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THE ALABAMA LAWYER

ALTERNATIVE DISPUTE RESOLUTION IN ALABAMA

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From Power to Service: The Story of Lawyers in Alabama

page 448



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- 13 Estate Planning *Birmingham*
- 18 Alabama Update *Mobile*
- 20 Employment Update *Birmingham*

DECEMBER

- 2 Alabama Update *Montgomery*
- 4 Bankruptcy Update *Birmingham*
- 9 Alabama Update *Huntsville*
- 10 Depositions *Birmingham*
- 11 Tort Update *Birmingham*
- 17 Evidence with Charles Gamble *Birmingham*
- 18 Negotiations *Birmingham*
- 21 Alabama Update *Birmingham*

JANUARY

- 29 Professionalism *Birmingham*

FEBRUARY

- 5 Banking *Birmingham*
- 19 Elder Law *Birmingham*
- 26 Workers' Compensation *Birmingham*



Online Seminars

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“Untitled”

Caryl P. Privett is a circuit judge in Jefferson County. After leaving the Northern District of Alabama’s U.S. Attorney’s Office, where she practiced for 22 years, and prior to becoming a judge, she practiced in the field of alternative dispute resolution for five years. She is a member of the Alabama Academy of Attorney Mediators. In addition, she has been “practicing” photography for nearly 30 years. According to Judge Privett, the cover photograph was taken a number of years ago on a misty and mystical morning.

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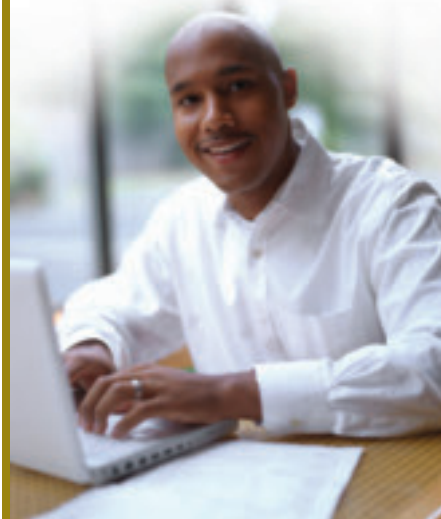


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THOMAS J. METHVIN

Pro Bono Week Just the Beginning of Emphasis on Access to Justice

The Alabama State Bar was proud to help celebrate National Pro Bono Week last month, October 25-31. This celebration recognized the valuable work lawyers do throughout the year to represent those who cannot afford civil legal assistance. The event provided a time to reflect on this core value of our profession, celebrate the achievements of pro bono activities and elevate them to even higher levels of service. This was also a time to educate the public about the pro bono services attorneys provide, and to celebrate those providing those services—Alabama lawyers.

Pro bono work is a priority for the Alabama State Bar, and is accomplished through the Volunteer Lawyers Program (VLP). The VLP works to meet the needs of low-income Alabamians with the active participation of our members, who donate their time to ensure the underserved have equal access to justice. Our clients are low-income persons who cannot afford an attorney and who have a wide range of legal problems including consumer, domestic, housing and probate matters.

Participation in the VLP affords us the opportunity to fulfill our professional responsibility to make legal counsel available to indigents consistent with a true sense of professionalism and Rule 6.1 of the *Alabama Rules of Professional Conduct*. Equally important, volunteer attorneys gain excellent client and courtroom experience since they are fully in charge of their pro bono cases. Most important of all, VLP attorneys derive great personal satisfaction from helping the less fortunate and from making a positive, visible difference in their communities.

As part of Pro Bono Week, we set a number of goals designed to help those in need, to promote the Volunteer Lawyer Program to our colleagues in the legal community, to help increase funding for these services and to raise public awareness of pro bono work.

PRESIDENT'S PAGE

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"One of our main focus areas was awareness and encouragement within the legal community," said **Alyce Spruell**, president-elect of the Alabama State Bar, and chair of our Pro Bono Week task force. "In addition to highlighting and emphasizing the need for pro bono representation among our bar members, we also worked to educate the public about it, with an emphasis on the need for funding these important services. We need a broad base of support—it can't just come from the bar—it has to come from the community at large."

Outreach activities included a partnership with every circuit in the state, and all five law schools to provide pro bono services in their communities. Clinics providing free legal services were scheduled all over the state within the 60-day timeframe surrounding Pro Bono Week.

In addition to participating in hands-on service events, bar members were enlisted to speak to members of the media, as well as to civic clubs and organizations. Additionally, public service announcements about Pro Bono Week ran throughout the state on television and radio. These efforts helped raise the profile of the legal profession by illustrating the good work attorneys do within the community, while helping to educate the public about the varied nature of pro bono work and the many people it serves.

Alabama was the first state in the nation to officially designate Oct. 25-31, 2009 as Pro Bono Week, with a proclamation signed by Gov. Bob Riley. Additionally, Pro Bono Week was declared by mayors throughout the state, and judicial resolutions were passed by the circuit, district and juvenile judges' associations.

If you are not yet involved in the Volunteer Lawyers Program, I urge you to consider it now. YOU can make a difference! It is estimated that about 25 percent of Alabama's population, or approximately 1 million people, live in poverty. With limited staff and

budgets, federally funded Legal Services programs cannot handle all the legal problems of these stricken Alabamians. As a result, many poor persons find themselves waiting without legal representation in matters crucial to their well-being.

Please help us with this critical problem by joining the Volunteer Lawyers Program. If this is impossible for you right now, other options are available to serve low-income Alabamians. You can perform intake and screening at an "advice only" legal clinic or Legal Services office in your area, or serve as a speaker at a VLP-sponsored training seminar, or even recruit for this program at bar association functions. Sign up on the Alabama State Bar Web site (www.alabar.org), call the bar (334-269-1515) or e-mail vlp2@alabar.org to request an enrollment form. If you live in Huntsville, Birmingham or Mobile, you can enroll by calling your local bar. We gratefully accept whatever time you are able to give.

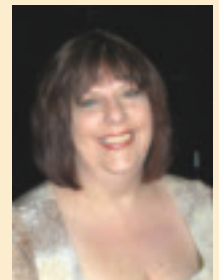
The important mission of Pro Bono Week does not end just because the date of this celebration has passed. It is an ongoing commitment for Alabama lawyers. ▲▼▲

Photo Credits, Annual Meeting Highlights

Thanks to **Laura Calloway, Robert Cook, Wyatt Cook, Bruce Gray, Earl Lawson, Diane Locke, Robby Lusk, Frank McLaughlin, Cameron Murphy, and Kari Skinner** for their photographic skills and assistance with the September *Alabama Lawyer!*

Omission

Please note that the article, "State Bar Offers Discounts to Military Personnel," which appeared on page 353 of the September issue, was authored by **Renee Avery, ASB Lawyer Referral Service secretary.**





Coming this Spring: Online Voting for State Bar Elections

At its meeting in October, the Alabama State Bar Board of Commissioners approved changes to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Members of the Board of Commissioners* to permit online voting. A task force consisting of **Hamp Baxley** of Dothan, **Lee Copeland** of Montgomery, **Augusta Dowd** of Birmingham, **Joe Fawal** of Birmingham, and **Claude Hundley** of Huntsville studied the issue of online balloting for state bar elections. In its recommendation to the commissioners, the task force concluded that online voting would substantially reduce election costs and would likely result in a higher participation rate.

