks, you will make the jury instructions much easier to understand on appeal.

## 9 Keep an ear tuned to the transcript.

My favorite trial lawyers are those who always have an ear tuned to the transcript. When something happens in the courtroom that will not appear in the words typed by the court reporter, the best ones always think to describe it in words. The best way to train yourself to be such a trial lawyer is to imagine one of the jurors is blind. Be sure everything that goes on in the courtroom comes out in words somewhere in the transcript.

Now that jury trials have become multimedia affairs, keeping track of everything in the transcript is even more difficult. This seems counterintuitive. Computers, trial software, bar-coded exhibits and video monitors are supposed to make things easier, right? For those sitting in the courtroom, it does. But for those of us who have to review paper

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transcripts of trials for a living, the high-tech trials are often the most difficult to understand. Why? Because so much of what happens in the courtroom happens on screen, without the necessity of explanation.

Beware of this problem by keeping an eye out for those things that appear on screen in the courtroom that may not be heard by the court reporter and, thus, cannot be read later. For instance, if your opponent puts an inflammatory slide on the screen during closing argument, you should both object and ask the court to require opposing counsel to print the slide, making it a court exhibit. The same goes for depositions played at trial. Be conscious that court reporters often stop typing shorthand when you start playing a video clip on screen. If that happens, you may find “[deposition excerpt played]” appears at the place in the transcript where you hoped to find the most egregious error. Many trial software programs now include written transcripts alongside video deposition clips, which the court reporter can use in lieu of transcribing the

testimony again. Even better, the parties can agree to put all the video clips shown at trial on one CD and submit the CD as a court exhibit at the end of trial. These are just a couple of examples of what I call evaporating evidence. If you do not preserve such evidence in some form other than video at the time, it will literally evaporate on appeal.

## 10 Don't worry.

Finally, don't sweat the small stuff. Although appellate lawyers like to nitpick

every decision made in the course of a jury trial, there is no need to worry. Only those decisions that affect your client's substantive rights can be reversible error. See FED. R. CIV. P. 61; ALA. R. CIV. P. 61. So, just relax and try your case with an eye to preserving the most obvious harmful issues. Once the case is over, your appellate lawyer is going to find something to gripe about. That's what we do. But if you can try your case so that your appellate lawyer only has harmless error to gripe about, then you will have done your job. ▲▼▲



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# UNIFORM LAW COMMISSION Concludes 117th Annual Meeting

*By Representative Cam Ward*

Each year it is a pleasure to report to the members of the bar on the work taking place by Alabama attorneys who are involved in the drafting of uniform acts. The Uniform Law Commission (ULC) recently concluded its 117<sup>th</sup> Annual Meeting in Big Sky, Montana. The ULC approved seven new acts dealing with issues ranging from an update of the law on family support to new revisions to a uniform act that provides rules on condominiums and other types of planned communities.

Alabama commissioners Jerry Bassett, Bill Henning, Gorman Houston, Tom Jones, Ted Little, Bruce McKee, Bob McCurley, and Cam Ward were joined by more than 200 lawyers, judges, law professors, legislators, and government attorneys appointed in their respective jurisdictions to serve as uniform law commissioners. Uniform Law commissioners are appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. In Alabama, the governor appoints three members to the commission, the speaker of the house and lieutenant governor each appoint a member and there are two statutory members. The commissioners draft proposals for uniform laws on issues where disparity between the states is a problem.

As they have done each summer since 1892, uniform law commissioners gathered for a full week to discuss—and debate line by line, word by word—legislative proposals drafted by their colleagues during the year. The seven acts just approved are now available for state enactment.

The **Uniform Interstate Family Support Act** (UIFSA), the law in every state, was amended to modify the current version of UIFSA's international provisions to comport with the obligations of the United States under the 2000 Hague Convention on Maintenance, which was signed by the President in 2008. The amendments give greater enforcement of U.S. orders abroad; also, foreign orders will be recognized and enforced like orders of other American states.

The **Uniform Common Interest Ownership Act** (UCIOA) was amended in order to update the 1994 UCIOA, which provides provisions for creating, managing and terminating condominium, planned community and other types of real estate cooperatives. Amendments to UCIOA were necessary in light of intervening developments in this area of the law. A **Uniform Common Interest Ownership Bill of Rights Act** is also available as a separate act.

The **Revised Uniform Unincorporated Non Profit Association Act** (RUUNAA) is the product of a joint project between the ULC, the Uniform Law Conference of Canada and the Mexican Center on Uniform Laws. The RUUNAA, a revision of the UUNAA of 1996, governs all unincorporated non-profit associations (UNAs) that are formed or operate in a state that adopts the act. There are hundreds of thousands of UNAs in the United States, including educational, scientific and literary

clubs, sporting organizations, political organizations, neighborhood associations, and the like. The RUUNAA provides a basic legal framework for the operation of UNAs.

The **Uniform Unsworn Foreign Declarations Act** will permit, in state court proceedings, unsworn declarations under penalty of perjury to be executed by witnesses located outside the United States in lieu of affidavits, verifications or other sworn court filings. Obtaining an affidavit abroad can be a costly and time-consuming process, making a uniform state law on this subject extremely useful in transnational litigation.

Amendments to the **Uniform Probate Code** and the **Uniform Principal and Income Act** were also approved.

Information on all of these acts, including the approved text of each act, can be found at the ULC Web site at [www.nccusl.org](http://www.nccusl.org).

Once an act is approved by the ULC, it is officially promulgated for consideration by the states, and the legislatures are urged to adopt it. Since its inception, the ULC has been responsible for more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act and the Uniform Interstate Family Support Act.

Alabama joined the ULC in 1906, and since that time has enacted more than 52 uniform or model acts promulgated by the Conference. Alabama currently has eight uniform law commissioners appointed to the Conference: Jerry Bassett, Montgomery; Bill Henning, Tuscaloosa; Justice Gorman Houston, Birmingham; Tom Jones, Tuscaloosa; Senator Ted Little, Auburn; Bruce McKee, Birmingham; Bob McCurley, Tuscaloosa; and Representative Cam Ward, Alabaster.

The procedures of the Uniform Law Commission ensure meticulous consideration of each uniform or model act. The ULC usually spends a minimum of two years on each draft. Sometimes, the drafting work extends much longer. No single state has the resources necessary to duplicate this meticulous, careful, non-partisan effort. Working together with pooled resources through the ULC, Alabama joins with every other state to produce the impressive body of laws known as the "Uniform State Laws." ▲▼▲



*State Representative Cam Ward is currently serving in his second term in the Alabama House of Representatives for District 49. He is a member of the House Judiciary, Rules and Education Policy committees and a graduate of the Cumberland School of Law. Representative Ward is on the Executive Committee for the Alabama Law Institute and one of Alabama's five commissioners on the National Conference of*

*Commissioners on Uniform State Laws.*



# State Bar Actively Addressing Growing Hispanic Population

*By Enrique J. Gimenez and Wendy Padilla-Madden*

**W**ith a Hispanic population increase of more than 210 percent during the 1990s, Alabama has become a leading United States center for Hispanic population growth and business development. The first few years of this decade continued the trend, with Alabama's 22 percent increase in Hispanic population nearly doubling the national average. While many societal services have fallen short in their efforts to cope with this cultural influx—and, in some instances, simply failed to expend any effort at all—the Alabama State Bar, through its Spanish Speaking Lawyers Committee (“SSL”), has taken affirmative steps to ensure that this massive client base, one oftentimes unfamiliar with this country's language and, more often than that, its legal system, are adequately represented and protected.

The SSL's initial efforts quickly revealed that many in the Hispanic community were distrustful of engaging the legal process, even in the face of obvious legal wrong, based in large part on negative experiences with attorneys advertising themselves out to be Spanish-speaking. These attorneys, once engaged, all too often produced an assistant or employee with no legal training to serve as the client's contact. These relationships almost always ended poorly.



Earlier this year, however, the SSL was able to secure an informal opinion from the Office of General Counsel that quite sharply prohibits this type of legal abuse.<sup>1</sup> More specifically, the opinion makes clear that an attorney cannot imply an ability to speak a foreign language when, in fact, it is an employee of the attorney who will be communicating with the client in the foreign language. Instead, if an attorney is going to advertise the fact that her law firm can communicate with a client in a particular language, the opinion requires that any advertisement state with particularity whether the attorney has the ability to communicate in the foreign language, or whether an employee has that ability.

Perhaps most importantly, the informal opinion leaves no doubt that an attorney will be held responsible for the conduct of any non-lawyer employee to the same extent as if the attorney engaged in the conduct himself. Accordingly, any time a lawyer uses a non-lawyer employee to communicate with a client, the lawyer is under a duty to ensure that the information communicated to and received from the client is accurate. The opinion is clear that any failure by the non-lawyer employee to accurately relay information between the client and the lawyer that adversely affects the rights or interests of the client could constitute an ethics violation by the lawyer.<sup>2</sup>

Further in support of this effort, the Alabama State Bar recently formed a task force to review the proposed Alabama Unauthorized Practice of Law (“UPL”) Criminalization Act currently pending in the Alabama legislature and make a recommendation to what action, if any, is appropriate for the Alabama State Bar to take. This task force is being chaired by Wendy Padilla-Madden.

In addition to addressing potential abuse from the legal side, the SSL has additionally made strides in arming the Hispanic population with knowledge about the American legal system through

the translation of multiple ASB public information brochures into Spanish and composing a Spanish language brochure explaining many of the areas of confusion and difference between Central and South American legal systems and the U.S. system.<sup>3</sup> The committee has also worked with the bar in attempting to identify attorney advertisements seeking to capitalize on this confusion.

Once Hispanics enter the court system, the SSL has worked hand-in-hand with Alabama’s Administrative Office of Courts (“AOC”) in securing the resources, financial and otherwise, to join the National Consortium of Court Interpreters. The committee’s hope is that the consortium will provide uniform training and testing materials to ensure that any individual providing interpreter services to Hispanics in the judicial system will be certified through the consortium. Presently, the SSL is providing feedback to the AOC on its draft of the AOC Policies and Procedures—Foreign Language Interpreters in Alabama’s Unified Judicial System.

Over the next decade, the influx of Hispanics into Alabama and its workforce are expected to continue outpacing most other groups. Accordingly, the group’s need to access a properly armed court system through competent legal counsel is necessary to mirror that rise. The Alabama State Bar, through its Spanish Speaking Lawyers Committee, hopes to remain in the forefront of attempting to meet these needs.<sup>4</sup> ▲▼▲

### Endnotes

1. The SSL has been advised that the OGC now intends to release the opinion as a formal opinion of the Disciplinary Counsel, a result certain to greatly increase the ability to curb misconduct.
2. A complete copy of the OGC’s informal opinion and, when released, the formal opinion, can be viewed and downloaded at [www.lightfootlaw.com](http://www.lightfootlaw.com).
3. Copies of these materials may also be seen and downloaded at [www.lightfootlaw.com](http://www.lightfootlaw.com).
4. The Spanish Speaking Lawyers Committee is chaired by Wendy Padilla-Madden and is divided into four

sub-committees: the Communications Sub-Committee, co-chaired by Kristin Johnson and Michael Johnson, is charged with translating bar publications into Spanish and creating a publication addressing the problem of B L; the Hispanic Outreach and Rules Sub-Committee, co-chaired by Enrique J. Gimenez provides guidance to the bar on the application of the B L statute, *Rules of Professional Conduct* and *Rules of Court* encountered by lawyers representing clients with limited English proficiency; the Court Interpreters Sub-Committee, co-chaired by Michelle K. Pieroni and Brian P. Brock, outlines the rules and regulations the supreme court needs to promulgate in order to guide the judiciary when interpretive services are required; and the Referral Sub-Committee, co-chaired by Jessica S. Grover and Lou J. Willie, III, directs its efforts to compiling a list of existing resources to provide access to justice for the Hispanic community. The Honorable J. Scott Vowell, circuit court judge of Jefferson County, volunteers his time and counsel as an honorary co-chair.



*Enrique “Henry” J. Gimenez is an associate of Lightfoot, Franklin & White LLC in Birmingham. His diversity efforts include his selection as one of the founding members of the Alabama State*

*Bar’s Hispanic Outreach Committee and participation on the Alabama Defense Lawyers Association’s Diversity Task Force.*



*Wendy Padilla-Madden is an attorney and lobbyist with Balch & Bingham LLP’s Birmingham and Washington, D.C. offices. She chairs the Alabama State Bar’s Spanish Speaking*

*Lawyers Committee, as well as the Hispanic Business Council of the Birmingham Chamber of Commerce. Padilla-Madden is originally from Guatemala.*

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JAMES M. TERRELL



I am pleased to recognize the members of the Executive Committee who will be serving our section for the upcoming year: **Gray Borden** (Birmingham), **Brandon Hughey** (Mobile), **Shay Lawson** (Tuscaloosa), **Elizabeth Kanter** (Birmingham), **Brent Irby** (Vestavia Hills), **David Cain** (Mobile), **Nathan Dickson** (Union Springs), **Kitty Brown** (Birmingham), **Mark Bledsoe** (Huntsville), **Hughston Nichols** (Birmingham), **Clifton Mosteller** (Mobile), **Andrew Nix** (Birmingham), **Katie Hammett** (Mobile), **Leslie Ellis** (Montgomery), **Rodney Miller** (Birmingham), **Tucker Yance** (Mobile), **Jon Patterson** (Birmingham), **Louis Calligas** (Montgomery), **Norman Stockman** (Mobile), **Hall Eady** (Birmingham), **J. R. Gaines** (Montgomery), **Mitesh Shah** (Birmingham), **Brad Hicks** (Bay Minette), **Charles Fleming** (Birmingham), **Chris Waller** (Montgomery), **Michael Clemmer** (Birmingham), **Larkin Hatchett** (Mobile), and **Brett Ialacci** (Birmingham).

In October, we hosted the Alabama State Bar Admissions Ceremony for fall admittees at the Montgomery Performing Arts Center. The Performing Arts Center at the Renaissance Montgomery Hotel and Spa serves as an excellent venue for this. Special thanks go to our Admissions Ceremony Chair, **Chris Waller**, for his hard work in making this event extremely successful. **Leslie Ellis**, **Nathan Dickson** and **Louis Calligas** also need to be recognized for their hard work on this ceremony.

On November 21, 2008, we will be hosting our Seventh Annual Iron Bowl CLE in Birmingham. This CLE is a great opportunity to obtain credit and possibly win tickets to the upcoming Iron Bowl. If you did not receive an Iron Bowl CLE brochure in the mail or want more information about this CLE, please visit our Web site, [www.alabamayls.org](http://www.alabamayls.org). Space is limited, so make plans to attend as soon as possible.

Finally, we are launching a new initiative this year in association with the Alabama Appleseed Center for Law and Justice. Alabama Appleseed is confronting the legal issues associated with heir property in Alabama. Heir property is land that has been held by a family for generations but whose title has been clouded or rendered meaningless by the passage of time—usually due to the failure to file wills by family members or due to repeated subdivisions by family members. **Gray Borden** will serve as the chair of this committee which will seek to identify the owners of heir property, educate the public about heir property and establish a *pro bono* and fee based network of legal professionals willing to assist owners of heir property in obtaining clear title to their property. We'll provide updates about the progress of this project in the coming months.

If you have any questions about your Young Lawyers' Section, or if you would like to get more involved with the YLS, please contact me at [jterrell@mmlaw.net](mailto:jterrell@mmlaw.net).









## Good, Better, Best

It has been just over eight weeks since I joined the bar and my time here so far has been a whirlwind. I had to learn all the CLE rules. (As an attorney admitted in Alabama for just three years, I only knew the rules that were necessary to keep me in good standing: Twelve hours per year, including one of ethics, all due by New Year's Eve.)

After I learned all the rules, I had to learn all the exceptions. (Just like evidence.)

My conclusion: Way too complicated.

The Solution: Simplify. (Priceless.)

As a litigator for 18 years, and even in my personal life, I have developed the attitude that I don't want to know about anything I don't actually need to know about.

So I have drafted a set of proposed revisions to the MCLE Rules, which the MCLE Commission is now reviewing. The basic paradigm won't change; you will still be required to complete 12 hours per year, including one hour of ethics, by New Year's Eve. But the proposed new rules, if approved by the Bar Commission and the court, will be simpler, more organized and easier to follow.

Of more immediate concern to you are the changes we have made to your annual CLE transcripts. You should be receiving them soon, if you have not already. From now on, each year, around the end of October, you will receive a **Preliminary CLE Status Report**, just to let you know how you stand before the end of the year. The simplified report will more closely reflect what you see when you view your transcript online; it will list the CLE courses you have taken through the end of the third quarter of the year (September 30). After the list of courses, it will tell you very clearly whether or not you are already CLE compliant. The **Annual Status Report** will be identical in format, but it will not be sent to you until the end of January. It just didn't seem to make sense to send you a transcript prior to January 31 when program sponsors of courses you may have taken as late as December 31 have 30 days to report your attendance to us. So, your Annual Status Report will reflect all reported courses that you have taken through December 31 and it, too, will tell you very clearly whether or not you are CLE compliant. You will have 30 days to notify us of any corrections that should be made to the report.

If you remain non-compliant after December 31, all of the old rules will still apply and you will have to file and complete a **Deficiency Plan**, and pay the required fees, before returning to good standing with the bar.

We hope the new status report formats will be easier for you to follow. If you have any comments or suggestions about them, please send us an e-mail at [cle@alabar.org](mailto:cle@alabar.org). We'll be happy to hear from you. ▲▼▲

# Annual Meeting CLE CD Now Available!

**\$15**

CLE Program Materials from the 2008 Alabama State Bar Annual Meeting are available on a single CD. It's convenient, portable and worth every penny!

**LIMITED  
SUPPLY**

Succeeding in Your Law Practice: Part I – How Can I Be More Successful, Efficient and Content in My Legal Career?  
Immigration Issues and Employment Law Update  
Criminal Defense Law Update  
A Cautionary Tale for All Administrative Boards:  
Relating *Morrison and Lupo*  
Family Law Case Update  
Electronic Recording Act and the Real Estate Practitioner  
Succeeding in Your Law Practice: Part II – Strategic Planning – Identifying Your Purpose, Establishing Objectives and Reaching Your Goals

Featured Workshop: At the Center of America's Cultural Wars – The Role, Decisions and Influence of the U.S. Supreme Court  
Featured Workshop: Don't Be Client No. 9 – What Happens in Las Vegas May Cost You Your Law License (\*Ethics)  
Workers' Compensation Law Update  
Featured Workshop: Annual Meeting of the Alabama Law Institute  
Featured Workshop – The "D" Word: A Candid Look at Achieving a Diverse Legal Profession  
Featured Workshop: 2008 Intellectual Property Law Section Update  
The Final Word: Finality and Rule 54(b)  
Auto Products Liability – Plaintiff's and Defense Perspective

## PLUS!

You'll get the *Alabama Rules of Professional Responsibility* and other information from many of the bar's programs, sections and services.

## How do I order the CD?

Simply remit a check or money order made payable to the Alabama State Bar for \$15 and forward it with your name and mailing address either clearly marked on the check or money order, or by filling in the following information:

Feel free to order as many CDs as you would like! Just tally the cost at \$15 per CD, and remit that amount.

Name: \_\_\_\_\_

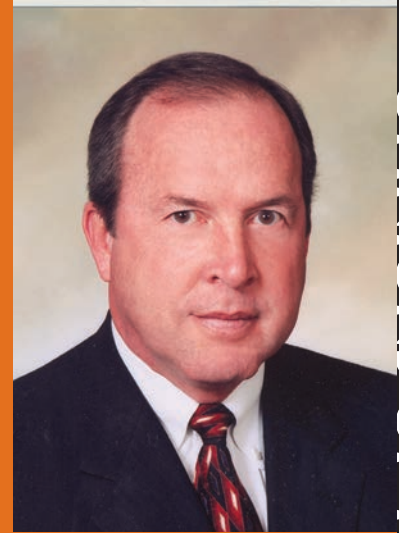
Address: \_\_\_\_\_

\_\_\_\_\_

For informational purposes only. No CLE credit will be granted.

**Mail To:**

Alabama State Bar  
Communications Department  
Post Office Box 671  
Montgomery, Alabama 36101



J. ANTHONY MCLAIN

# Corporation and Individual Directors

## QUESTION:

I am general counsel for a closely held corporation. Fifty percent of the stock in this corporation is owned by Husband and Wife A and B. The other fifty percent is owned by Husband and Wife C and D.

The corporation was initially established with three directors, A, C and D. A was also the corporation president, D was the vice president and C was the secretary-treasurer. Additionally, A and C are salaried employees of the corporation.

The relationship between A and C is now completely deteriorated and they are incompatible. The corporate directors have regular monthly meetings at which I am called upon by C and D to provide certain services for said corporation. Additionally, I represent C and D in certain business transactions which are not in any way related to the corporation or its business.

Further, C has asked me to prepare a buy-sell agreement with a covenant not to compete for the consideration of the stock holders. I have now completed this work.

A has obtained counsel of his own choosing. A refuses to sign the buy-sell agreement because it contains a covenant not to compete insofar as the insurance business is concerned for a limited period of time and a limited geographical area.

In a recent meeting of the directors, A implied that I had a conflict in representing the corporation and both C and D. I question A's contention, as I am representing the corporation at the request of the majority of the board of directors of the corporation, and I am representing C and D on other business dealings, e.g., the sale of a shopping center to the children of C and D. I believe A is concerned because he has employed an attorney of his own, whom I assume he is paying or intends to pay out of his own private funds.

## OPINIONS OF THE GENERAL COUNSEL Continued from page 455

Please provide an opinion as to whether it would be ethical for me to represent a corporation, at the request and direction of the majority of the board of directors of said corporation, and also to represent the directors of the corporation in their private dealings not related to the corporation.

### ANSWER:

There would be no ethical impropriety in your representing the corporation at the request and direction of a majority of the board of directors (C and D) and at the same time representing certain of the directors (C and D) in their private matters unrelated to the corporation, namely, the sale of a shopping center to the children of C and D.

### DISCUSSION:

Rule 1.13(a), *Alabama Rules of Professional Conduct*, states as follows:

Rule 1.13 Organization As Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The Comment to Rule 1.13 states that while communication of a constituent of an organizational client with the organization's lawyer is protected by Rule 1.6, this does not mean that constituents of an organization client are clients of the lawyer. Pursuant to these rule provisions and interpretations, your identified clients in your representation are the corporation, as a legal entity, and two individual directors of that corporation, in separate, unrelated matters.

Rule 1.7(b), *Ala. R. Prof. C.*, states as follows:

Rule 1.7 Conflict of Interest:

General Rule

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and

- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Comment to Rule 1.7 recognizes that the propriety of concurrent representation can depend on the nature of the litigation and the representation. In your fact situation, you point out that your representation of the corporation requires your participation in regularly monthly meetings of the board of directors.

The Disciplinary Commission had previously considered this scenario, under the prior *Code of Professional Responsibility*. Therein, the Commission quoted Ethical Consideration 5-18 as follows:

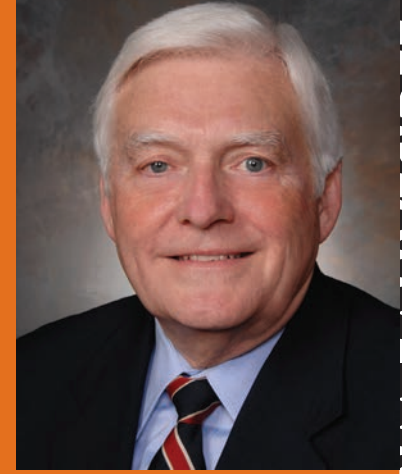
Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that different interests are not present.

As such, the Disciplinary Commission is of the opinion that, based upon the representations in your ethical inquiry that the matters are not in any way related, then you may ethically represent the directors and stockholders C and D, in their individual capacity in a matter which is apparently completely unconnected with any of the affairs of the corporation and which would not interfere with the exercise of your independent professional judgment on behalf of the corporation.

Further, consistent with the mandates of Rule 1.13, you can represent the corporate entity only at the request and instructions of a majority of the board of directors, which request and instructions have been obtained in the instant case.

[This opinion hereby modifies and supersedes previously issued opinion RO-81-518]. ▲▼▲





ROBERT L. MCCURLEY, JR.

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

## Business and Non-Profit Entities Code

At the end of the 2008 regular session of the Alabama legislature, Representative Marcel Black and Senator Rodger Smitherman introduced the *Business and Non-Profit Entities Code*. The 815-page bill was introduced so legislators and others interested in entities laws could become familiar with the act prior to enactment. This bill will be introduced again in February 2009. Efforts are underway to familiarize attorneys with this new reorganization of Title 10. A copy of the act, along with commentary and cross-reference charts, is available on the Law Institute's homepage.

In May 1999, a committee of the Law Institute began its study of all the business entities in Alabama. The study primarily was to clear up inconsistencies between the entities which may be a trap for lawyers and for those with multiple-entity organizations. The Law Institute Drafting Committee completed its study nine years later, with over 50 meetings held. The committee first drafted the Alabama Entities Conversions and Mergers Act which passed the legislature in 2000 and is now found in *Ala. Code 10-15-1 et seq.*

The bill reorganizes the following types of business entities into one *Code*:

1. Alabama Business Corporation Act;
2. Non-Profit Corporation Act;
3. Alabama Limited Liability Company Act;
4. Alabama Revised Partnership Act;
5. Alabama Revised Limited Partnership Act;
6. Alabama Real Estate Investment Trust Act;
7. Alabama Professional Corporations Act;
8. Alabama Professional Associations Act; and
9. Other existing provisions of Alabama statutes governing domestic and foreign business and non-profit entities.

The reorganization will:

- (1) Rearrange the business and non-business organizations into a more logical order;
- (2) Provide a smooth transition when a business needs to change from one entity to another;

## LEGISLATIVE WRAP-UP

Continued from page 457

- (3) Provide a numbering system designed to accommodate future expansion of the law;
- (4) Eliminate repealed, duplicative, expired and other ineffective provisions; and
- (5) Simplify the language of the various acts.

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

The purpose of this code is primarily non-substantive. It is to make the law encompassed by this title more accessible and understandable by:

- (1) Rearranging the kinds of business and non-business organizations and the statutes applicable to them into a more logical order by a non-substantive revision of analogous or comparable provisions found in the prior Alabama Business Corporation Act, Alabama Non-Profit Corporation Act, Alabama Limited Liability Company Act, Alabama Revised Partnership Act, Alabama Revised Limited Partnership Act, Alabama Real Estate Investment Trust Act, Alabama Professional Associations Act, Alabama Professional Associations Act, and other existing provisions of Alabama statutes governing domestic and foreign business and non-profit entities;
- (2) Employing a format and numbering system designed to facilitate access to and citation of the law and to accommodate future expansion of the law;
- (3) Eliminating repealed, duplicative, expired, executed, and other ineffective provisions; and
- (4) Restating the law in modern American English to the greatest extent possible.

This bill would add Title 10A, entitled *Alabama Business and Nonprofit Entities Code*, to the *Code of Alabama 1975*. The added title is comprised of sections previously located in Title 10, which are amended and renumbered, and adds additional sections, resulting in a revised, recast and reordered business and nonprofit entities code. Certain sections of Title 10 are also repealed. The *Code* includes hub provisions applicable to the various entities and spoke provisions applicable to a particular type of entity.

The following is taken from the preface to the *Entities Code* written by Professor Howard Walthall, Cumberland School of Law, who is the reporter for this study:

### **Chapter 1, General Provisions**, concerns:

Definitions, applications and purposes; purpose and powers of a domestic entity; formation and governance; filings; names of entities, registered agents and registered offices; indemnification and insurance; foreign entities; conversions and mergers; and winding up and termination of a domestic entity.

### **Chapter 2, Alabama Business Corporation Law**

and applicable portions of Chapter 1, concerns: General provisions; formation and governing documents; purpose and powers; shares and distributions; shareholders; directors and officers; amendment of articles of incorporation; merger and share exchange; sale or mortgage of assets; dissenter's rights; dissolution; foreign corporations; records and reports; and application.

### **Chapter 3, Alabama Non-Profit Corporation Law**

and applicable portions of Chapter 1 concerns: General provisions; substantive provisions; formation of nonprofit corporations; amendments; mergers and consolidation; sale of assets; dissolution; and miscellaneous provisions.

### **Chapter 4, Alabama Professional Corporation Law**

and applicable portions of Chapter 1, concerns: General provisions; purposes, powers and organization; shareholders; directors and officers and professional liability; special provisions as to amendments, merger and consolidation; regulation of professional corporations, foreign professional corporations and application to existing corporations; and limited liability corporations.

### **Chapter 5, Alabama Limited Liability Company Law**

and applicable portions of Chapter 1, concerns: General provisions; formation; relationship of members and managers to third parties; relationship among members; contributions and distributions; transfer of membership interest; dissolution; and professional services.