The task force considered several factors. First, better than 90 percent of the bar's members have access to the Internet. Next was the cost of printing and processing paper ballots. This past year, we did not have a contested race for president-elect and only five of 12 commissioners' races were contested, necessitating run-offs. For these contests, we incurred more than \$15,000 to print and mail paper ballots. This figure does not include staff time processing the paper ballots for the election certification committee. With a mailout to the entire bar membership (more than 16,000) in a president-elect race, our election costs would easily swell to \$25,000 or more. Finally, fewer and fewer members are taking the time to vote with paper ballots. Thus, our participation level averages in the mid-30 percent. The task force observed that since the Birmingham Bar Association adopted online voting a couple of years ago, it has experienced a significant increase in the number of their members casting ballots in those elections.

Under the revised election rules, qualifications and deadlines for nominations, as well as the rules governing campaign conduct, will not change. Nominating petitions, however, for both president-elect and commissioners may now be transmitted electronically. Under the new rules, members in good standing will be notified after May 1st each year by e-mail with a link to the bar's Web site that includes an electronic ballot. The online balloting system will authenticate the voting member and prevent the casting of multiple ballots while preserving the voting member's anonymity. The deadlines for casting ballots have been shortened for both regular and



KEITH B. NORMAN

EXECUTIVE DIRECTOR'S REPORT

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run-off elections. In both president-elect and commissioners' races, the initial ballot must be cast by the last Friday in May and the run-off ballot, if necessary, must be cast by the third Friday in June.

The task force made sure to include in its recommendations, which the commissioners adopted, a procedure for ensuring that bar members in good standing without access to the Internet are permitted to cast a ballot in president-elect and commissioners' races. When elections are announced in *The Alabama Lawyer* or members receive written notification of commissioner vacancies, a member can simply write the bar stating his/her lack of Internet access and request a paper ballot. The request will be good for all elections (president-elect and commissioners') during that election cycle.

Online balloting for Alabama State Bar elections will save thousands of dollars each year and considerably

streamline our election process. Members will now have a more convenient way to cast their ballots and those who lack Internet access will still be able to exercise their franchise in bar elections. The bar's elections rules are viewable on the bar's Web site, http://www.alabar.org/members/election_rules.pdf. I hope that you will take time to review these new changes. ▲▼▲

Education Debt Update

Nearly 60 percent of the applicants for the July bar exam had outstanding education loans. These loans averaged \$84,000. The average debt based on the law school attended was: Alabama, \$47,247; Birmingham, \$32,571; Cumberland, \$100,455; Jones, \$81,214; Miles, \$26,333; and out-of-state, \$96,457.

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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 15, 2010. 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.

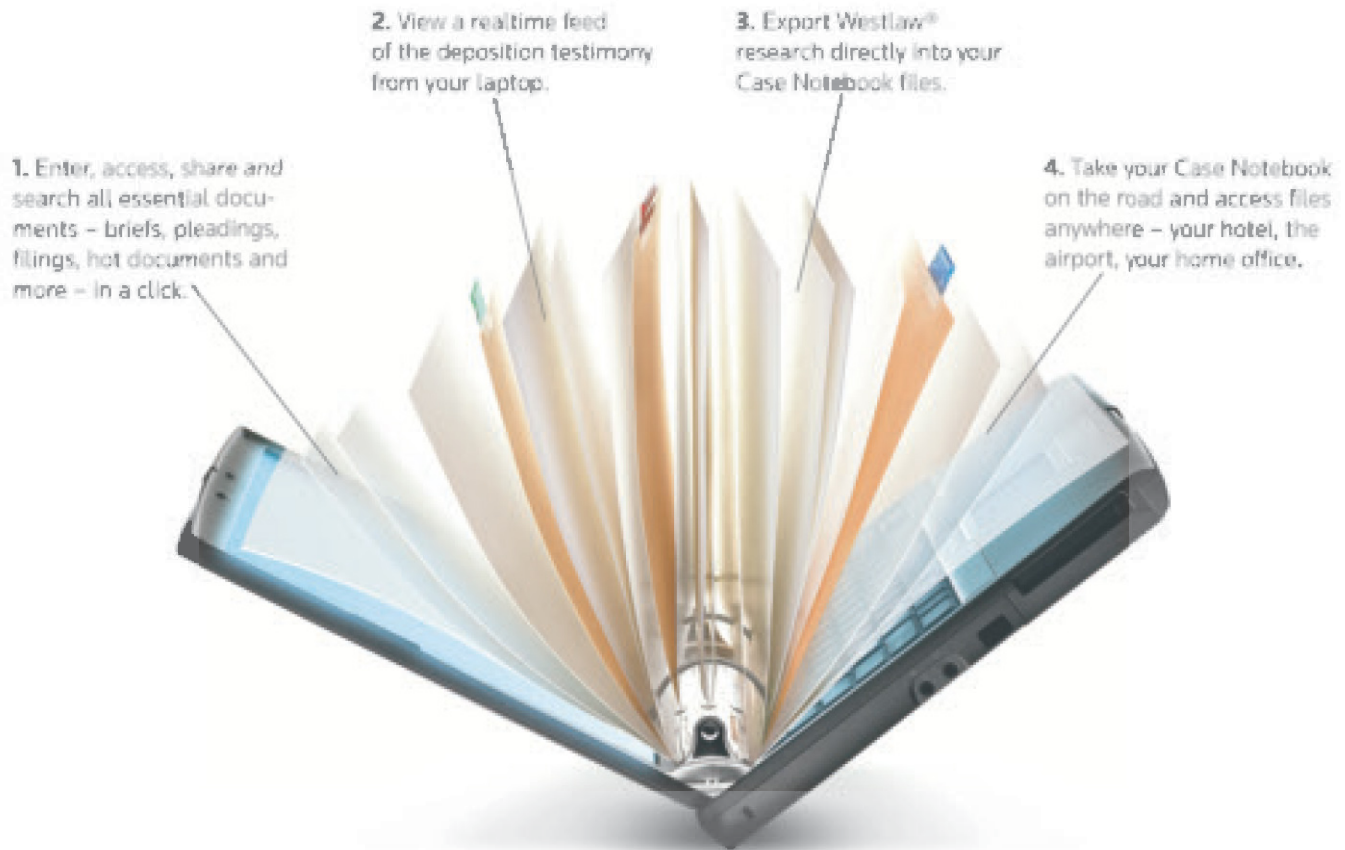
Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.



Important Judicial-Experience Legislation Receives Support from Governor

Gov. Bob Riley poses with the Alabama State Bar delegation at a ceremonial bill-signing for legislation setting minimum experience requirements for judges. Pictured above, left to right, are ASB President Thomas J. Methvin, Immediate Past President Mark White, Legislative ASB Co-Counsel Suzanne Edwards, Rep. Paul DeMarco, ASB Past President Samuel N. Crosby, Scott Mitchell (representing Chief Justice Sue Bell Cobb), ASB Legislative Chair Jim Pratt, Raymond Crosby (Legislative Reference Service), and Sen. Roger Bedford. The state bar had unanimously endorsed the legislation.





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Edward J. Azar

Montgomery attorney Edward J. Azar died April 12th. He was born and raised in Montgomery and attended the University of Notre Dame and the University of Alabama School of Law, graduating in 1947. He was married to Gloria J. Azar for 63 years. Ed was a member of Saint Peter's Catholic Church and was a very active layman who received a Papal appointment as a Knight of St. Gregory.



He practiced real estate law and lectured on real estate law at the University of Alabama Montgomery Extension Center and Auburn University.

Ed was recognized as one of the preeminent real estate lawyers in Alabama and practiced continuously for more than 60 years.

He served in the Patterson administration as the Alcohol Beverage Control Board administrator and is credited with establishing many of the modern business practices utilized by the ABC board.

Ed was a staunch Alabama football fan and attended every Alabama-Auburn game since the series was re-established in 1948.

He was truly respected by all lawyers and he taught many young lawyers the ropes of practice pertaining to real estate. He is survived by his wife, Gloria, and his son, Norman. He will be greatly missed as a husband, friend and fellow lawyer.

—George B. Azar, *Montgomery*

John H. Lavette

Birmingham attorney John H. Lavette, an avid outdoorsman, passed away May 19th.

John is survived by his wife of 53 years, Mary Beth Lavette, and their children, Rose Lavette, Patrick Lavette, Jack Lavette, Ann Le Lavette, and Elizabeth Lavette Sharb, and 10 grandchildren. (Both Patrick and Jack are also members of the Alabama State Bar.)

John was born July 28, 1931 in Birmingham. He graduated from Ramsey High School in 1949, after which he attended the University of Alabama, graduating in 1952 with a BA degree. He obtained his law degree from the University of Alabama School of Law in January 1957. John served as an officer in the Air force for several years during the Korean Conflict.

He was a member of the Alabama State Bar and the Birmingham Bar Association and was a very skillful and astute lawyer. He was considered



EDWARD J. AZAR

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REEVES III

MEMORIALS Continued from page 413

one of the premier experts in the legal profession in eminent domain law. In one of John's last cases he and son Pat were successful in obtaining one of the largest jury verdicts rendered in an eminent domain case in Alabama; this verdict was affirmed by the Alabama Supreme Court in January 2007.

John was a lawyer's lawyer in the truest sense. He had a very disarming and effective manner in the courtroom and always developed a close rapport with the juries. His skill as a trial lawyer was admired by all who either worked with him or opposed him in the courtroom.

John was an avid outdoorsman and was one of the original conservationists. He owned property in Chilton County and enjoyed hunting there. In recent years, he spent a great deal of time and resources in cultivating the properties and preparing the same for better quail habitat. John loved the sport of quail hunting as well as working with and training young bird dogs.

John loved and was loved by his wife, family and friends, all of who will dearly miss him.

—Anthony L. Cicio Sr., Birmingham

Henry Arthur Leslie

Henry Arthur Leslie, 87, of Montgomery, died June 26th. Born in Troy he resided in Montgomery for the last 45 years. He was a member of the Alabama State Bar for over 50 years.

Henry Leslie's professional career is best summarized by three words: law, education and banking. He excelled in all three. His affinity for the law was passed to his children and two adult grandchildren—daughter Cindy Bagby and son Arthur Leslie are lawyers as are grandchildren Leslie Klasing and David Miller and daughter-in-law Jeanne Marie Leslie is director of the ASB Lawyer Assistance Program. Mr. Leslie was devoted to all his family which also includes two other grandchildren, Arthur and Culle Leslie, and four great-grandchildren,



Anita and Katie Klasing and Nicholas and Madeline Miller. Mr. Leslie was predeceased by his loving wife of almost 60 years, Anita Leslie.

Henry received a BS degree in commerce from the University of Alabama where he was a member of Phi Beta Kappa, ODK, Jason's and captain of the Million Dollar Band. He received an LLB degree from the University of Alabama and an SJD degree from Yale University Law School. Enlisting in military service during World War II, he was later commissioned a 2nd Lieutenant. In 1944 he was awarded the Bronze Star for heroic service in France and the ETO Ribbon and four battle stars. After VE Day he became the military government officer over Bad Ischl, Austria until returning home. He continued to serve in the Army Reserve and retired as a Lt. colonel.

Henry taught economics and business law at the University of Alabama as a law student and was a professor of law and assistant dean of the law school. He entered the banking profession with Birmingham Trust National Bank. He joined Union Bank & Trust in Montgomery and was president and CEO from 1978-1991. After his retirement from banking he practiced law in association with one of his former students, Perry O. Hooper, Sr. During this period he was also on the board of directors of FFMC in Atlanta.

His involvement in civic and community organizations included terms as president of the Montgomery Chamber of Commerce, Children's Center, Downtown Unlimited, the Alabama Educational Foundation, and the World Affairs Council. He was on the board of directors of the Shakespeare Theatre, Montgomery Business Committee for the Arts and the Community Foundation, and was a trustee of Humana Hospital East, the Montgomery Museum of Fine Arts and the Montgomery Country Club. He was a member of the the Federal Reserve Board and the American Bar Association and Montgomery County Bar Association. He was a member of St. John's Episcopal Church where he served as senior warden.

—Anita Leslie Bagby, Birmingham, and Henry Arthur Leslie, Jr., Montgomery

John Cleveland Hays Miller, Jr.

John Cleveland Hays (Jack) Miller, Jr., a Mobile attorney prominent for more than a quarter-century in the worlds of law, banking, politics and higher education, died at his home on July 11th.

A native of Mobile, Miller received his undergraduate degree in 1966 from Duke University, and his law degree in 1969 from the University of Alabama School of Law, where he was elected to the Order of the Coif. He began his career in Alabama politics in 1966, in the re-election campaign of U.S. Senator John Sparkman, as founder of Young Alabamians for Sparkman.

Miller went to Washington, D.C. in 1971 as administrative assistant to U.S. Representative Walter Flowers of Tuscaloosa. In the following year, he became counsel to the U.S. Senate Banking Committee, and remained in Washington from 1973 to 1977, at the Federal Deposit Insurance Corporation, where he served as assistant to the director and then as deputy to the chairman of the FDIC.

In 1977, Miller returned to Mobile with his young family and took on the task of managing the gubernatorial campaign of an Opelika businessman, then known mainly as a former Auburn University football star and a successful business entrepreneur. Many Alabama political observers were stunned in 1978 when Miller's candidate, a former Republican named Fob James, defeated Lt. Gov. and former Attorney General Bill Baxley in the Democratic primary.

After James was elected governor that November, Miller turned his attention, and his considerable energies, to the law office that he had opened in Mobile. In 1979, he began advising and representing Robert E. Lowder of Montgomery, in forming the banking organization that, in 1981, was to become The Colonial BancGroup Inc. Miller was a founding member of the board of directors of the company, and over the years

also served as a director of some of its subsidiaries, with his service to the organization culminating in his election in 2007 as vice chairman of Colonial BancGroup, a position that he continued to hold until his death.

In 1981, Miller, along with Palmer Hamilton, of Mobile, Ronald Snider, a Selma native, and Mobile native Lewis Odom, Jr., a former administrative assistant to Senator Sparkman, founded Miller, Hamilton, Snider & Odom. The firm soon established, and thereafter maintained, a reputation as one of the premier specialty banking law firms in the United States. In 2008 it merged with Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP of New Orleans.

Appointed to the board of trustees of Auburn University in 2000, Miller brought to that institution, and devoted to its betterment, his training, his lifelong love for learning and his keen appreciation of, and fascination with, the art of effective verbal expression, both written and oral.

He served as a member of numerous committees of the board of trustees, including serving as chairman of the Academic Affairs Committee, and his commitment to Auburn was appropriately recognized in 2007, when the university conferred upon him the honorary degree of Doctor of Humane Letters. Perhaps equally gratifying to Miller, the university honored his heartfelt desire to imbue others with the same passion for language that he felt when, in 2009, it chose to name the university's new undergraduate writing center the John C. H. Miller Jr. Writing Center.