**Chapters 6 and 7 are reserved** for future legislation.

### **Chapter 8, Alabama General Partnership Law**

and applicable portions of Chapter 1, concerns: General provisions; nature of partnership; relations of partners to persons dealing with partnerships; relations of partners to each other and to partnership; transferees

and creditors of partners; partners' dissolution; partners' dissolution when business not wound up; winding up partnership business; registered limited liability partnerships; and miscellaneous provisions.

**Chapter 9, Alabama Limited Partnership Law** and applicable provisions of Chapter 1, concerns: General provisions; certificate of limited partnership; limited partners; general partners; finance; distributions and withdrawals; assignment of partnership interests; dissolutions; derivative actions; and miscellaneous provisions.

**Chapter 10, Alabama Real Estate Investment Trust Law** and applicable provisions of Chapter 1, concerns: Form; compliance; declaration of trust; classification of shares; removal of trustee powers; investment and use; annual report; inspection of records; filing fees; amendment of declaration; merger; dissolution; liability of trust, shareholders and trustees; service of process; income tax and treatment.

**Chapter 11, Alabama Employee Cooperative Corporations Law** and applicable provisions of Chapter 1, concerns: Election as employee cooperative and revocation of election; corporate names; members, membership shares, rights and responsibilities; directors and officers; voting power, amendment of bylaws, protection of shareholders; apportionment of earnings and losses; internal capital accounts; internal capital account cooperatives; and conversion of membership shares and merger of employee cooperatives.

**Chapters 12, 13, 14 and 15 are reserved** for future legislation.

**Chapter 16, Business Trusts**, concerns: Establishment and purpose; powers and liabilities of trustees and liability of trust; certificate of ownership and liability of beneficial owners; contents and recording of declaration of trust; duration and suits against trust; and attachment and execution.

**Chapter 17, Alabama Unincorporated Non-Profit Association Law** and applicable provisions of Chapter 1, concerns: Governance; association as legatee, devisee or beneficiary; statement of authority; liability in tort and contract; capacity to assert and defend and standing effect of judgment or order; disposition of personal property of inactive or dissolved association; appointment of agent; claims, venue and service; transition; and acts not repealed, saving clause and uniformity of application.

**Chapters 18 and 19 are reserved** for future legislation.

**Chapter 20, Special Purpose Entities**, concerns: Bishop of diocese; churches, public societies and graveyard owners; conferences of ministers; state conventions and association of churches; educational institutions; healthcare service plans; industrial development corporations; local fraternal orders; single tax and mutual economic associations; private foundations; charters of medical, dental, pharmaceutical or similar associations; charters of corporations not of a business character; retail merchants' associations, wholesale merchants' associations; water and power companies; and liability of officers of non-profit organizations.

**Chapter 21, Certain Powers, Rights and Duties of Corporations**, concerns: Corporate political contributions; corporate powers of eminent domain; and prosecution of corporations.

**Chapters 22 to 29, inclusive, are reserved** for future legislation.

**Chapter 30, Provisions Applicable to Existing Entities of a Type that May No Longer Be Formed**, concerns: Unincorporated professional associations and close corporations.

The drafting committee donated over \$ million of legal services for this project. The lawyers who undertook this enormous task are:

Professor J m Bryce, Tuscaloosa  
Larry Childs, Birmingham  
Rick Clifton, Andalusia  
Fred Daniels, Birmingham  
Robert Denniston, Mobile  
Peck Fox, Montgomery  
Charles Grainger, Montgomery  
James Hughey, J ., Birmingham  
Gregory Leatherbury, J ., Foley  
Curtis Liles, III, Birmingham  
Mark Maloney, Decatur  
Thomas Mancuso, Montgomery  
J m Pruett, committee chair, Gadsden  
Henry Simpson, Birmingham  
Bradley Sk ar, Birmingham  
Professor Howard Walthall, Birmingham  
Robert Walthall, Birmingham

The Uniform Laws Commission has recognized the work of this committee and has obtained the services of Professor Howard Walthall to undertake a similar national drafting project on business and non-profit entities.

To obtain the *Business and Non-Profit Entities Code* and other Institute-drafted legislation, both the filed bill and the ALI draft with Comments, go to [www.ali.state.al.us](http://www.ali.state.al.us). ▲▼▲

**"To give away money is an easy matter and in any man's power.**

**But to decide to whom to give it, and how large and when, for what purpose and how, is neither in every man's power nor an easy matter."**

*Aristotle*



## **How do you recommend charity without recommending a charity?**

It's a delicate dilemma. You want to show your client how charitable giving can help with estate or tax planning, but you don't want to recommend a specific cause or organization.

**Your local Community Foundation provides the solution --** a single, trusted vehicle your clients can use to address the issues they care about most, while gaining maximum tax benefit under state and federal law. We offer a variety of giving options, including the ability to set up a charitable fund in your client's name or handle gifts of real estate and hard-to-value assets. **Contact your local Community Foundation to find out more!**



Community Foundation  
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[www.foundationbirmingham.org](http://www.foundationbirmingham.org)



Central Alabama  
Community Foundation  
334.264.6223  
[www.cacinfo.org](http://www.cacinfo.org)



Walker Area Community  
Foundation  
205.302.0001  
[www.wacf.org](http://www.wacf.org)



The Community Foundation  
of South Alabama  
251.438.5591  
[www.communityendowment.com](http://www.communityendowment.com)



# IN THE SUPREME COURT OF ALABAMA

September 12, 2008

## ORDER

IT IS ORDERED that Rule 4, Rule 4.1, Rule 4.2, Rule 5, Rule 8, Rule 12, Rule 15, Rule 20, Rule 21, Rule 22, Rule 23, Rule 27, Rule 28, Rule 29, Rule 32, Rule 33, and Rule 35, *Alabama Rules of Disciplinary Procedure*, be amended to read in accordance with Appendices A, B, C, D, E, F, H, I, J, K, L, M, N, O, P, Q, and R, respectively;

IT IS FURTHER ORDERED that Rule 12.1, *Alabama Rules of Disciplinary Procedure*, is hereby adopted to read in accordance with Appendix G;

IT IS FURTHER ORDERED that Rule 5.1 and Rule 8.1, *Alabama Rules of Disciplinary Procedure*, are hereby rescinded;

IT IS FURTHER ORDERED that these amendments, the adoption of Rule 12.1, and the rescission of Rule 5.1 and Rule 8.1 are effective October 6, 2008;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 4, Rule 4.1, Rule 4.2, Rule 5, Rule 8, Rule 12, Rule 12.1, Rule 15, Rule 20, Rule 21, Rule 22, Rule 23, Rule 27, Rule 28, Rule 29, Rule 32, Rule 33, and Rule 35:

"Note from the reporter of decisions: The order amending Rule 4, Rule 4.1, Rule 4.2, Rule 5, Rule 8, Rule 12, Rule 15, Rule 20, Rule 21, Rule 22, Rule 23, Rule 27, Rule 28, Rule 29, Rule 32, Rule 33, and Rule 35, and adopting Rule 12.1, effective October 6, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 2d."

IT IS FURTHER ORDERED that the following note from the reporter of decisions be inserted in place of Rule 5.1 and Rule 8.1:

"Note from the reporter of decisions: The order rescinding Rule 5.1 and Rule 8.1, effective October 6, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 2d."

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Maddox, JJ., concur.

## APPENDIX A

### RULE 4. THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

#### (a) Establishment and Membership of the Disciplinary Board; Terms of Members.

(1) The Board of Commissioners of the Alabama State Bar shall appoint three panels of five members each, each panel to be known as "The Disciplinary Board of the Alabama State Bar" (hereinafter referred to as a "Disciplinary Board"). Each panel shall be composed of three persons who are Bar commissioners, one layperson, and the Disciplinary Hearing Officer appointed pursuant to Rule 4.2 of these Rules. As used in these Rules, the term "Disciplinary Board" shall refer to that panel

involved in a particular disciplinary proceeding, and the term "layperson" shall mean an adult resident citizen of the State of Alabama who is not now, and who never has been, a lawyer. Those Bar commissioners appointed to the Disciplinary Board shall be appointed for terms of three years, except when appointed to fill an unexpired term, and they cannot serve more than two consecutive full terms. Layperson members shall be appointed for terms of one year and may serve unlimited successive terms. Any member appointed to a Disciplinary Board shall be required to attend a three-hour training session conducted by the Office of General Counsel of the Alabama State Bar at Alabama State Bar headquarters. Members who are lawyers will receive CLE credit for attending the training session.

- (2) The Disciplinary Hearing Officer appointed pursuant to Rule 4.2 of these Rules and assigned to hear a particular matter may appoint members of the Board of Bar Commissioners who are not members of the Disciplinary Commission to sit temporarily on a Disciplinary Board. The Disciplinary Hearing Officer may make such a temporary appointment to ensure that a quorum of the Disciplinary Board is available to hear or to consider a particular matter, but the Disciplinary Hearing Officer's authority to appoint temporary members of the Disciplinary Board is not restricted to appointment of that number of members as may be necessary to secure a quorum, and the Disciplinary Hearing Officer may appoint as many temporary members as the Disciplinary Hearing Officer deems appropriate, up to the number required to provide a full panel of five members. A roster shall be made of the names of the Bar commissioners who are not members of the Disciplinary Board or Disciplinary Commission, and these temporary appointments shall be made from that roster.
- (3) Whenever a layperson member of a Disciplinary Board is not present for the hearing of a particular matter, the Disciplinary Hearing Officer shall appoint another layperson from the "lay list" provided for pursuant to subsection (c); that layperson so appointed shall serve as the Disciplinary Board's layperson member for the hearing of the particular matter. A Disciplinary Board must include one layperson member for each proceeding.

#### (b) Powers of the Disciplinary Board and the Disciplinary Hearing Officer.

- (1) Each Disciplinary Board shall exercise the powers conferred upon it and shall perform the duties imposed upon it by these Rules or by any other rules of procedure adopted by the Board of Commissioners of the Alabama State Bar. It shall specifically have the power and duty to consider and investigate any alleged ground for discipline or any alleged disability of a lawyer that comes to its attention. It has this power and duty whether the alleged ground for discipline or the alleged disability comes to its attention by its own motion or comes to its attention by some other means or action. It shall have the power to take such action with respect to an alleged ground for discipline or an alleged disability as shall be appropriate to effectuate the purposes of these Rules.

(2) As to a proceeding before the Disciplinary Board, the Disciplinary Hearing Officer assigned to hear the matter shall have those powers and duties enumerated in Rule 4.2(b)(5) of these Rules.

(3) For purposes of determinations to be made pursuant to the Supreme Court's "Attorney Calendar Conflict Resolution Order," a lawyer member of the Disciplinary Board and a Disciplinary Hearing Officer shall, when the Disciplinary Board is conducting a hearing, be deemed to be an attorney engaged in a trial.

**(c) Selection of Lay Members.** Each member of the Board of Bar Commissioners shall select one layperson (as defined in Rule 4(a)(1)) residing in his or her circuit to be eligible for appointment as a lay member of a Disciplinary Board. The names of those laypersons selected shall be placed on a list to be known as the "lay list." The Board of Bar Commissioners shall, at its annual meeting, select nine (9) persons whose names appear on the lay list; the Board of Bar Commissioners shall appoint three (3) of those nine (9) persons to be members of the Disciplinary Boards (one layperson per Board); these three (3) persons shall serve as Disciplinary Board members for the ensuing year and each of the remaining six (6) laypersons shall serve as an alternate, subject to appointment as a layperson member of a Disciplinary Board in the event the regular layperson member of a panel is not available to participate in a particular matter before the panel (see Rule 4(a)(3)). Each person whose name appears on the lay list shall be subject to all rules, orders, and requirements of confidentiality that the lawyer members of the Disciplinary Board are subject to.

**(d) Establishment of Quorum; Majority Required for Disciplinary Board to Act.** Three members shall constitute a quorum, provided, however, that the quorum must include a lay member. A panel shall act only with the concurrence of a majority of its five members, notwithstanding that fewer than all members are present to conduct the proceeding.

**(e) Recusal From Proceedings.** Disciplinary Board members and Disciplinary Hearing Officers shall recuse themselves from any proceeding in which a judge, similarly situated, would be required to recuse himself or herself.

**(f) Reimbursement of Expenses; No Compensation for Services.** Members of a Disciplinary Board shall receive no compensation for their services but may be reimbursed for their travel and for other actual and necessary expenses incidental to the performance of their duties as members of the Disciplinary Board.

**(g) Adoption of Rules.** The Board of Commissioners of the Alabama State Bar may adopt additional rules of procedure applicable to the Disciplinary Board.

## APPENDIX B

### RULE 4 . THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR — TRANSDNA L PROVS D N

As soon as practicable after the effective date of the amendment of this rule, Disciplinary Board Panels I, II, and III, as constituted on the effective date of the amendment of this rule shall be automatically reconstituted, and the members thereof reappointed as Disciplinary Hearing Officer, Disciplinary Board member, and lay member, except for the Bar commissioner last appointed to each panel, whose appointment shall be deemed to expire so that each panel shall be composed of only five (5) members. Those reappointed by operation of this rule shall

be deemed appointed for an initial term for purposes of succession. The remaining Disciplinary Board panels, Panels IV, V, and VI, shall be dissolved, and appointments and terms for Disciplinary Board members, Disciplinary Hearing Officers, and lay members serving on those panels shall terminate upon the effective date of the amendment of this rule; provided, however, that, for purposes of this rule, the Disciplinary Board Panels that have hearings scheduled at the time of the effective date of the amendments to these Rules effective October 6, 2008, shall continue in full force and effect until the completion of said pending matters.

## APPENDIX C

### RULE 4 2 THE DISCIPLINARY HEARING OFFICER OF THE ALABAMA STATE BAR

#### (a) Appointment, Qualifications, Training, Compensation, and Terms.

(1) *Appointment and Qualifications.* The Board of Bar Commissioners of the Alabama State Bar shall appoint a pool of three (3) qualified lawyers to serve as Disciplinary Hearing Officers. Those appointed shall have been members in good standing of the Alabama State Bar for a period of twelve (12) years and shall have had no prior discipline imposed by the Alabama State Bar or by any other jurisdiction in which they have been admitted to practice law. Appointments shall be made from a list compiled by the Executive Secretary of the Alabama State Bar from not less than ten (10) nominations received from the Executive Council of the Alabama State Bar. The names of those appointed shall be placed on a list maintained by the Disciplinary Clerk of the Alabama State Bar.