Miller is survived by his wife of 38 years, Susan Ross Miller; his mother, Emily Townsend Miller, of Mobile; his children, Emily Miller Washburn, and her husband, James, of Atlanta; John Cleveland Hays Miller, III, and his wife, Julia, of McCalla; and Edward Aubert Roberts Miller and his wife, Meredith, of Daphne; and two grandsons, Jackson Roberts Washburn and Jesse Townsend Washburn.

Archibald Thomas Reeves III

Archibald Thomas Reeves III, a wonderful father, husband, brother, grandfather, uncle, friend, and well-known Selma attorney, died May 3rd.



Archie was born in Selma June 6, 1932 to Archibald Thomas Reeves Jr. and Martha Mallory Reeves. After completing public schools in Selma, he attended Davidson College and the University of Alabama. In 1956, he earned his law degree from the University of Alabama School of Law, where he was a member of the *Alabama Law Review* and elected to the Order of the Coif. That same year, he began practicing law in Selma at his family's firm, Reeves & Stewart, one of the oldest law firms in the state. While there, he practiced with his father and was later joined by his son,

Allen Smith Reeves, who continues practicing at the firm today.

Archie was very active in St. Paul's Episcopal Church in Selma and numerous community and civic organizations. He loved fishing, a joy he passed onto his children and grandchildren. His other passions were his family, his church and his beloved city. He will always be remembered for his intellect, his wit, his animated stories on almost any subject, his enthusiasm, his distinctive voice, and his unfailing kindness to so many.

He is survived by his wife, Anne Smith ("Bebe"). Other survivors include his brother, H. Mallory Reeves (Martha); his sister, Claude Reeves Baniakas (Perry); his cousin, Hugh Mallory (Virginia); his sister-in-law, Sally Smith Carrington (David); his sons, Archie T. Reeves IV (Shannon), Allen Smith Reeves (Anne Catharine) and Edgar Stewart McNeil Reeves (Amy); eight grandchildren; and dozens of nieces, nephews, grand-nieces and -nephews; and other relatives.

—*The Reeves family*

Amos, Mary Riseling

Birmingham
Admitted: 1990
Died: May 24, 2009

Blackburn, John Gilmer

Auburn
Admitted: 1954
Died: May 31, 2009

Colvin, Serena B.

Jasper
Admitted: 1950
Died: June 7, 2009

De Laney, Christopher Columbus, Jr.

Mobile
Admitted: 1948
Died: June 8, 2009

Jones, A. Gary

Dothan
Admitted: 1996
Died: April 24, 2009

Marks, Alex Andrews

Montgomery
Admitted: 1935
Died: June 9, 2009

McCoy, Albert Lee

Alabaster
Admitted: 1997
Died: May 11, 2009

Morgan, Charles, Jr.

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

Seale, James Hezekiah, III

Greensboro
Admitted: 1982
Died: June 21, 2009

Southerland, Henry deLeon, Jr.

Birmingham
Admitted: 949
Died: April 26, 2009



- **Jennifer Busby**, a partner at Burr Forman LLP, is the chair-elect of the American Bar Association Tort Trial & Insurance Practice Section for a one-year term. In August, she became the first Alabama lawyer to chair the section.



Busby

- **Laura Calloway**, ASB director of service programs, was inducted as a fellow of the College of Law Practice Management at the college's annual meeting induction ceremony in September. Formed in 1994, the College of Law Practice Management (www.colpm.org) recognizes and honors notable law practice management professionals, sets achievement benchmarks for others in the profession and funds and assists undertakings that enhance the highest quality of law practice management.



Calloway

- **Tuscaloosa County Circuit Judge Scott Donaldson** recently taught Advanced Evidence at the National Judicial College. Judges from across the country attended the four-day course.



Donaldson

- **Michael I. Fish**, of FISH NELSON LLC in Birmingham, was appointed chair of the ABA TIPS Workers' Compensation and Employer Liability Committee for a one-year term that began in August.

The ABA Tort Trial & Insurance Practice Section unites plaintiff, defense, insurance and corporate counsel to advance the civil justice system.

- Governor Phil Bredesen has appointed **Stacey A. Garrett**, founding member of Bone McAllester Norton PLLC, to a second term on the Tennessee Human Rights Commission.

- **Reid S. Manley**, a partner in Burr & Forman's litigation section, has been elected a fellow in the American College of Mortgage Attorneys.

With a membership of roughly 450 lawyers, the college is an association of attorneys from the United States and Canada who are highly skilled and experienced in the preparation of real estate mortgages, lending transactions secured by real estate and related practices.



Manley

- The American Bar Association recently named **Steve McKinney** chair-elect of its Section on Environment, Energy and Resources. McKinney is a partner in Balch & Bingham, where he also leads the Environmental Law Practice Group.



McKinney

- **Harold Stephens** of Huntsville was elected president of the Alabama Defense Lawyers Association (ADLA) at its recent annual meeting. With almost 1,200 members, ADLA is the nation's fifth largest state defense lawyers organization. Stephens is a partner with Bradley Arant Boult Cummings LLP.



- JENNIFER BUSBY
- LAURA CALLOWAY
- JUDGE SCOTT DONALDSON
- MICHAEL I. FISH
- STACEY A. GARRETT
- REID S. MANLEY
- STEVE MCKINNEY
- HAROLD STEPHENS

FROM THE CENTER'S DIRECTOR:

Alabama ADR Goes Global

By *Judith M. Keegan*

Anticipate the unexpected. Every good mediator can relate to that. But I wasn't thinking about Alabama ADR going global when the State Department called about a conflict resolution project for Africa.

On June 12, 2009, the Center hosted a very special delegation of 10 individuals, accompanied by three Department interpreters, from the African nations of Benin, Cameroon, Central African Republic, Comoros, Democratic Republic of Congo, Mali, Niger, Rwanda, and Togo. The individuals were leaders in their countries, conflict resolution practitioners, government and elected officials, and NGO and community leaders, particularly those involved in policy-making and negotiation. They were selected for participation in the U.S. Department of State International Visitor Leadership Program by American Embassies.

The professional objectives statement of the project states that, "Nearly a third of Africa is engulfed in intractable violent conflicts which have resulted in massive loss of life and human rights abuses, caused the collapse of state institutions, exacerbated corruption, aggravated the HIV/AIDS pandemic, and destroyed infrastructure." Our guests' United States visit was to address methods for resolving regional and sub-regional political, ethnic, economic and other disputes. In meetings and site visits, participants were to consider the role of government, NGOs, media and other players in conflict resolution.



Ret. Justice Harold See greeting a delegation from 10 African countries



Members of the ASB Alternative Dispute Resolution Committee (2009-2010) include, front row, left to right, Don Brockway, Charles Booth, Judy Keegan, Sally Bowers, Abigail van Alstyne, Mary Lynn Bates, Michelle Obradovic, Helen Alford, Allison Skinner, and Heather Leonard. On the back row are Nick Gaede, Jim Reddoch, John Webb and Stewart O'Bannon.



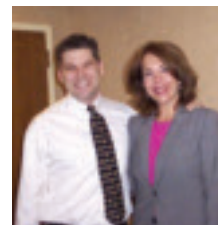
Mediation panel for the State Department's African Delegation included Robert Ward, Rebecca Oates, Cheryl Leatherwood and Justice Harold See, ret.

After greetings and morning refreshments, **Keith Norman** welcomed everyone to the building (the lawyers in the group were eager to have such a building for lawyers in their countries). Our panel of experts (wired like the UN) spoke eloquently and fielded questions as interpreters kept everything going, and **Lynn DeV Vaughn** conducted our PowerPoint. After my overview of conflict resolution in Alabama, **Robert Ward** addressed mediation of general civil and commercial cases, **Rebecca Oates** spoke about appellate mediation, **Justice Harold See** reflected on the rule of law and mediation beyond the supreme court and **Cheryl Leatherwood** focused on the mediation of family and domestic relations disputes. My thanks to our master panel who gave willingly of their time.

And to all those I work with in the Alabama Supreme Court Commission on Dispute Resolution, the bar's ADR Committee, the Alabama Academy of Attorney Mediators, the State Agency ADR Support Group, the district court volunteer mediation programs, our grantees, my board of directors, my colleagues at the bar, **Patsy Shropshire** (my great assistant), and **Troy Smith** (my favorite mediation trainer), we all affect others more than we know. ▲▼▲



Patsy Shropshire, assistant to the center's director



Troy Smith, mediation trainer, and Judy Keegan



Judith M. Keegan has been the executive director of the Alabama Center for Dispute Resolution since 1994. She is a 1986 graduate of Catholic University's Columbus School of Law and practiced in Maryland before coming to Alabama. She has been a mediator since 1985.

IN MEMORIAM

Karen LaMoreaux Bryan



Bryan

This 15th-year ADR anniversary issue of *The Alabama Lawyer*, November 2009, is dedicated to the memory of our friend, mediator and PELA general counsel Karen LaMoreaux Bryan of Tuscaloosa, who passed away March 9, 2009.

Karen was both a mediator and avid proponent of mediation. She was appointed to the Governor's Task Force on State Agency ADR which was established by Executive Order 42, March 18, 1998. The order encouraged state agencies to study, develop and implement appropriate procedures within their agencies to allow the use of mediation to resolve disputes among parties. The task force met for four years, 1998-2002, with Karen Bryan and **Marshall Timberlake** serving as co-chairs, and Judy Keegan serving as coordinating director. It was Karen who submitted the final report to Governor Siegelman in 2002, reporting on the database constructed, the surveys taken, the review of ADR programs in administrative agencies nationwide, the beginning of the state agency employee mediation pilot program with the training of

agency mediators, and the education of Alabama government executives in collaborative processes at the Fellows Program training presented by the task force. Karen also served as a leader in the successor group, Alabama State Agency Support Group,

which picked up where the task force ended, and continues to work for the benefit of state agencies. With her wit, positive personality and hard work, she won the acclaim of all who worked with her.

Karen was a many-year member of the bar's ADR Committee, the Alabama Academy of Attorney Mediators and the Alabama State Court Mediator Roster. Close to her heart were mediations in divorce and family cases, preserving loving relationships through negotiating in the tough times. Karen's family was so important to her, and this enabled her to empathize with and assist others.

On a personal note, Karen was a real friend to me, more than just a legal colleague. I do miss her bright smile, and the happiness that she always brought with her. ▲▲▲

By Judith M. Keegan



Booth

Pro Bono Mediator Award

by *Judith M. Keegan*

This year, **Charles H. Booth, Jr.** of Birmingham won the Pro Bono Mediator Award at the Alabama State Bar's Annual Meeting in Point Clear. The Volunteer Lawyers Program selects the winner from a list of mediators who conducted mediations at no cost or reduced cost to the parties. The list is compiled by the Alabama Center for Dispute Resolution from annual surveys provided by mediators on the Alabama State Court Mediator Roster. Previous winners are **Louis Colley** and **Doug Key**.

Booth has worked with the Jefferson County District Court Mediation Program for five years, and has served as coordinator of this project for three years. He helps *pro se* parties at the district court settle their disputes. He also serves as a mediator for the Better Business Bureau and the Cumberland Community Mediation Center, volunteering to judge their student negotiation teams. In 2008 Booth mediated over 35 cases pro bono. ▲▼▲

Thank You, Mediators

The Alabama Center for Dispute Resolution thanks the following mediators who performed pro bono mediations in 2008:

J. Hodge Alves	Blake Lazenby
Beverly P. Baker	Cheryl Leatherwood
Kaye Barbaree	Michael Maddox
Mary Lynn Bates	David McAlister
Joseph Battle	John McClusky
Betsy Blake	J. Wesley McCollum
Clyde Blankenship	Edward McDermott
Robert Boliek	Elizabeth McGlaughn
Emily Bonds	Boyd Miller
Charles Booth	James Moffatt
Quentin Brown	Samuel Monk
Robin Burrell	Terinna Moon
Terry Lucas Butts	Larry Moore
William Carn	Roger Morrow
Laura Chain	Pamela Nail
Stephen Clements	George "Jack" Neal
Lois Colley	Claud Neilson
Martha Cook	Michelle Obradovic
Samuel Crosby	Julie Palmer
W. Todd Crutchfield	William Ratliff
Lee Davis	Joe Rech
John Davis	Ian Rosenthal
Kenneth Dunham	Thomas Sherk
Bernard Eichold	Kenneth Simon
David Evans	Patrick Sims
Charles Fleming	Fern Singer
George Ford	Donna Smalley
Michael Ford	Anthony Smith
Robert French	Jeffrey Smith
Roger Halcomb	Donald Spurrier
Regina Hammond	Harold Stephens
Leif Hampton	Robert Thetford
Arthur Hanes	Randy Thomas
Jerry Hicks	Jerome Thompson
Claire Holland	Philip Thompson
Christopher Hughes	Jere Trent
Anne Isbell	James Turnbach
John Karrh	Wayne Turner
Douglas Key	Marty Van Tassel
Karl Kirkland	James Vickrey
Sammye Kok	Michael Walls
	Robert Whittaker

Alabama Appellate Mediation, Five Years Later

By *Rebecca Oates and Celeste Wallner Sabel*

When the Alabama Appellate Mediation Program began in January 2004, many, including some of us responsible for implementing the program, had doubts about whether such a program could work. What party or attorney would want to mediate a decided case—a case with a judgment? Fortunately for litigants, there were those who had faith that such a program would work—**Justice Champ Lyons, Justice Thomas Woodall, Justice Bernard Harwood** (retired), **Judge Sharon Yates**, and **Judy Keegan**, just to name a few. Thanks to them and to the mediators and attorneys involved, the appellate mediation program has been *very* successful. Over 50 percent of the cases referred to appellate mediation in Alabama’s supreme court and court of civil appeals since the beginning of the program in 2004 have settled.



Gary Canner, appellate mediation trainer

Those of us looking at appellate mediation before the program was developed were advised that an appellate mediation program would not work without the complete support of the courts involved. We thank the supreme court and the court of civil appeals for being proponents of the program; for providing strict confidentiality for the mediated cases; and, when necessary, for imposing sanctions when parties (or, more often, their lawyers) fail to comply with orders of the mediation office.