(2) *Training.* Training for Disciplinary Hearing Officers is required, subject to the terms of this rule. Disciplinary Hearing Officers shall attend one Disciplinary Hearing Officer training session within 12 months after their appointment. The training shall consist of a minimum of a six-hour session conducted by the Alabama State Bar with input from the Alabama Judicial College, the Office of General Counsel of the Alabama State Bar, and the Supreme Court of Alabama. Disciplinary Hearing Officers who fail to attend the minimum training session shall be removed from consideration for appointment in future cases. However, failure to attend the minimum training session shall not be the basis for the disqualification of any Disciplinary Hearing Officer.

(3) *Compensation.* Disciplinary Hearing Officers shall receive no compensation for their services but they may be reimbursed for their travel and for other actual and necessary expenses incidental to the performance of their duties as Disciplinary Hearing Officers.

(4) *Terms.* Disciplinary Hearing Officers shall be appointed for terms of three years, except when appointed to fill an unexpired term, and they cannot serve more than two full consecutive terms.

#### (b) Powers and Duties.

In accordance with these Rules, a duly appointed Disciplinary Hearing Officer shall have the following powers and duties:

(1) To exercise general supervision over disciplinary proceedings assigned to a Disciplinary Board, and to perform all duties necessary to carry out these Rules or any other rules of procedure adopted by the Board of Bar Commissioners of the Alabama State Bar.

(2) To pass on all questions concerning the sufficiency of formal charges filed with the Disciplinary Board.

- (3) To conduct pretrial negotiations between the Alabama State Bar and a respondent attorney and/or the respondent's counsel.
- (4) To grant continuances and to extend any time limit provided herein as to any matter pending before him or her.
- (5) As to a proceeding before the Disciplinary Board, to conduct all preliminary matters, to rule on all matters of evidence, to vote as a member of the panel on all matters before the panel, and generally to guide and superintend the conduct of the proceeding. For purposes of all hearings and proceedings, the Disciplinary Hearing Officer shall have the power and immunity of a circuit judge and the Alabama Rules of Civil Procedure and Alabama Rules of Evidence, as applicable to non-jury trials in the circuit court, shall apply, except to the extent that these Rules may provide otherwise.
- (6) The Disciplinary Hearing Officer shall make written findings of fact and conclusions of law as directed by the Disciplinary Board, which shall be captioned "Report and Order." The decision of the Disciplinary Board may be announced immediately after the conclusion of the proceedings. In such cases, if possible, the "Report and Order" should be drafted and circulated as provided in subparagraph 4.2(b)(6)(A) at that time.
- (A) Within seven (7) days after the conclusion of a hearing before a Disciplinary Board, the Disciplinary Hearing Officer shall circulate a copy of the Report and Order among the Disciplinary Board members present for the hearing for their approval and shall file with the Disciplinary Clerk of the Alabama State Bar a notice that the Report and Order has been served on those Disciplinary Board members.
- (B) Within seven (7) days of service of the Report and Order, the Disciplinary Board members shall notify the Disciplinary Hearing Officer of any suggested changes to the Report and Order and/or of their approval of the Report and Order. When the Report and Order is approved by a majority of the Disciplinary Board members, the Report and Order shall be filed with the Disciplinary Clerk. The Report and Order may be accepted and filed at any time within the foregoing time periods and thereupon become a final order for purposes of appeal at the time of filing. The failure to file the Report and Order within the time provided by this rule shall not be a ground for reversal of the findings or of the discipline imposed.
- (C) The Report and Order shall contain:
- (i) A finding of fact and conclusion of law as to each allegation of misconduct, which, upon acceptance by the Disciplinary Board, shall enjoy the same presumption of correctness as the judgment of a trier of fact in a nonjury civil proceeding in which evidence has been presented ore tenus;
  - (ii) A finding as to whether the respondent attorney is guilty or not guilty of the misconduct charged;
  - (iii) A finding as to the discipline to be imposed, with reference, where appropriate, to the Alabama Standards for Imposing Lawyer Discipline;
  - (iv) A statement of what, if any, mitigating and aggravating factors were considered in imposing the discipline, as referenced in Standard 9.0, Alabama Standards for Imposing Lawyer Discipline; and
  - (v) A statement of whether restitution was requested, and, if requested, whether it was granted, and, if granted, a statement of the amount requested and the amount granted. Restitution

shall be payable as directed by the Disciplinary Board and shall constitute a judgment for which execution may issue; and

- (vi) A proposed order accepting and approving the Report and Order, which shall, upon acceptance by a majority of the Disciplinary Board members present for the hearing, be executed and filed by the Disciplinary Clerk and served upon all parties of record.

## APPENDIX D

### RULE 5. THE DISCIPLINARY COMMISSION OF THE ALABAMA STATE BAR

- (a) Establishment and Membership of the Disciplinary Commission.** The Board of Commissioners of the Alabama State Bar shall appoint from among their number four members to be the Disciplinary Commission, none of whom shall be a member of the Disciplinary Board. A member shall be appointed for a term of three years, except to fill an unexpired term. A member cannot serve more than two successive terms. The Board of Commissioners of the Alabama State Bar shall appoint a chair of the Disciplinary Commission for a term not to exceed five years. The chair shall assist and advise the members of the Disciplinary Commission on individual disciplinary matters, but shall not vote in such matters. The chair has the power and authority to approve the agenda of the Disciplinary Commission, to establish meeting dates, to vote on all policy or procedural matters of the Disciplinary Commission, and to participate in the disciplinary process of the Alabama State Bar. The chair may be reappointed for an additional term not to exceed five years.
- (b) Powers of the Commission.** Members of the Commission shall exercise the powers and perform the duties conferred and imposed upon them by these Rules and by the rules of procedure adopted by the Board of Commissioners of the Alabama State Bar.
- (c) Establishment of a Quorum.** Two members shall constitute a quorum. The Commission shall act only with the concurrence of a majority of the Commission, which shall be not less than two members.
- (d) Recusal From Proceedings.** Commission members shall recuse themselves from any proceeding in which a judge, similarly situated, would be required to recuse himself or herself. If more than one member recuses himself or herself in a particular proceeding, the President of the Alabama State Bar may appoint alternate members for that proceeding only.
- (e) Reimbursement of Expense.** Commission members shall receive no compensation for their services but may be reimbursed for their travel and other actual and necessary expenses incidental to the performance of their duties.
- (f) Adoption of Rules.** The Board of Commissioners of the Alabama State Bar may adopt rules of procedure applicable to the Disciplinary Commission, which are consistent with these Rules.

## APPENDIX E

### RULE 8. TYPES OF DISCIPLINE

- (a) Disbarment.** Disbarment terminates the individual's status as a lawyer and may result from a hearing or by consent as provided in Rule 23. A person who has been disbarred may not apply for reinstatement until the expiration of at least five (5) years from the effective date of disbarment. A

lawyer who has been disbarred after reinstatement following a prior disbarment shall not be reinstated.

**(b) Suspension.** Suspension is the removal of a lawyer from the practice of law for a specified period of time not less than forty-five (45) days and not more than five (5) years, unless the suspension is conditioned upon the satisfaction of some condition, such as restitution of client funds, in which case the suspension shall continue until the condition is satisfied. Suspension may result from a hearing or by consent as provided in Rule 24. A lawyer who has been suspended for ninety (90) days or less will be automatically reinstated upon expiration of the period of suspension and the filing of an affidavit that he or she has complied with all applicable discipline or disability orders and rules. A lawyer who has been suspended for more than ninety (90) days must apply for reinstatement pursuant to Rule 28, unless the order of suspension expressly provides otherwise.

**(c) Interim Suspension.**

(1) Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. The Disciplinary Commission may, pursuant to Rule 20 of these Rules, place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a "serious crime" or that the lawyer's continuing conduct is causing or is likely to cause immediate and serious injury to a client or to the public.

(2) A "serious crime" is defined as:

(A) A felony;

(B) A lesser crime involving moral turpitude;

(C) A lesser crime, a necessary element of which, as determined by the statutory or common-law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or

(D) An attempt, a conspiracy, or the solicitation of another to commit a "serious crime."

**(d) Indefinite Suspension.** A lawyer may be suspended indefinitely from the practice of law for failing to comply with the Client Security Fund Rules, the Mandatory Continuing Legal Education Rules, and the Interest on Lawyer Trust Account Rules of the Alabama State Bar.

**(e) Summary Suspension.** A member who fails to pay any assessment, costs, or restitution as ordered by the Alabama Supreme Court, the Disciplinary Commission, or the Disciplinary Board within 30 days following entry of the judgment or order or a later time as fixed in the judgment or order, or who fails to participate in formal proceedings or to respond to requests for information concerning a disciplinary matter shall be summarily suspended upon order of the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 20 of these Rules.

**(f) Public Reprimand.** Public reprimand is a form of public discipline that declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice. The two versions of public reprimand are:

(1) A public reprimand with general publication requires, in accordance with Rule 33 of these Rules, publication in the official Bar publication and in a newspaper of general circulation in each judicial circuit in the State of Alabama in which the respondent maintained or maintains an office for the practice of law.

(2) A public reprimand without general publication requires, in accordance with Rule 33 of these Rules, a publication in the official Bar publication

to include the name of the respondent, but no publication in the newspaper is permitted. This type of public reprimand is nevertheless public and may be released upon request by any interested party.

**(g) Private Reprimand.** Private reprimand is a form of non-public discipline that declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

**(h) Probation.** Probation is a sanction that allows a lawyer to practice law under specified conditions and may be imposed alone or in conjunction with other forms of discipline. Probation shall be public unless otherwise ordered by the Disciplinary Commission or Disciplinary Board. Probation may also be imposed as a condition of reinstatement.

Probation should be used only in those cases where there is little likelihood that the respondent lawyer will harm the public during the period of probation and where the conditions of the probation can be adequately supervised. Probation may be appropriate in certain cases of disability, if the condition is capable of treatment without transfer to the disability inactive status.

Probation must be imposed for a specified period.

**(i) Additional Sanctions and Remedies.** In conjunction with any of the above punishments, the Disciplinary Board or the Disciplinary Commission may impose any of the following sanctions and remedies:

(1) Restitution;

(2) Assessment of cost (not including lawyer's fees);

(3) Limitation upon practice;

(4) Appointment of a receiver;

(5) Requirement that the lawyer retake and pass the State Bar examination or the professional responsibility examination, or both;

(6) Requirement that the lawyer attend continuing legal education courses approved by the Alabama State Bar; and

(7) Other requirements consistent with the purposes of lawyer discipline.

## APPENDIX F

### RULE 12. PROCEDURES

An investigation of alleged misconduct, whether upon complaint or otherwise, shall be initiated and conducted by the General Counsel, as provided in paragraph (a) of this rule, or by a local grievance committee, as provided in paragraph (b) of this rule. A recommendation based upon such investigation shall be submitted to, and acted upon by, the Disciplinary Commission, as provided in paragraph (c) of this rule. A decision by the Disciplinary Commission to enforce a private or public reprimand shall be responded to by the respondent, as provided in paragraph (d) of this rule. A disciplinary charge filed by the General Counsel shall be tried to the Disciplinary Board by a formal hearing, as provided in paragraph (e) of this rule. The parties shall have the right to appeal from an adverse decision, as provided in paragraph (f) of this rule.

**(a) Investigation by General Counsel.**

(1) The General Counsel for the Alabama State Bar shall have the right to investigate an allegation or complaint of misconduct of any member of the Alabama State Bar and any nonresident lawyer admitted pro hac vice pursuant to Rule VI, Rules Governing Admission to the Alabama State Bar (hereinafter referred to as "respondent").

(2) Upon the conclusion of an investigation, the General Counsel shall decide whether the matter warrants dismissal, the imposition of a private or public reprimand, or the filing of formal charges with the Disciplinary Board. In making this decision, the General Counsel, without a formal hearing, shall consider all legal evidence pertinent to the issue, including any prior ethical violations by the respondent. The decision, along with all relevant materials considered by the General Counsel, shall be reported as a recommendation to the Disciplinary Commission.

(3) *Notice to Law Firms.* When a formal disciplinary or investigative file is opened by the General Counsel or by a local grievance committee as provided in subsection (b) of this rule, the respondent shall disclose the fact that a disciplinary file has been opened to the respondent's current law firm by notifying the managing partner, senior partner, executive committee, or management committee. If the respondent changes law firms after a disciplinary file has been opened, but before a final determination has been made by the Disciplinary Commission or the Disciplinary Board, the respondent shall disclose the fact that a disciplinary file has been opened to the respondent's new law firm by notifying the managing partner, senior partner, executive committee, or management committee of the new firm. If the respondent was associated with a different law firm at the time of the act or acts giving rise to a complaint, then the respondent shall also notify that law firm. Disclosure shall be in writing and in the following form:

"A complaint of unethical conduct against me has been filed with the Alabama State Bar. The nature of the allegations are: [Provide a general description.] This notice is provided pursuant to Rule 12(a)(3) of the Alabama Rules of Disciplinary Procedure."

The notice shall be provided within 15 days of notice that a disciplinary file has been opened, and a copy of the above notice shall be served on the Office of General Counsel of the Alabama State Bar.

**(b) Investigation by Local Grievance Committee.**

(1) A local grievance committee, approved pursuant to Rule 7 of these Rules, shall have the right to investigate an allegation or complaint of misconduct of any member of the Alabama State Bar and any nonresident lawyer admitted pro hac vice pursuant to Rule VI, Rules Governing Admission to the Alabama State Bar.

(2) Upon the conclusion of an investigation, the local grievance committee shall decide whether the matter warrants dismissal, the imposition of a private or public reprimand, or the filing of formal charges before the Disciplinary Board. In making its decision, the local grievance committee, without a formal hearing, shall consider all legal evidence pertinent to the issue, including the respondent's prior ethical violations, if any. This decision, along with all relevant materials considered by the local grievance committee, shall be reported, as a recommendation, to the Disciplinary Commission.

(3) In the event the Disciplinary Commission modifies the recommendation of a local grievance committee, the matter shall be continued until the next meeting of the Disciplinary Commission. The local grievance committee shall be notified of the modification by the Disciplinary Commission, and it may file a written request for reconsideration by the Disciplinary Commission. The Disciplinary Commission may require the attendance of a representative of the local grievance committee at any meeting at which such a modification is reconsidered.

**(c) Action by Disciplinary Commission.**

(1) Upon receiving a recommendation, as provided in paragraph (a)(2) or paragraph (b)(2) of this rule, the Disciplinary Commission shall decide,

by majority vote, whether the matter should be concluded by dismissal; by imposition of a private or public reprimand; or by the filing of formal charges before the Disciplinary Board. The decision of the Disciplinary Commission not to pursue an inquiry is not appealable.

(2) The notice by the Disciplinary Commission to the respondent of a decision to impose a public or private reprimand shall include a recital of the Disciplinary Rule, and a concise finding of fact constituting the misconduct, upon which the proposed discipline is based.

**(d) Action by Respondent.** A respondent, within fourteen (14) days after being advised of the decision to impose a private or public reprimand, may do any of the following:

(1) Accept the proposed private or public reprimand;

(2) Submit in writing to the Disciplinary Commission additional information and request the Disciplinary Commission to reconsider the proposed discipline. If, after reconsideration, the Disciplinary Commission approves a private or public reprimand, the respondent may accept such sanction or demand charges, as provided in paragraph (d)(3) below, within fourteen (14) days after being advised of the decision of the Disciplinary Commission; or

(3) Demand, in writing and delivered to the General Counsel, that the General Counsel file formal charges with the Disciplinary Board, in accord with paragraph (c) of this rule.

**(e) Formal Hearing by Disciplinary Board.**

(1) Formal disciplinary proceedings before a Disciplinary Board shall be instituted by the General Counsel's filing with the Disciplinary Clerk of the Alabama State Bar a petition, which shall reasonably inform the respondent of the alleged misconduct. The Disciplinary Clerk shall assign and transmit the petition to a Disciplinary Hearing Officer and a Disciplinary Board. A copy of the petition shall be served upon the respondent. The respondent shall serve a copy of his answer upon the General Counsel and file the original with the Disciplinary Clerk within twenty-eight (28) days after the service of the petition, unless the Disciplinary Hearing Officer extends the time for answering the petition. If the respondent fails to answer, the charges shall be deemed admitted; provided, however, that if the failure to answer was attributable to mistake, inadvertence, surprise, or excusable neglect, a respondent who fails to answer within the time provided may obtain permission from the Disciplinary Hearing Officer to file an out-of-time answer.

(2) Following the service of the answer or upon failure to answer, a time, date, and place for a hearing shall be set by the Disciplinary Hearing Officer.

(3) The Disciplinary Hearing Officer shall serve a notice upon the General Counsel and the respondent, or the respondent's counsel, at least fourteen (14) days in advance of the date set for the hearing, stating the time, date, and place of the hearing. The notice shall advise the respondent that he or she is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence in his or her own behalf.

(4) If the Disciplinary Board finds that the respondent has violated the Alabama Rules of Professional Conduct, the Disciplinary Board shall permit the General Counsel and the respondent to present matters in aggravation and in mitigation, including any prior violations of the Rules of Professional Conduct by the respondent, or the absence of such violations, for consideration by the Disciplinary Board in determining the appropriate discipline. If the charges have been deemed admitted because the respondent failed to file an answer within the prescribed time, the respondent will be advised that the purpose of the hearing is to

determine punishment and that the Disciplinary Board will consider only those matters relevant in aggravation and in mitigation of punishment.

**(f) Review by the Supreme Court.**

- (1) The parties have a right to appeal an adverse decision of the Disciplinary Board or, in a Rule 20 proceeding, an adverse decision of the Disciplinary Commission, to the Supreme Court of Alabama by filing a notice of appeal with the Disciplinary Clerk of the Alabama State Bar and the Clerk of the Supreme Court within fourteen (14) days after the decision of the Disciplinary Board or the Disciplinary Commission is filed with the Disciplinary Clerk.
- (2) The record on appeal shall include: (A) all filings except those listed in Rule 10(a), Alabama Rules of Appellate Procedure, unless the inclusion of those items is specifically requested by the respondent or by the Office of General Counsel; (B) a transcript of testimony; and (C) the decision of the Disciplinary Board or the Disciplinary Commission.
- (3) Within seven (7) days after filing notice of appeal, the appellant shall make satisfactory arrangements with the Disciplinary Clerk for payment of the costs of photocopying a sufficient number of copies of the record on appeal in order to furnish one copy each to the Supreme Court of Alabama, the appellee, and the appellant, if the appellant desires to order a copy.
- (4) Within fourteen (14) days thereafter, the Disciplinary Clerk shall forward the record on appeal to the Clerk of the Supreme Court of Alabama.

## APPENDIX G

### RULE 21 . PROCEDURES — TRANSDONAL PROVISION

For purposes of Rule 12, any matters pending before the Board of Disciplinary Appeals on the effective date of the amendments to these Rules effective October 6, 2008, shall be resolved as soon as possible by the Board of Disciplinary Appeals, and the Board of Disciplinary Appeals shall remain in effect, notwithstanding the effective date of the amendments to these Rules, for the limited purpose of disposing of pending matters.

## APPENDIX H

### RULE 5 IMMUNITY

- (a) Complaints, Petitions, and Testimony.** Complaints and petitions submitted pursuant to these Rules or testimony with respect thereto shall be absolutely privileged, and no lawsuit predicated thereon may be instituted.
- (b) Official Duty Immunity.** The following shall be immune from suit for any conduct in the course of their official duties:
- (1) Members of the Executive Committee of the Alabama State Bar;
  - (2) Members of the Disciplinary Commission;
  - (3) Members of the Disciplinary Board, including lay members;
  - (4) The General Counsel and the staff of the Office of General Counsel;
  - (5) Members of local grievance committees and any executive committee or member of a local bar association while serving as a part of the local grievance process;

- (6) A Bar commissioner while participating in the grievance procedure;
- (7) A Disciplinary Hearing Officer;
- (8) The Disciplinary Clerk;
- (9) The Client Security Fund Committee and its members or consultants;
- (10) Trustees appointed pursuant to Rule 29 of these Rules and monitors or mentors appointed pursuant to Rule 21 of these Rules;
- (11) The Alabama State Bar Lawyer Assistance Program and any member of its staff or its agents;
- (12) The Alabama State Bar Practice Management Assistance Program and any member of its staff or its agents.
- (13) In addition, any financial institution reporting an overdraft of a lawyer's trust account pursuant to the provisions of Rule 1.15(e) of the Alabama Rules of Professional Conduct shall be immune from suit for any conduct in the course of its official duties in complying with Rule 1.15.

**(c) Reporting of Professional Misconduct.** A lawyer acting in compliance with Rule 8.3, Alabama Rules of Professional Conduct, shall be immune from civil suit.

**(d) Unauthorized Practice of Law.** Members of the Alabama State Bar serving on the Alabama State Bar Unauthorized Practice of Law Committee or on authorized Practice of Law Committees of local bar associations and members of the State Bar staff investigating unauthorized-practice-of-law complaints, or taking action against individuals for the unauthorized practice of law, shall be immune from civil suit for any conduct in the course of their official duties.

A person submitting an unauthorized-practice-of-law complaint to the Alabama State Bar shall be immune from civil suit.

## APPENDIX I

### RULE 2 INTERIM SUSPENSION AND SUMMARY SUSPENSION.

**(a) Grounds for Suspension-With and Without Notice.**

- (1) *Conviction of a Serious Crime.* The Disciplinary Commission may issue an order temporarily suspending a lawyer without written or oral notice to the lawyer on petition of the General Counsel, supported by an affidavit demonstrating facts personally known to the affiant, or a verified complaint, showing that a lawyer has been convicted of a serious crime, as defined in Rule 8 of these Rules.
- (2) *Other Circumstances Without Notice.* The Disciplinary Commission may issue an order temporarily suspending a lawyer without written or oral notice to the lawyer on petition of the General Counsel, only if:
  - (i) it clearly appears from specific facts shown by an affidavit demonstrating facts personally known to the affiant or by a verified complaint that the lawyer's continuing conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public, or showing that grounds for summary suspension as defined in Rule 8(e) exist, and
  - (ii) General Counsel certifies to the Disciplinary Commission in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.

Unless the Disciplinary Commission is satisfied by the showing made pursuant to subsection (ii) above that suspension without notice is warranted under the circumstances, a lawyer, other than one convicted of a serious crime, shall not be suspended without notice and an opportunity to be heard as provided in subsection (3).

(3) *Other Circumstances With Notice and Preliminary Hearing.* The Disciplinary Commission may issue an order temporarily suspending a lawyer with written or oral notice to the lawyer on petition of the General Counsel if it clearly appears from specific facts shown by an affidavit demonstrating facts personally known to the affiant or by a verified complaint that the lawyer's continuing conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. The written or oral notice required by this subsection is notice that is reasonable under the circumstances. Reasonable notice shall be presumed if written or oral notice was attempted upon the lawyer at the address, telephone or facsimile number, or e-mail address on file with the membership department of the Alabama State Bar. The Disciplinary Commission may conduct a preliminary hearing on the petition for interim suspension with forty-eight (48) hours notice to the parties. The preliminary hearing shall not include a trial of the merits of the petition, but shall include only an inquiry into whether there is probable cause to believe that the lawyer's continuing conduct is causing, or is likely to cause, immediate and serious injury to client or to the public. The respondent lawyer or his attorney shall be allowed to cross-examine witnesses and present evidence on his or her own behalf at the preliminary hearing. A lawyer suspended with notice and after a preliminary hearing shall not be entitled to a hearing under subsection (d) of this rule.

**(b) Effect of Interim Suspension.** An order suspending a lawyer under this rule immediately suspends his or her right to practice as of the effective date stated in the order. Simultaneously with the issuance of the suspension order, a trustee may be appointed pursuant to Rule 29 of these Rules to protect the interest of the lawyer and his or her clients.

**(c) Termination of Interim or Summary Suspension.** A suspension must be terminated by the Disciplinary Commission:

- (1) **p** on reversal or vacation of the judgment of conviction that gave rise to the suspension;
- (2) **p** on the effective date of the order of final discipline;
- (3) **p** on transfer to disability inactive status;
- (4) **p** on dissolution of the order of suspension by the Disciplinary Board, the Disciplinary Commission, or the Alabama Supreme Court; or
- (5) In the case of an interim suspension, upon failure of the General Counsel to file formal charges within twenty-eight (28) days after the date of interim suspension.

**(d) Dissolution or Amendment of Interim Suspension or Summary Suspension.** The lawyer may request dissolution or amendment of an order of suspension or summary suspension entered without notice by filing a petition with the Disciplinary Commission, a copy of which petition shall be served on the General Counsel. The petition shall be set for hearing before the Disciplinary Commission within seven (7) days of its filing. The scope of the hearing shall be as defined in subsection (a)(3) above. The Disciplinary Commission shall decide the petition with the utmost speed consistent with due process. The Disciplinary Commission may modify the order of suspension, if appropriate, and continue such provisions of that order as may be appropriate until final disposition of all disciplinary charges against the lawyer. An appeal may be taken from decisions of the

Disciplinary Commission as provided in Rule 12(f); however, the suspension will not be stayed during the appeal process.

**(e) Surrender of License.** A lawyer who is suspended by action of the Disciplinary Commission pursuant to this rule shall promptly surrender his or her license to the Secretary of the Alabama State Bar within ten (10) days after issuance of the order of suspension.

**(f) Notice to Clients and Court.** A lawyer suspended pursuant to this rule shall immediately provide notices as required by Rule 26 of these rules.

**(g) Trust Accounts.** An order of suspension pursuant to this rule, when served on a bank maintaining a trust account for the suspended lawyer, shall prevent the bank from making further payments from that account.

**(h) Advertising.** A lawyer suspended under this rule shall, to the extent possible, immediately cancel and cease any advertising activities in which the lawyer is engaged.

## APPENDIX J

### RULE 21. PROBATION

**(a) When Probation Appropriate.** Probation is appropriate when the respondent has problems requiring supervision, but can still perform useful legal services. Probation may be an appropriate discipline in certain cases of disability, if the condition is temporary or minor and capable of treatment without transfer to disability inactive status. Probation should be used only in those cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised.

**(b) Conditions.** The order placing a lawyer on probation shall specify the conditions of probation. The conditions shall take into consideration the nature and circumstances of the lawyer's misconduct and the history, character, and health status of the lawyer, and shall include as a condition that the lawyer commit no further violations of the Alabama Rules of Professional Conduct. The conditions may include, but are not limited to, the following, where appropriate:

- (1) Making periodic reports as directed by the Disciplinary Commission, the Disciplinary Board, the Disciplinary Hearing Officer, or the Office of General Counsel;
- (2) Monitoring of the lawyer's practice or accounting procedures;
- (3) Establishing a relationship with an attorney-mentor, and regularly reporting with respect to the development of that relationship;
- (4) Completing a specified a course of study;
- (5) Retaking and passing all of, or any portion of, the bar examination;
- (6) Refunding and/or making restitution;
- (7) Submitting to medical evaluation and/or treatment;
- (8) Submitting to mental-health evaluation and/or treatment;
- (9) Submitting to evaluation or treatment in a program that specializes in treating disorders related to sexual misconduct;
- (10) Submitting to evaluation or treatment in a program that specializes in treating matters relating to family violence, including, but not limited to, violence inflicted on a domestic partner, an elder, or a child;

- (11) Submitting to substance-abuse evaluation and/or treatment; or
- (12) Abstaining from alcohol and/or drugs.

**(c) Costs.** The lawyer shall be responsible for all costs of evaluation, treatment, and supervision. Failure to pay these costs before probation is terminated shall constitute a violation of probation.

**(d) Monitoring.** The Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board shall monitor the attorney's compliance with the conditions of probation imposed under these Rules. When appropriate, the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board may delegate the monitoring role to a responsible lawyer or mentor. In cases in which monitoring is so delegated, the designated monitor shall submit such reports the Office of General Counsel requests.

**(e) Violation.** If, during the probationary period, the Office of General Counsel, the Disciplinary Board, or the Disciplinary Commission receives information that a condition of probation may have been violated, the Office of General Counsel may file a motion specifying the alleged violation and seeking an order requiring the respondent to show cause why probation should not be revoked. The filing of such a motion shall toll any period of probation until final action is taken on the motion. A hearing shall be held on motion of either party before the Disciplinary Board or the Disciplinary Commission. At the hearing, the Office of General Counsel has the burden of establishing, by a preponderance of the evidence, the violation of a condition of probation. In a revocation hearing, when the alleged violation of a condition is the respondent's failure to pay restitution or costs, the evidence of the failure to pay shall constitute prima facie evidence of a violation. Any evidence having probative value shall be admissible, regardless of its admissibility under the Alabama Rules of Evidence, provided that the respondent is accorded a fair opportunity to rebut that evidence. At the conclusion of a hearing, the Disciplinary Hearing Officer or chair of the Disciplinary Commission shall prepare a report setting forth findings of fact and the decision.