Of interest to practitioners may be the settlement results in cases in which both parties did not agree to mediation. Below are charts for each court, indicating the percentage of cases which settled or not, in relation to whether one or both parties did nor did not think mediation would be productive. As you can see, the results have little to do with whether both parties did or did not think mediation would work. ▲▼▲

Party Responses to Referred Mediations With A Resolution For Mediation in the Supreme Court of Alabama

Terminated between 10/01/2007 and 10/05/2008

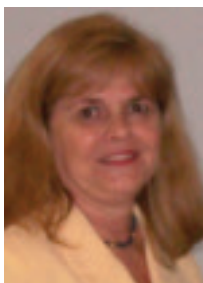
Resolution	Both Sides Agree to Mediation	Appellant-Yes Appellee-No	Appellant-No Appellee-Yes	Neither Side Wants to Mediate
Full	53%	36%	19%	50%
None	46%	50%	59%	39%

Party Responses to Referred Mediations With A Resolution For Mediation in the Alabama Court of Civil Appeals

Terminated between 10/01/2007 and 10/05/2008

Resolution	Both Sides Agree to Mediation	Appellant-Yes Appellee-No	Appellant-No Appellee-Yes	Neither Side Wants to Mediate
Full	46%	50%	52%	21%
None	50%	44%	44%	71%

For more information about appellate mediation in Alabama, go to <http://www.judicial.state.al.us/>.



Rebecca Oates serves as the assistant clerk and appellate mediation administrator for the Alabama Court of Civil Appeals.



Celeste Wallner Sabel is a staff attorney and the appellate mediation administrator for the Supreme Court of Alabama.



Hon. Quentin Brown, Debra Leo, Hon. Gerald Topazi, Judy Keegan, Ken Wallis, Hon. Ralph Coleman, Sam Crosby, Scott Mitchell, and Tom Whatley look on as Gov. Riley signs the Mediator Confidentiality bill.

Mediator Confidentiality Now Alabama Law

Confidentiality is one of the most important elements in any settlement negotiation or mediation. In 2008, the Alabama legislature passed the Mediator Confidentiality Act, Alabama Statute §6-6-25, and Governor Riley signed it into law. The act states that except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator may not be compelled "to divulge contents of documents received, viewed or drafted during mediation or the fact that such documents exist, nor may the mediator be otherwise compelled to testify in regard to statements made, actions taken or positions stated by a party during the mediation."

The Alabama Civil Court Mediation Rules provide the following exceptions to mediator confidentiality:

- (1) A mediator or a party to a mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure.
- (2) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.
- (3) The confidentiality provisions of these Rules shall not apply:
 - (i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;
 - (ii) to a party of mediator who uses attempts to use the mediation to plan or to commit a crime; or
 - (iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.

Rule 11(b) Alabama Civil Court Mediation Rules

Many individuals contributed over the years to make sure this legislation passed, and provides another layer of protection for our mediators. Special thanks to Senator Rodger Smitherman, Senator Roger Bedford, Representative Demetrius Newton, Tom Whatley, Sam Crosby, Dean Hartzog, Judge Gerald Topazi, Judge Ralph Coleman, members of the Alabama Supreme Court Commission on Dispute Resolution, and the Alabama State Bar ADR Committee. ▲▲▲

The Alabama Supreme Court Commission on Dispute Resolution: Fifteen Years of Quiet Service with Results

Every once in a while it is important to acknowledge and thank people who give of their time for a good cause and receive no pay. Such are the members of the Alabama Supreme Court Commission on Dispute Resolution. Back in 1994, the court established the commission to institute the necessary guidelines for the orderly progress of alternative dispute resolution (ADR) programs and procedures in Alabama. Every year since, appointees to the commission have met six times a year to develop standards, draft rules and ethics, award grants, promote legislation, set training requirements, supervise the Alabama Center for Dispute Resolution, develop publications, and provide technical assistance and education. Mediator and arbitrator rosters are published annually for distribution, and are also located, along with ADR court rules, standards, training schedules, brochures, and information, at www.alabamaadr.org. Many commission members have served since its inception. Others, like the **Hon. Bill Pryor**, **Chief Justice Bo Torbert**, **Jack Park**, **Hon. Sharon Yates**, **Spud Seal**, **Ernestine Sapp**, **Hon. Bill Gordon**, **Rod Max**, **Hon. John Crawley**, **Hon. Ralph Coleman**, and **Ted Hosp**, to name a few, were appointed for a season. Sometimes they return to us, as Judge Gordon is this year.

Meet the current commission (below), and their appointing organizations. Get in touch with them if you have questions, and encourage those you know.

Members are: **Charles Boyd** (chair), Alabama Trial Lawyers; **Anne Isbell** (vice chair), at large; **Judith Keegan** (secretary), Alabama Center for Dispute Resolution; **Thomas Albritton**, speaker of the house; **Hon. Tommy Bryan**, Alabama



The Alabama Supreme Court Commission on Dispute Resolution, 2009

Court of Civil Appeals; **Hon. Robert Bynon**, District Judges; **William Coleman**, Alabama State Bar; **Hon. Aubrey Ford, Jr.**, District Judges; **Noah Funderburg**, at large; **Hon. Bill Gordon**, Alabama State Bar; **Hon. Hub Harrington**, Circuit Judges; **Tony Higgins**, Alabama Defense Lawyers; **Dr. Karl Kirkland**, at large; **Hon. Richard Lane**, Circuit Judges; **Cheryl Leatherwood**, at large; **Debra Leo**, Alabama State Bar; **Justice Glenn Murdock**, Supreme Court of Alabama; **H. Sonny Reagan**, governor's office; **Sandra Speakman**, attorney general's office; **Hon. Gerald Topazi**, Lt. governor's office; **Robert Ward**, Alabama Lawyers. Liaison members are **Callie Dietz**, AOC, and **Keith Norman**, Alabama State Bar. Court attendees are **Celeste Sabel**, Supreme Court of Alabama; **Rebecca Oates**, Alabama Court of Civil Appeals; **Michelle Ohme**, Appellate Mediation Program; and **Lynn DeVaughn**, Alabama Court of Civil Appeals.

To contact Judy Keegan at the center or commission members call (334) 269-0409 or go to www.alabamaADR.org. ▲▲▲

photo by Ann Wade



Cumberland School of Law students participate in a mediation simulation.

Cumberland Community Mediation Center Serves as a Voice of Reason

The growing demand for mediation as a successful tool in dispute resolution prompted the establishment of the Cumberland Community Mediation Center [CCMC] in November 2005. Before that, community members sometimes had to wait more than six months for their cases to be heard in court.

“The faculty saw a need to meet and assist the legal community and the community as a whole,” shared **Cassandra Adams**, director of the CCMC.

The center offers confidential, cost-free mediation. Attorneys, law students and trained community members make these services possible. As of August 2008, the CCMC had 36 volunteer mediators.

The CCMC mediates disputes between family members, neighbors, friends or roommates. In addition, the center can mediate landlord/tenant disagreements and consumer/merchant disputes involving services, goods or repairs. Since its inception, the CCMC has accepted more than 100 cases.

Adams and **Dean John Carroll** jointly teach a mediator practice course. Students are trained in all aspects of mediation, and are required to take part in a full simulation and write an agreement within the class. Course enrollment doubled this year due to student demand.

Students also gain mediation practice outside the classroom by participating in the Samford University Residence Life Mediation Program. Roommate disputes are referred to the CCMC and are mediated by law students.

The Jefferson County Family Court has been referring cases to the CCMC since a pilot program was launched in September 2006. Cases submitted for mediation include post-minority support, visitation issues and child support modification.