**(f) Termination.** Unless otherwise provided in the order of probation, within thirty (30) days and not less than fifteen (15) days prior to the expiration of the period of probation, the respondent shall file an affidavit with the Disciplinary Clerk and serve a copy of the affidavit on the Office of General Counsel, stating that he or she has complied with all terms of probation. Upon receipt of this notice and absent objection from the Office of General Counsel, the Disciplinary Board or the Disciplinary Commission shall forthwith issue an order showing that the probation was successfully completed. The order shall become effective upon the expiration of the period of probation, unless otherwise stated therein.

**(g) Independent Charges.** A motion for revocation of a respondent's probation shall not preclude the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board from filing independent disciplinary charges based on the same conduct as alleged in the motion.

**(h) Prerogatives of the General Counsel.** With respect to probation, the General Counsel may investigate to determine whether the probation should be terminated, revoked, or extended. The General Counsel may recommend to the Disciplinary Commission or to the Disciplinary Board that the probation be terminated; that the probation be revoked; that the probation be extended; or that other discipline be imposed.

**(i) Trust Account.** An order of probation that restricts the lawyer from maintaining a trust account, when served on any bank maintaining a trust account against which the lawyer may make withdrawals, shall prevent the bank from making further payments from that account.

## APPENDIX K

### RULE 22. MANDATORY SUSPENSION OR DISBARMENT

**(a)** The Disciplinary Commission shall disbar or suspend a lawyer:

(1) When a judgment is rendered against the lawyer for money collected by him or her as a lawyer upon which judgment and execution has been issued and returned "no property found." The record of the judgment, execution, and return, or a copy thereof certified and authenticated in the manner authorized by law, is conclusive evidence thereof, unless such judgment has been set aside, reversed, or annulled.

(2) If the lawyer's conviction for a "serious crime," as defined in Rule 8 of these Rules, has become final, regardless of the plea, in any court of record of this state or any other state, or of the United States, or of a territory of the United States. The record of his or her conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence of such conviction. Whether a lawyer's conviction involves a serious crime as defined in Rule 8(c)(2)(B), (C), and (D) shall be made by the Disciplinary Board upon petition by the General Counsel. The Disciplinary Board may conduct a hearing to assist it in making this determination. If the Disciplinary Board determines that the conviction involved a serious crime, then the Disciplinary Commission will determine the discipline, upon further petition by the General Counsel. When the conviction is not final, the General Counsel may file a petition with the Disciplinary Commission, make a showing of good cause, and request that the lawyer be suspended immediately, pursuant to Rule 20 of these Rules, irrespective of the lawyer's right to appeal the conviction.

**(b)** If the crime for which the lawyer is convicted does not constitute a "serious crime," as defined in Rule 8 of these Rules, it may nevertheless constitute grounds for discipline under Rule 2(b) of these Rules.

## APPENDIX L

### RULE 23. DISBARMENT BY CONSENT

**(a) Request for Disbarment.** A lawyer, who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct, may request to be disbarred by delivering to the General Counsel an affidavit stating that he or she desires to consent to disbarment and that:

(1) Such consent is freely and voluntarily rendered, is not the result of coercion or duress, and he or she is fully aware of the implications of submitting such consent; and

(2) The lawyer is aware that there is currently pending an investigation into, or proceeding involving, allegations of grounds for his or her disbarment, the nature of which he or she shall specifically set forth.

**(b) Filing Affidavit and Order of Disbarment.** Upon receipt of the required affidavit, the General Counsel shall file it with the Disciplinary Board. The Disciplinary Hearing Officer shall enter an order disbaring the lawyer by consent.

**(c) Disbarment Public.** The order disbaring the lawyer by consent shall be a matter of public record, and publication will be made pursuant to Rule 33 of these Rules. However, the affidavit required under the provisions of paragraph (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of the Disciplinary Board.



# APPENDIX M

## RULE 27. TRANSFER TO DISABILITY INACTIVE STATUS

- (a) Lawyer Declared Incompetent or Mentally Ill.** If a lawyer has been judicially declared incompetent or mentally ill, or has been committed or confined by judicial action on the grounds of incompetency or mental illness, the Disciplinary Board, upon proper proof of the fact, shall enter an order transferring such lawyer to disability inactive status. A copy of the order shall be served upon such lawyer and his or her guardian, if any, and if he or she has been committed to an institution, upon the director of such institution, in such manner as the Disciplinary Board may direct.
- (b) Petition to Determine Incapacity.** If a petition is filed to determine whether a lawyer who is engaged in the practice of law is incapacitated from continuing the practice of law by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, such petition shall be referred to the Disciplinary Board. The Disciplinary Board shall provide for such notice of proceedings in the matter to the respondent as it deems proper and advisable and may appoint a lawyer to represent the respondent, if he or she is without adequate representation. The Disciplinary Board may take or direct such action to be taken as it deems necessary or proper to determine whether the lawyer is so incapacitated, including the examination of the lawyer by such qualified medical experts as the Disciplinary Board shall designate. If, upon due consideration of the matter, the Disciplinary Board concludes that the lawyer is incapacitated from continuing to practice law, it shall enter an order transferring him or her to disability inactive status on the ground of such disability.
- (c) Incapacity Claimed by Respondent Lawyer.** If, during the course of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental or physical infirmity, illness, or addiction to drugs or intoxicants, which makes it impossible for the respondent to adequately defend himself or herself, the Disciplinary Board shall enter an order transferring the respondent to disability inactive status until a determination is made of the respondent's ability to adequately defend himself or herself. The Disciplinary Board shall appoint a lawyer to represent the respondent if he or she is without adequate representation, and may take or direct such action to be taken as it deems necessary or proper to determine whether the respondent is able to adequately defend himself or herself, including the examination of the respondent by such qualified medical experts as the Disciplinary Board shall designate. If the Disciplinary Board determines that the respondent is able to adequately defend himself or herself, it shall take such action as it deems proper and advisable, including a direction for the resumption of the disciplinary proceedings against the respondent.
- (d) Appeal.** Either party may appeal the decision of the Disciplinary Board, in accordance with the procedures set out in Rule 12(f). Whether the action of the Disciplinary Board will be stayed during the appeal is within the discretion of the Alabama Supreme Court.
- (e) Disciplinary Proceedings Stayed.** A pending disciplinary proceeding against the respondent shall be held in abeyance so long as the respondent remains on disability inactive status.
- (f) Expenses.** All expenses incurred in paragraphs (a), (b), or (c) of this rule, including legal and medical fees, shall be borne by the respondent, unless the indigency of the respondent is affirmatively established, in which case all reasonable legal and medical fees, as determined by the Disciplinary Board, may be paid upon application to the Client Security Fund.

**(g) Reinstatement.** A lawyer transferred to disability inactive status under the provisions of this rule may not resume active status until reinstated by order of the Disciplinary Board. Pursuant to Rule 28 of these Rules and Appendix "A" to these Rules, a lawyer transferred to disability inactive status under the provisions of this rule shall be entitled to petition for reinstatement to active status once a year or at such shorter intervals as the Disciplinary Board may direct in the order transferring the respondent to disability inactive status or any modification thereof. Such petition shall be granted upon a showing by clear and convincing evidence that the lawyer's disability has been removed and that he or she is fit to resume the practice of law. Upon such application, the Disciplinary Board may take or direct such action to be taken as it deems necessary or proper to determine whether the lawyer's disability has been removed, including a direction for an examination of the lawyer by such qualified medical experts as the Disciplinary Board shall designate. In its discretion, the Disciplinary Board may direct that the expense of such examination shall be paid by the lawyer, and that the lawyer establish proof of competence and learning in law, which proof may include certification by the Bar Examiners of his or her successful completion of an examination for admission to practice.

If a lawyer has been transferred to disability inactive status by an order in accordance with the provisions of paragraph (a) of this rule and thereafter has been judicially declared to be competent, the Disciplinary Board may dispense with further evidence that his or her disability has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

- (h) Burden of Proof.** In a proceeding seeking to transfer a lawyer to disability inactive status under this rule, the burden of proof shall rest with the petitioner. In a proceeding seeking an order of reinstatement to active status under this rule, the burden of proof shall rest with the applicant.
- (i) Waiver of Physician-Patient Privilege.** The filing of a petition for reinstatement to active status by a lawyer transferred to disability inactive status shall be deemed to constitute a waiver of any physician-patient privilege with respect to any treatment of the lawyer during or prior to the period of disability. The lawyer shall be required to disclose the name of every psychiatrist, psychologist, and physician by whom, and every hospital or other institution in which, the lawyer has been examined or treated with respect to his or her disability, and the lawyer shall furnish to the Disciplinary Board written consent to each to divulge such information and records as may be requested by medical experts appointed by the General Counsel or the Disciplinary Commission.
- (j) Public Nature of Disability Inactive Status.** An order of the Disciplinary Board transferring a lawyer to or from disability inactive status will be public.

# APPENDIX N

## RULE 28. REINSTATEMENT

- (a) Prohibition of Practice.** A lawyer who has been disbarred by consent or after hearing, or who has been suspended for more than ninety (90) days, or who has been placed on disability inactive status pursuant to Rule 27 of these Rules, or who has voluntarily surrendered his or her license, shall not resume the practice of law until reinstated by order of the Disciplinary Board, the effective date of which shall be established by the Alabama Supreme Court.
- (b) Time of Reinstatement.** A lawyer who has been suspended for more than ninety (90) days may not apply for reinstatement until the period of suspen-

sion has terminated. A lawyer who has been disbarred by consent or after hearing, or who has surrendered his or her license, may not apply for reinstatement until the expiration of at least five (5) years from the effective date of the disbarment or surrender of license. A lawyer on disability inactive status may apply for reinstatement pursuant to Rule 27(g) of these Rules.

- (c) Petitions for Reinstatement.** Petitions for reinstatement shall be filed with the Disciplinary Clerk of the Alabama State Bar and served upon the General Counsel, and shall be in the form and contain the material specified in Appendix "A" to these Rules. A petition that does not substantially comply with the form specified in Appendix "A" or that does not contain the information and documents specified in Appendix "A" or that does not contain satisfactory proof of compliance with the provisions of Rule 26 of these Rules shall constitute prima facie evidence that the petitioner has not met the burden of proof required for reinstatement under this rule, and the petition shall be summarily denied. Upon receipt by the Disciplinary Board of a petition that substantially complies with Appendix "A," a Disciplinary Hearing Officer shall promptly set the petition for a hearing. At the hearing, the petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications to practice law in this state and that his or her resumption of the practice of law within the state will not be detrimental to the integrity and standing of the Bar or the administration of justice, and will not be subversive to the public interest. Proof of compliance with the provisions of Rule 26 of these Rules shall be a condition precedent to consideration of a petition for reinstatement. The Disciplinary Board shall, within seven (7) days after the hearing, issue an order granting or denying the petition.
- (d) Proceedings.** In all proceedings upon a petition for reinstatement, cross-examination of the petitioner's witnesses shall be conducted by the General Counsel, and evidence in opposition to the petition, if any, shall be submitted by the General Counsel.
- (e) Costs.** Petitions for reinstatement under this rule shall be accompanied by an advance cost deposit in an amount to be set from time to time by the Disciplinary Board to cover anticipated costs of the reinstatement proceedings.
- (f) Publication of Petition.** Notice that a person has applied for reinstatement may be published in a newspaper of general circulation in the city or county of residence of the petitioner or in the judicial circuit or circuits in which the petitioner last practiced, or both, and may be published to the local bar association, inviting the public and the local bar to provide any information relevant to the qualifications of the petitioner.
- (g) Approval or Denial of Petition.** If the petitioner is found unfit to resume the practice of law, the petition shall be denied. If the petitioner is found fit to resume the practice of law, the order of the Disciplinary Board shall reinstate him or her; provided, however, that the order may make such reinstatement conditional upon any or all of the following:
- (1) Restitution (partial or complete), with or without interest, to parties harmed by the petitioner's misconduct, whether or not the obligation has been discharged in bankruptcy or by operation of law;
  - (2) Payment of all or part of the costs of reinstatement proceedings but not lawyer's fees;
  - (3) Probation or limitation upon practice as provided by Rule 8 and Rule 21 of these Rules;
  - (4) Appointment of a probation supervisor, monitor, or trustee or receiver;
  - (5) Proof of passage of the bar examination, the professional responsibility examination, or both, or any other proof of competency deemed appropriate by the Disciplinary Board;

(6) Attendance at a continuing legal education course or courses in addition to the annual mandatory continuing legal education requirement; and

(7) Any other requirement that the Disciplinary Board deems appropriate.

- (h) Effective Date.** No petitioner shall be reinstated to the practice of law in the State of Alabama until the effective date of reinstatement as is established by order of the Alabama Supreme Court.
- (i) Reapplication.** No petition for reinstatement under this rule shall be filed within one year following an adverse order of the Disciplinary Board, which has become final, on a petition for reinstatement filed by or on behalf of the same person.
- (j) Appeal.** Either party may appeal the decision of the Disciplinary Board pursuant to Rule 12(f). Whether the action of the Disciplinary Board will be stayed during the appeal is within the discretion of the body considering the appeal.
- (k) Notice.** Upon reinstatement, the Disciplinary Board shall transmit notice of such reinstatement to all parties to whom notice of discipline or transfer to disability inactive status were sent under Rule 30 of these Rules.

## APPENDIX O

### **RULE 9 APPOINTMENT OF TRUSTEE OR SUPERVISING LAWYER TO PROTECT THE INTERESTS OF A LAWYER AND THE LAWYER'S CLIENTS**

- (a) Appointment of Trustee or Supervising Lawyer.** If a lawyer has been transferred to disability inactive status because of incapacity or disability, has disappeared or died, has been suspended or disbarred, or has surrendered his or her license, and there is evidence that the lawyer has not complied with Rule 26 of these Rules or that the lawyer probably will not comply, as demonstrated by his or her failure to respond or otherwise to cooperate or participate in disciplinary proceedings or that the lawyer has been suspended pursuant to Rule 20 of these Rules and there is evidence that the appointment of a trustee or supervising lawyer is necessary to protect the interests of the lawyer or the lawyer's clients, the presiding judge of the judicial circuit in which the lawyer maintained his or her practice, the Disciplinary Board, or the Disciplinary Commission, upon proper proof of that fact, shall appoint a member or members of the Bar to act as trustee or trustees or supervising lawyer or lawyers to inventory the files of the disabled, disappeared, deceased, suspended, or disbarred lawyer or the lawyer that has surrendered his or her license and to take such action as may be necessary and appropriate to protect the interests of the lawyer and the lawyer's clients. If a reasonable fee is approved by the court, the Disciplinary Commission, or the Disciplinary Board, the appointed member or members may apply to the Client Security Fund of the Alabama State Bar for the payment of the fee.
- (b) Confidentiality.** A member of the Bar appointed as trustee or supervising lawyer shall not be permitted to disclose any information contained in any file inventoried pursuant to the appointment without the consent of the client to whom the file relates, except as may be necessary to carry out the order of the court or Disciplinary Board or Disciplinary Commission to inventory the files and to take such action as may be necessary and appropriate to protect the interests of the lawyer and the lawyer's clients.

# APPENDIX P

## RULE 32. RECORD KEEPING

**(a) Appointment of Disciplinary Clerk and Maintenance of Files.** The Executive Secretary of the Alabama State Bar shall appoint, subject to approval of the Board of Bar Commissioners of the Alabama State Bar, a Disciplinary Clerk and such Deputy Clerks as the Executive Secretary may from time to time deem appropriate. The Disciplinary Clerk shall have such qualifications as the Board of Bar Commissioners deems appropriate, and shall be responsible for maintaining formal and informal opinions of the Office of General Counsel and the Disciplinary Commission; accepting the filing of grievances, charges issued by the Disciplinary Commission, and pleadings or other papers filed with the Disciplinary Commission, or the Disciplinary Board; issuing process, and preparing and maintaining records of each disciplinary proceeding; and performing such other duties as are assigned by the Board of Bar Commissioners. The Disciplinary Clerk shall maintain the files of all matters concluded by discipline for the life of the member disciplined and shall maintain all other matters relating to discipline (including but not limited to complaints and investigations) for a period of not less than six (6) years.

**(b) Destruction of Files.** All files relating to a complaint terminated by a dismissal shall be expunged from the files of the Alabama State Bar after six (6) years have elapsed from the date of dismissal. The term "expunge" shall mean that all files or other evidence of the existence of the complaint shall be destroyed, except that the Alabama State Bar may keep a

docket showing the names of each respondent and complainant, the final disposition, and the date all files relating to the matter were expunged.

After a file has been expunged, any Alabama State Bar response to an inquiry requiring a reference to the matter shall state that any files the Alabama State Bar may have had of such matter have been expunged pursuant to the Rules of Disciplinary Procedure and that no inference adverse to the respondent is to be drawn on the basis of the incident in question.

**(c) Extension of Time of Destruction.** Upon application to the Disciplinary Commission by the General Counsel, for good cause shown and with notice to the respondent and opportunity to be heard, files that would otherwise be expunged under paragraph (b) of this rule may be retained for an additional period not to exceed three (3) years, as the Disciplinary Commission deems appropriate.

**(d) Local Grievance Committee.** A local grievance committee shall maintain files of each complaint filed with it or investigated by it for a period of not less than six (6) years. A file relating to a complaint terminated by dismissal shall be expunged as provided in paragraph (b) above.

If the Disciplinary Commission extends the period of retention of a file beyond the six-year period, a local grievance committee may likewise retain the file for the period specified by the Disciplinary Commission.

**(e) Official Court File.** The Disciplinary Clerk will be responsible for maintaining an official court file containing all pleadings and other documents filed with the Disciplinary Board and the Disciplinary Commission in connection with any formal proceeding under these Rules.

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PS Form 3526, September 2007 (Page 2 of 3)			

## APPENDIX Q

### RULE 33. PUBLICATION AND COSTS

**(a) Lawyer to Bear Costs of Publication.** In a case involving the imposition of discipline consisting of disbarment, suspension, public probation, or public reprimand with general publication, or the transfer of a lawyer to disability inactive status, notice shall be published in the official Bar publication and in a newspaper of general circulation in each judicial circuit of the State of Alabama in which the disciplined or disabled lawyer maintained an office for the practice of law. The costs of publishing the newspaper notice shall be assessed against the disciplined or disabled lawyer. In a case involving the imposition of a reprimand, without general publication, notice of such reprimand will be published only in the official Bar publication.

**(b) Assessment of Research Fee and Recovery of Costs.** The cost of production, when photocopying or other document production is performed by the Alabama State Bar for purposes of these Rules, shall be a commercially reasonable rate, not to exceed \$1.00 per page. In addition to reproduction charges, the Bar may charge a reasonable fee incident to a request to review disciplinary records or for research into the records of disciplinary proceedings and identification of documents to be produced. These costs shall include a minimum research fee of \$25.00 per request in addition to the costs of reproduction.

**(c) Production of Voluminous Documents.** When the Bar is requested to reproduce documents that are voluminous or is requested to produce transcripts in its possession, the Bar may decline to reproduce the documents and shall inform the person requesting the documents of the following options:

- (1) Purchase the transcripts from the court reporter's service that produced them;
- (2) Purchase the documents from the third party from whom the Bar received them; or
- (3) Designate a commercial photocopy service to whom the Bar shall deliver the original documents to be copied, at the requesting party's expense, provided the photocopy service agrees to preserve and return the original documents and not to release them to any person without the Bar's consent.

**(d) Taxable Costs.** Taxable costs of the proceeding shall include:

- (1) Investigative costs, including travel and out-of-pocket expenses;
- (2) Court reporter's fees;
- (3) Copy costs;
- (4) Telephone charges;
- (5) Fees for translation services;
- (6) Witness expenses, including mileage, per diem, and actual and necessary expenses; provided, however, that witnesses may be compensated for travel to and attendance at hearings only, and shall be compensated in the same manner and at the then prevailing rate of compensation as provided for in-state travel for state employees and for mileage for state employees or as otherwise directed by the Board of Bar Commissioners of the Alabama State Bar.
- (7) Expenses of a Disciplinary Hearing Officer, members of the Disciplinary Board, and members of the Disciplinary Commission;
- (8) Expenses incurred by the Office of General Counsel in the proceedings; and
- (9) An administrative fee in the amount of \$750 when costs are assessed in favor of the Bar.

**(e) Discretion to Award Costs.** A Disciplinary Hearing Officer, the Disciplinary Board, or the Disciplinary Commission shall each have discretion to award costs. Absent an abuse of that discretion, such an award shall not be reversed.

## APPENDIX R

### RULE 35. DISQUALIFICATION

A current or former member of the Board of Bar Commissioners, of the staff of the Office of General Counsel, of the Disciplinary Commission, of the Disciplinary Board, or of a local grievance committee shall not represent a respondent or appear as a character witness for a respondent in any proceeding that is or was being investigated and/or prosecuted during the member's service on the respective Board, Commission, or committee or within a three-year period of the member's ceasing to serve on the Board, the Commission, the staff, or the committee. ▲▼▲



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NOTICES TO SHOW CAUSE

REINSTATEMENTS

SURRENDER OF LICENSE

DISBARMENTS

SUSPENSIONS

## Notices to Show Cause

- **James Glenn McElroy**, whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 28 days of November 15, 2008 or, thereafter, reciprocal discipline shall be imposed upon him by the Disciplinary Board of the Alabama State Bar pursuant to Rule 25(a), *Ala. R. Disc. P.*, in Pet. 08-26.
- **Kenneth Jerome Robison**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2008 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 06-133(A), 06-185(A), 07-37(A), 07-61(A), and 07-126(A) by the Disciplinary Board of the Alabama State Bar. [ASB nos. 06-133(A), 06-185(A), 07-37(A), 07-61(A), and 07-126(A)]
- Notice is hereby given to **Matthew Travis Self**, who practiced law in Huntsville, and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated April 25, 2008, he has 30 days from the date of this publication (November 2008) to come into compliance with the Client Security Fund assessment requirement for 2008. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF No. 08-88]
- **Amy Leigh Thompson Thomas**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2008 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 07-66(A) and 07-168(A) by the Disciplinary Board of the Alabama State Bar. [ASB nos. 07-66(A) and 07-168(A)]

## Reinstatements

- On August 21, 2008, Panel I of the Disciplinary Board of the Alabama State Bar reinstated the license of Auburn attorney **Julie Boggan Kaminsky**, with conditions. Kaminsky's license was summarily suspended on July 11, 2008 for her failure to respond to requests for information from the Office of General Counsel regarding disciplinary matters. [Rule 20(a), Pet. No. 08-45]
- Montgomery attorney **Mitch McBeal**, who was interimly suspended from the practice of law in the State of Alabama pursuant to rules 8(c) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective August 14, 2008, was reinstated to the practice of law in the State of Alabama, effective September 3, 2008, pursuant to order of the Disciplinary Board of the Alabama State Bar dissolving the interim suspension. [Rule 20(a); Pet. No. 08-53]

## DISCIPLINARY NOTICES

Continued from page 473

### Surrender of License

- Huntsville attorney **Gary Carlton Huckaby** requested that the Disciplinary Commission of the Alabama State Bar accept the surrender of his law license, effective February 8, 2007. The Supreme Court of Alabama issued an order on June 9, 2008 accepting Huckaby's surrender of license, thereby striking his name from the roll of attorneys duly licensed to practice law in the State of Alabama and excluding him from the practice of law in the State of Alabama effective February 8, 2007. [ASB No. 08-104(A)]

### Disbarments

- Montgomery attorney **Keith Ausborn** was disbarred from the practice of law in the State of Alabama effective June 23, 2008 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the June 23, 2008 order of Panel I of the Disciplinary Board of the Alabama State Bar. In ASB No. 05-272(A) and 06-195(A), Ausborn failed to perform tasks in a timely manner, failed to keep his clients updated on the progress of their cases and failed to provide copies of pleadings and motions to the clients in a timely manner. The Disciplinary Board also took into account Ausborn's significant prior disciplinary history that included multiple reprimands and a suspension for similar conduct. [ASB No. 05-272(A) and 06-195(A)]
- The Supreme Court of Alabama adopted an order of the Alabama State Bar Disciplinary Board, Panel IV, disbarring Dothan attorney **Richard Heywood Ramsey, IV** from the practice of law in the State of Alabama effective June 10, 2008. On March 20, 2008, Ramsey's license was summarily suspended. On June 9, 2008, Ramsey entered a consent to disbarment in all pending bar-related disciplinary matters. [Rule 23(a), Pet. No. 08-37; ASB No. 07-161(A)]
- Bessemer attorney **Brion Dejon Russell** was disbarred from the practice of law in the State of Alabama effective March 19, 2008 by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Russell's consent to disbarment. On or about February 6, 2008, Russell pled guilty to violating § 36-25-7(b) (offering, soliciting or receiving things of value

for purpose of influencing official action), *Code of Alabama* 1975, a Class B felony. While working as an assistant district attorney for the Bessemer Division of the District Attorney's Office, Russell solicited a bribe from a criminal defendant in exchange for dismissing the defendant's criminal case. [ASB No. 06-085(A)]

- Mobile attorney **Lewis Daniel Turberville, Jr.** was disbarred from the practice of law in the State of Alabama retroactive to the date of his last suspension which was January 6, 2004, by order of the Supreme Court of Alabama. The supreme court entered its order in accord with the provisions of the March 31, 2008 order of the Disciplinary Board of the Alabama State Bar accepting Turberville's conditional guilty plea. Turberville admitted that he failed to perform legal work he was retained to do, failed to properly communicate with his clients, knowingly failed to respond to requests for information from a disciplinary authority and engaged in conduct that adversely reflected on his fitness to practice law, all of which are violations of the *Alabama Rules of Professional Conduct*. Turberville was also ordered to make restitution in individual cases to both the Client Security Fund and individual complainants. [ASB nos. 03-211(A), 03-270(A), 03-289(A), 05-169(A), 04-008(A), 04-009(A), 04-018 (A), 04-020(A), 04-021(A), 04-35(A), 04-51(A), 04-052 (A), 04-053(A), 04-119(A), 04-126(A), 04-131(A), 04-153(A), and 04-180(A)]

### Suspensions

- Troy attorney **Randy Scott Arnold**, who was summarily suspended from the practice of law in the State of Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective June 25, 2008, was reinstated to the practice of law in the State of Alabama, effective September 1, 2008, pursuant to order of the Disciplinary Board of the Alabama State Bar dissolving the summary suspension. [Rule 20(a); Pet. No. 08-42]
- Tuskegee attorney **Albert Clarence Bulls, III** was suspended from the practice of law in the State of Alabama for a period of 91 days, by order of the Supreme Court of Alabama effective August 1, 2008. The supreme court entered its order in accord with the provisions of the July

9, 2008 order of the Disciplinary Commission of the Alabama State Bar accepting Bulls's conditional guilty plea to violations of rules 1.15(a), 1.15(b), 1.15(c), 1.15(e), 1.15(f), 1.15(g), 1.15(h), and 8.4(a), *Ala. R. Prof. C.* Bulls was retained to prepare and assist a client in a loan closing. While performing a title search it was discovered that there was a lien on the house located on the property. As a result, \$9,000 was withheld from the loan proceeds and placed in Bulls's trust account to be used to satisfy the lien. Bulls agreed to pursue satisfaction of the lien for a flat fee of \$1,200. Despite a verbal agreement to charge a flat fee, Bulls charged the client for 29.75 hours of work at a rate of \$165, and only remitted \$1,790.25 to the client. These funds were remitted from Bulls's office account instead of the trust account. Bulls admitted that he made a mistake and agreed that he would disburse the remaining balance owed to the client. It was also determined that Bulls's trust account was not an IOLTA account and that a number of transactions in said account were not adequately supported by appropriate documentation. Bulls also admitted that he made other improper payments for personal use directly from his trust account and could not provide documentation or explanations for numerous other trust account transactions. [ASB No. 08-023(A)]

- Tuskegee attorney **Albert Clarence Bulls, III** was suspended from the practice of law in the State of Alabama for a period of 91 days, by order of the Supreme Court of Alabama effective August 1, 2008. Said suspension was ordered to run concurrently with the 91-day suspension ordered in ASB No. 08-23(A). The supreme court entered its order in accord with the provisions of the July 12, 2006 order of the Disciplinary Commission of the Alabama State Bar accepting Bulls's conditional guilty plea to violations of rules 1.5(a), 1.7(b), 1.8(b), 1.11(a), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* In or around April 2003, Bulls, while on active duty as a judge advocate in the United States Air Force, met with the widow of a former State of Alabama Air National Guardsman who was seeking assistance with collecting her husband's military life insurance and death benefits. Rather than assisting the widow through the Air Force, Bulls instructed her to meet him at his civilian office. Bulls then had the client sign a contingent fee agreement whereby he would receive one-third of all benefits in exchange for assisting the client in securing the proceeds of her husband's \$250,000 life insurance policy. After securing the proceeds, Bulls had the client meet him at the military base's legal office, gave the client her insurance

check and told her not to discuss the matter with commanders or unit members. Bulls retained \$91,959.69 in attorney's fees from the settlement. The client later filed a complaint with the Air Force. The Air Force conducted a formal inquiry and determined that Bulls violated Rule 7, *Standards of Professional Conduct* for Air Force Reserve Judge Advocates. As discipline, Bulls was discharged from the Air Force. The matter was then referred to the Alabama State Bar. As discipline, the Disciplinary Commission of the Alabama State Bar ordered that Bulls receive a 91-day suspension. Said suspension was suspended pending restitution to the client in the amount of \$91,959.69. Bulls failed to make the ordered restitution. [ASB No. 08-143(A)]