Contact the CCMC at (205) 726-4342 or ccmc@samford.edu. ▲▼▲

—Reprinted originally in the Cumberland Lawyer, a publication of the Cumberland School of Law

photo by Ann Wade



Cassandra Adams, director of the CCMC

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Welcome

Jones Law School to Host ABA Representation in Mediation Competition

In April 2010, Jones Law School will host the regionals for the American Bar Association Representation in Mediation Competition. The school's team of **Reid Strickland** and **Stephanie Joppeck** placed seventh nationally at the ABA finals in New York City this past April.

Faulkner University's Jones School of Law offers the only ADR Certificate program available through a law school in the Southeast. The program was developed by **Professor Ken Dunham** in 1997, who continues to oversee it. Courses offered include dispute resolution processes, negotiation, arbitration and a mediation clinic (in addition to the traditional interviewing

and counseling courses). Law students in the mediation clinic mediate cases with litigants of the Autauga and Montgomery Small Claims courts, and have been a great source of free volunteer mediators for these courts.

The ADR program at Jones was developed by **Professor Ken Dunham** in 1997, and its success continues through his ongoing efforts at keeping a high quality program finely tuned. Many of our young Alabama lawyers are graduates of the ADR Certificate program, and are able to use mediation for their clients with confidence. Professor Dunham may be reached at (334) 386-7186. ▲▲▲

Quality Paralegal Education



■ Our Mission

The Faulkner University Legal Studies Department seeks to provide a program that supports its students during their academic and professional careers. Upon graduation, students will be well equipped to begin or continue an exciting career as a paralegal.

■ What are typical paralegal responsibilities?

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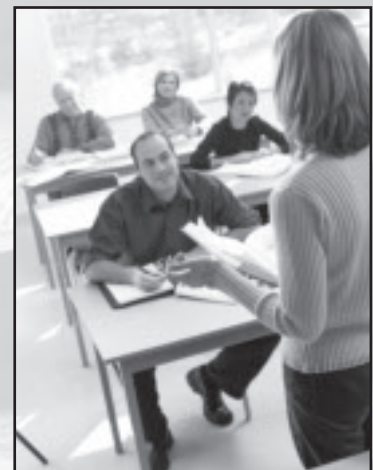
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The Role of Mediation for ESI Disputes

By Allison O. Skinner

Prior to and following the amendments to the *Federal Rules of Civil Procedure* regarding discovery of electronically stored information (ESI), e-discovery has been the frequent headline in courses, seminars and articles. Almost half of the states have already either adopted similar rules or are considering adopting them. Like it or not, e-discovery is here and here to stay. By now most litigators are familiar with the buzzwords: litigation hold, preservation, collection, processing, and archiving, to name a few. Litigators and their clients are also becoming familiar with all the different types of ESI, as well as the places where ESI can be found. Litigators are seeing the ESI request served in the most complex cases to the simple negligence case. The world of electronic discovery is exploding exponentially.

How does the introduction of e-discovery translate into the day-to-day management of a case? As with other legal disputes, one of the best tools for handling a case efficiently and without the risk of an unpredictable judge or jury is mediation.

Advantages

Mediation is no longer just for settlement purposes. The self-determination process can be critical in handling the uncontrollable, unlimited nature of ESI discovery. Mediating e-discovery allows for creative, mutual solutions among litigants that most likely will save the parties time and money in the long run. The informal mediation process creates a forum for the parties to:

- self-direct workable solutions,
- define scope parameters,
- determine relevancy,
- create timelines for production or e-depositions,
- propose confidential compromises,
- create efficiencies with a mutual discovery plan,
- set guidelines for asserting violations of the plan,
- create boundaries for preservation,
- avoid spoliation pitfalls,
- manage protection of privileged information,
- maintain credibility with the court,
- avoid court-imposed sanctions, and
- allocate costs.

Revised *Federal Rules of Civil Procedure* 26 and 34 allow for the discovery of electronically stored information that is “reasonably accessible.” To comply with the *Rules*, the litigator must be prepared in the meet-and-confer meeting to talk intelligently about what ESI is reasonably available and in what format it will be produced. Since the meet-and-confer must occur early in the case, the litigator must know what ESI his or her

client has control over that is reasonably accessible at the *outset* of the litigation. The client may not be prepared to respond to ESI requests at that early juncture, but must be made to understand the importance and potential impact of the requests and the responses.

The litigants must make a determination of what data is accessible. Data falls into three categories for this analysis. A spotlight illustration helps describe data and whether a court could consider such data as “reasonably accessible.”

- The “Green Light” data is the data the court will find reasonably accessible because it is data that is accessed daily or frequently.
- The “Yellow Light” data is the old or deleted data. The court will weigh factors to determine whether this type of data is discoverable or not.
- The “Red Light” data is the legacy data or disaster back-up tapes. Typically, this data is not reasonably accessible and will not be discoverable.

But, just like the car wreck at the intersection case, whether the light is green, yellow or red is the source of dispute. Courts look favorably upon parties who work together to determine practical solutions for production of ESI. *Malletier v. Dooney &*

Bourke, 2006 WL 3851151, *Self v. Equilon Enter.*, 2007 WL 427964, *Flexsys Americas v. Kuhmo Tire*, 2006 WL 3526794. During the discovery phase of the litigation, the parties can choose to mediate their discovery disputes. Parties who mediate their discovery are in control of the outcome of what is being requested and what is being produced and how. A mediation eliminates the time and cost associated with seeking the court’s intervention. In the end, the litigants that select mediation of discovery disputes build credibility with the court. Even if all discovery disputes are not reconciled at the mediation, the mediation affords the parties an opportunity to illuminate the key disputes to be presented to the court.

Often, discovery battles can result in an exchange of potentially inflammatory correspondence that may be used as an exhibit to a motion to compel or motion for protective order. Such correspondence could be damaging to the litigant’s credibility with the court. Mediating the e-discovery dispute allows the litigants to make proposals confidentially. Under Rule 11 of the *Alabama Civil Court Mediation Rules*, “all information disclosed in the course of a mediation, including oral, documentary or electronic information, shall be deemed confidential.” A confidential exchange of proposals on how to create a workable discovery plan increases the chances of reaching mutual solutions.


How to Prepare for Mediating the ESI Dispute

Be prepared to be specific about a particular request.

Often a request reads “produce any and all” of a particular type of information. In fairness to the requesting party, the requestor does not know what the opposing party possesses so using the catch-all phrase “any and all” protects the requesting party from self-eliminating potentially discoverable documents. Notwithstanding this position, the requesting party needs to be able to articulate what type of information the requesting party is genuinely looking for at the mediation. On the other hand, the responding party should not be able to hide behind an “any and all” request. Often, the responding party objects that an “any and all” request is overly burdensome. After all, how could any person or entity attest that *all* information was provided? If the requesting party can provide general terms of the information requested, then the responding party must respond in good faith. Specificity of a request is particularly important when asking for ESI. Specificity allows for more accurate search parameters, ensuring the requesting party is obtaining the appropriate material and the responding party is appropriately responding to the request.

Be prepared to articulate the importance of the requested information. Although ESI is new to the discovery scene, the issues of relevance and burden are not. In the old familiar way, relevance and burden must be balanced. A mediation allows the parties to strike this balance using workable solutions. Because the *Federal Rules* provide for a cost-shifting provision when information is not reasonably accessible, a mediation provides a forum for the requesting party to demonstrate the importance of the requested information, and in certain cases that such information is not available by other means. The requesting party may, in

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those cases, argue the cost-shifting provision should not apply, particularly if the responding party has the resources to handle the requested production. On the other hand, the mediation allows the responding party to articulate other means for obtaining the requested information, if applicable. Or, the responding party may explain the onerous financial burden such a request entails.