- Montgomery attorney **Rodney Newman Caffey** was suspended from the practice of law in the State of Alabama for 91 days, by order of the Supreme Court of Alabama effective August 25, 2008. The supreme court entered its order in accord with the provisions of the November 30, 2007 order of the Disciplinary Commission of the Alabama State Bar accepting Caffey's conditional guilty plea to violations of rules 1.15(a), 1.15(b), 1.15(e), 1.15(f), 1.15(g), 1.15(h), and 8.4(a), *Ala. R. Prof. C.* Caffey admitted that he failed to maintain an IOLTA account or other qualified trust account. In addition, Caffey also failed to promptly deliver funds to a client. In exchange for his guilty plea, Caffey agreed to a 91-day suspension. The suspension was held in abeyance and Caffey was placed on a two-year probation. The conditional guilty plea and order also stated that any subsequent violation of the *Alabama Rules of Professional Conduct* would be considered a violation of his probation and the 91-day suspension would take effect. On or about June 30, 2008, Caffey pled no contest to misdemeanor possession of marijuana in Georgia. As a result, Caffey admitted that he violated the terms of his probation and consented to the imposition of the 91-day suspension in ASB No. 07-109(A). [ASB No. 07-109(A)]
- Athens attorney **Pamela Whitworth Davis** was summarily suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated June 18, 2008. The Disciplinary Commission found that Davis's continued practice of law is causing or is likely to cause immediate and serious injury to her clients or to the public. [Rule 20(a); Pet. No. 08-35; ASB No. 08-117(A)]

## DISCIPLINARY NOTICES

Continued from page 475

- Anniston attorney **Marshall Douglas Ghee** was suspended from the practice of law in the State of Alabama for a period of 75 days by order of the Disciplinary Commission of Alabama State Bar, effective July 30, 2008. The Disciplinary Commission based its order on Ghee's guilty plea to violations of rules 1.15(a) and 8.4(a), *Alabama Rules of Professional Conduct*. Ghee failed to properly designate his trust account, and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account" or an "Attorney Fiduciary Account." On or about April 24, 2007, Ghee deposited \$35,000 in personal funds into his trust account that he borrowed from the Alabama Teacher's Credit Union. These funds were used to replace client funds that were improperly withdrawn from his account on previous occasions. In addition to the borrowed funds, Ghee also deposited into his trust account income from personal investment property and earned referral fees. Ghee also paid for personal expenses with checks drawn on his trust account on several occasions. [ASB No. 08-025(A)]
- Alabama attorney **Virginia F. Holliday**, who is also licensed in Mississippi, was suspended from the practice of law in the State of Alabama for a period of one year, effective August 25, 2008, by order of the Supreme Court of Alabama. The supreme court entered its order, as reciprocal discipline, pursuant to Rule 25, *Alabama Rules of Disciplinary Procedure*. The supreme court's order was based upon the April 3, 2008 opinion of the Supreme Court of Mississippi, suspending Holliday for a period of one year for violations of rules 1.2(a), 1.3, 1.4, 1.15(b), 1.16(a), 1.16(d), and 8.1(b), *Mississippi Rules of Professional Conduct*. Holliday neglected to communicate with her clients, failed to fulfill contracts with her clients and failed to respond to requests from a disciplinary authority. [Rule 25, Pet No. 08-34]
- Birmingham attorney **Monica McCord Jackson** was suspended from the practice of law in the State of Alabama for a period of 91 days, effective June 5, 2008. The 91-day suspension was deferred pending a one-year period of probation. Jackson admitted to improper management of her trust account and pled guilty to violating Rule 1.15(a), *Alabama Rules of Professional Conduct*.  
In ASB No. 06-184(A), a file was opened based upon notices received from Jackson's banking institution advising that non-sufficient funds had been drawn on her trust account. All funds were accounted for.
- In ASB No. 07-53(A), Jackson was hired by a title company to perform services related to loan closings. The client had not been paid although the money was supposed to have been held in Jackson's trust account. All funds were accounted for. [ASB nos. 06-184(A) and 07-53(A)]
- Effective August 20, 2008, attorney **Michael Norman McIntyre** of Birmingham has been suspended from the practice of law in the State of Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-03]
- Athens attorney **John Hamilton McLain, V** was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of Alabama State Bar effective July 31, 2008. The Disciplinary Commission based its order on McLain's consent to interim suspension. McLain was arrested July 23, 2008 and charged with two felony counts of enticing a child to enter a vehicle, house, etc. for immoral purposes in violation of § 13A-6-69, *Code of Alabama*. The criminal charges remain pending in the District Court of Limestone County, Alabama. [Rule 20(a); Pet. No. 08-49]
- Mobile attorney **Vader Al Pennington** was summarily suspended from the practice of law in the State of Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar effective August 6, 2008. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Pennington had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a); Pet. No. 08-52]
- Effective August 20, 2008, attorney **Etsuko Tanaka Smith** of Florence has been suspended from the practice of law in the State of Alabama for noncompliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-06]
- Effective August 20, 2008, attorney **David Walker Steelman** of Birmingham has been suspended from the practice of law in the State of Alabama for non-compliance with the 2007 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 08-07]





## About Members

**Connie J. Morrow** announces the opening of **C.J. Morrow Carraway Baker Law LLC** at 113 East Bridge St., Wetumpka. Phone (334) 478-4758.

**Wendy Thornton** announces the opening of **Law Offices of Wendy N. Thornton LLC** at 1 Metroplex Dr., Ste. 280, Birmingham 35209. Phone (205) 871-1310.

**David W. Trottier** announces the opening of **Trottier Law LLC** at 1002 Chestnut St., Gadsden 35901. Phone (256) 543-3288.

## Among Firms

**Austal USA** announces the appointment of **John Bell** to the position of director of legal affairs.

**Carr Allison** announces that **Kim Linville** and **Vaughan Russell** have joined the firm as associates.

**Richard E. Corrigan** and **Steven C. Pearson** announce the formation of **Corrigan & Pearson PC** with offices in Mobile and Fairhope. Phone (251) 476-2292.

**Fuller & Willingham LLC** announces that **Matthew K. Carter** and **Michael W. Fuller** have become members of the firm.

**Haygood, Cleveland, Pierce, Mattson & Thompson LLP** announces that **Rene' E. Richard** has joined as an associate.

**Ken Gomany** has been appointed treasurer of **Jefferson County**.

**Johnston Barton Proctor & Rose LLP** announces that **Holly J. Brown**, **Natalie A. Cox**, **Emily K. Price** and **James G. Saad** have joined as associates.

**Leake & Andersson LLP**, located in New Orleans, announces that **Mary Ellen Wyatt** has joined as an associate.

**David P. Martin** announces that **Jason E. Burgett** has joined as an associate.



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ABOUT MEMBERS, AMONG FIRMS

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30	\$22	\$24	\$33	\$48	\$72	\$140	

\$500,000 Level Term Coverage Male, Super Preferred, Non-Tobacco Monthly Premium							
AGE:	30	35	40	45	50	55	60
10	\$15	\$15	\$19	\$31	\$45	\$80	\$130
15	\$18	\$18	\$23	\$44	\$70	\$103	\$168
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## ABOUT MEMBERS, AMONG FIRMS

Continued from page 477

**Maynard, Cooper & Gale PC** announces that **Professor Pamela Bucy**, the Bainbridge professor of law at the University of Alabama School of Law, has joined the firm *of counsel* on an interim basis. Bucy will be with the firm during 2008 and 2009 while on sabbatical.

**McCalla Raymer LLC** announces that **Erin Stark Brown** has joined the firm as managing partner.

**The Law Firm of Philip E. Miles LLC** announces that **Jonathan Martin Welch** has joined as an associate.

**Ramadanah S. Jones** is now the staff attorney for the **Montgomery Public Schools**.

**Ogletree, Deakins, Nash, Smoak & Stewart PC** announces that **Jonice T. Vanterpool** has joined the firm as an associate.

**Porter, Porter & Hassinger PC** announces that **Hobart H. Arnold, III** and **Lauren G. Goodman** have become associates of the firm.

**Presley Burton & Collier LLC** announces that **David B. Ringelstein, II** has joined the firm as a partner.

**Richardson Callahan & Frederick LLP** announces that **Ashley E. Swink** has become a partner, **Gary L. Rigney** is now *of counsel* and **Lisa M. McCormack** has become associated with the firm.

**Rhodes & Creech** announces that **Sreekanth B. Ravi** has joined as an associate.

**Rumberger, Kirk & Caldwell PC** announces that **John B. Tally** has joined the firm.

**Sirote & Permutt PC** announces the addition of **Barry Ragsdale** in the firm's Birmingham office.

**Stames & Atchison LLP** announces that **Richard E. Davis** has joined as a partner.

**Stephens, Millirons, Harrison & Gammons PC** announces that **Rebekah P. Beal** has become an associate.

**Vickers, Riis, Murray & Curran LLC** announces that **M. Stephen Dampier** has joined as a member.

**Walston Wells & Birchall LLP** announces that **Adam G. Brimer**, **Blair R. Lanier** and **T. Parker Griffin, Jr.** have joined as associates.

**Elmer Jacobs Watson** and **C. Anthony Graffeo** announce the opening of **Watson Graffeo PC** at 228 Holmes Ave., NE, Ste. 300, Huntsville 35801. Phone (256) 536-8373. **Aaron C. Ryan** is an associate at the firm. ▲▼▲

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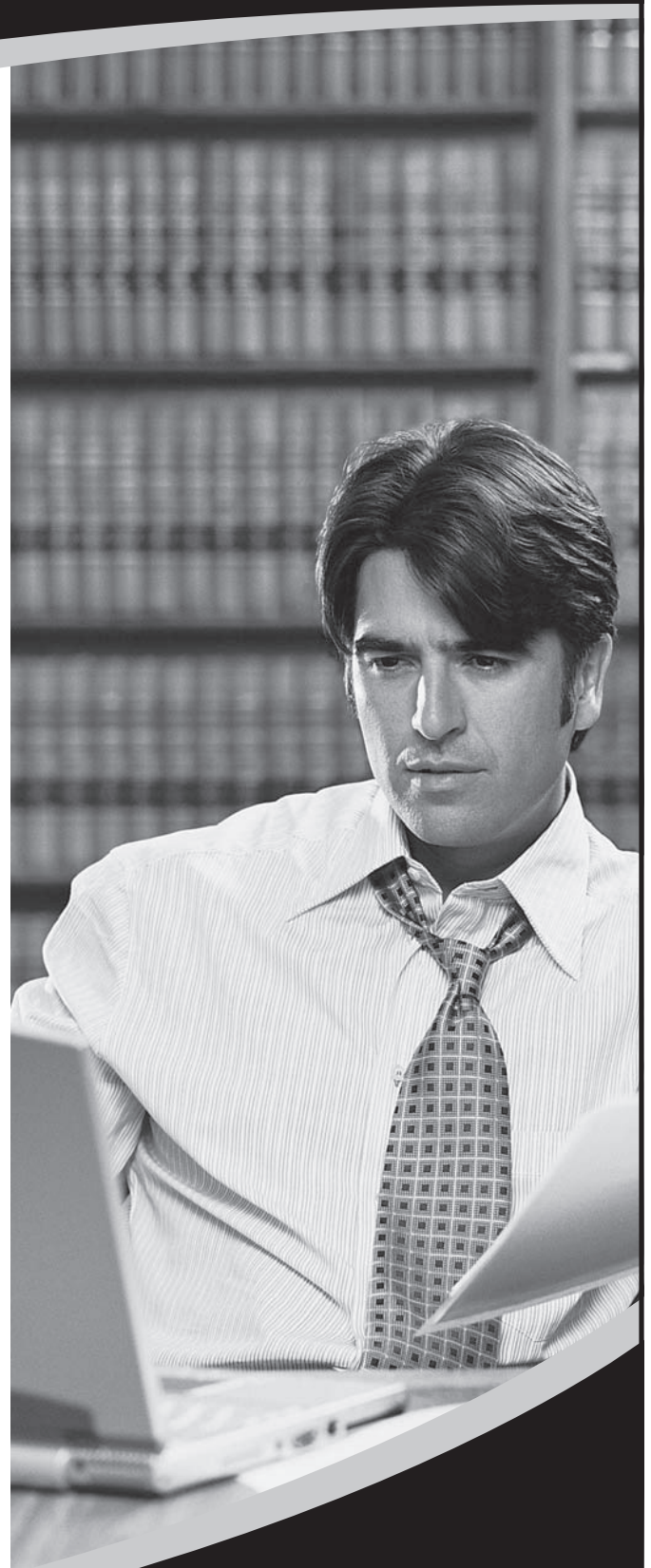
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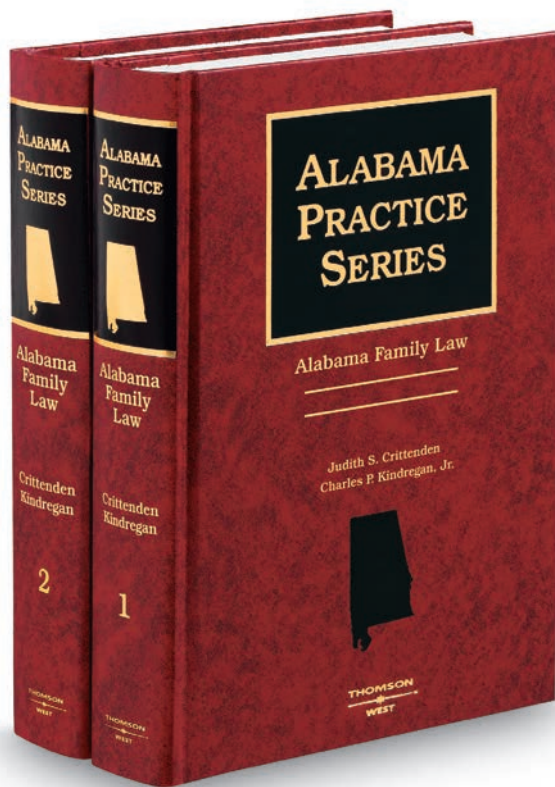
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