Be prepared to request and respond in the appropriate format. Parties may produce information in a different form from the original source if the parties agree. A native format contains metadata embedded in the electronic file. Metadata may disclose pertinent information that the responding party did not realize it was disclosing, *ie.*, the history of the document showing who edited the document and when. Metadata may include privileged information that would not otherwise be discoverable. However, a converted format such as a .tiff, .bmp, .jpeg or .pdf file does not readily contain metadata. This format is considered a digital image of the information. Either way, the requesting or responding parties must be prepared to provide a technical position for arguing why certain information should be produced in a particular format.

Be prepared to describe your client's technological capabilities (and possibly your firm's). Typically, the plaintiff is requesting ESI from a company. The attorneys for both sides need to appreciate their own firm's document management capabilities and whether electronic service of discoverable information to one another is compatible. In other words, how is the attorney going to receive, review/read, categorize, evaluate, and present the ESI? In the same vein, the company's attorney must understand what information is maintained in the ordinary course of business, how it is stored, how it can be retrieved, how it can be produced, and how much it will cost. For both sides, an information technology representative (IT) needs to participate in the mediation. In some cases, the plaintiff will have already deposed a corporate representative designated to provide information about the company's active data, metadata, databases, system data, deleted data, ghost data, legacy data, and/or backup tapes. In those circumstances, both parties are more knowledgeable about their respective position with respect

to the ESI. However, in the cases where "e-depositions" have not been taken, it is imperative that both parties bring or have available a representative who can assist with navigating the technical issues. It is not the mediator's role to make such determinations.

The Result of the ESI Mediation

The outcome of the mediation will be memorialized in a mediator's report signed by the parties. Whether the ESI mediation involved one request or hundreds of requests, the mediator should confirm the parties' agreements. Broadly speaking, one or all of these issues can be addressed during the mediation per discovery request: request number, type of data, accessible ability, format, search parameters, method of production, preservation, privilege issues, waiver, timing of production, cost burden, and control method.

Once these issues are determined, the parties will depart the mediation well-equipped with a discovery plan. Mediating the ESI dispute is an efficient, cost-saving method for managing litigation while preserving judicial economy and maintaining some degree of control over what data is actually produced. ▲▼▲



Allison O. Skinner is a full-time mediator at Sirote & Permutt. She received her B.A. at the University of Alabama, Phi Beta Kappa, and her J.D. from the University of Alabama School of Law. Skinner is registered as a trial, appellate and divorce mediator by the Alabama Center for Dispute Resolution. Prior to becoming a mediator, she handled complex litigation that included discovery disputes involving electronically stored information.

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Dependency Cases— Litigate or Mediate?

By Sarah Clark Bowers

As an experienced guardian ad litem (GAL) for dependent children, my initial response to the suggestion of dependency mediation was immediately doubtful. Child safety and well being were *not* issues open to mediation for my young clients. It is not unusual for attorneys involved with dependency cases to be initially skeptical regarding mediation and resist participation. Attorneys are trained in the adversarial process. Particularly for those educated before alternative dispute resolution became part of law school curriculums, embracing mediation as a viable means of client representation is unlikely to be a first reaction. Yet the collaborative resolutions that mediation can produce make it a process that deserves the utmost consideration in serving dependent children and their parents or custodians.

In Alabama a child may be adjudicated dependent:

- Whose parent or custodian subjects the child to abuse or neglect;
- Who is without a parent or custodian willing and able to provide for the care, support or education of the child;
- Whose parent or custodian refuses to provide medical care necessary for the health and well-being of the child;
- Whose parent or custodian fails, refuses or neglects to send the child to school in accordance with compulsory attendance laws;
- Whose parent or custodian has abandoned the child;
- Whose parent or custodian is unable or unwilling to discharge his responsibilities to the child;

- Who has been placed for care or adoption in violation of the law; or
- Who, for any other cause, is in need of the care and protection of the state.

See Ala. Code §12-15-102 (8)a.

Once a child is adjudicated dependent by clear and convincing evidence, the court faces the important task of making a disposition in the case. *See Ala. Code § 12-15-311.* Alabama's Juvenile Justice Act of 2008 establishes not only *protection* of the child as a goal, but also preservation and strengthening of the child's home environment, removal from home only if it is in the child's best interest, a timely and safe reunification with parents, and provision of a continuum of services. *See Ala. Code § 12-15-101 (a) and (b).* Where the child will live, who will make decisions regarding medical and educational needs, fulfillment of special care or rehabilitation needs, and right of visitation by parties who do not hold physical custody are all issues that may be addressed by the court in the dispositional phase of the case. Termination of parental rights may be the issue before the court if reasonable efforts have been made and were unsuccessful in maintaining a child in his home. *See Ala. Code § 12-15-301 et. seq.*

There are often multiple parties involved in dependency cases with grandparents opposing parents and parents opposing each other. The Department of Human Resources (DHR) is a party if they file a petition based on a need for protection of the child. Alternatively, DHR may play a role as a service provider. Other cases do not involve DHR, but are brought before the court by a relative or other adult concerned for the child's welfare. It is not unusual for multiple dependency petitions to be pending. As required by Alabama law, the child who is the subject of the case must have an attorney appointed as his GAL to represent his best interest. *See Ala. Code § 12-15-304 (a).* Dependency cases can become

chaotic with many differing perspectives on what is in the best interest of the child. Litigate or mediate? How will the child's best welfare truly be served?

Consider the following fact pattern. It is one, based not on a similar and infamous case involving the late Michael Jackson's children, but on a case currently in my open files. A single young mother lies dead in her bed of a sudden heart attack. Her two young children are found at her side waiting for their mother to wake up. The maternal grandmother who lives nearby immediately takes the children into her home and begins caring for them. She files a dependency petition and requests that custody of the children be placed with her. A presumed father, who lives out of state, appears to request that the petition be dismissed. He intends to take one of the children back to his home state to live with him. A multitude of legal issues are unresolved. Can the father be adjudicated the legal father of one or both of the children? If adjudicated the legal father, will a presumption in favor of a natural parent prevail? How will the court view separation of the children? Does the fact that the father has never provided monetary support for the children and had infrequent contact with them constitute abandonment? Litigate or mediate? If litigated, these children are likely to suffer greater loss as hurtful accusations are made by the parties against each other. The chances that the parties will work together for the benefit of the children will be greatly reduced. For these children to thrive after the traumatic death of their mother, it is imperative that a mutual agreement be reached that allows for the healing process these children so desperately need. Both parties have much to contribute to the wellbeing and safety of the children. Mediation can be a powerful tool to sort out the appropriate role for each of remaining parental figures in the lives of these children.

Although not all dependency cases are appropriate for mediation, the child benefits when all parties are committed to resolving a problem through mediation,

rather than defending a position. My previous assumptions that mediation marginalizes the safety and wellbeing of the child are not true. My practice has shown me that interventions with families and agencies producing an agreed-upon plan for a child strengthens the child's chances for a safe and secure future. Leading national experts in the field concur.¹

The evolution of mediation in dependency proceedings has in many ways been driven by changes in public policy with regard to permanency for children in out-of-home care. The federal Adoption Assistance and Child Welfare Act of 1980 and its subsequent amendments set guidelines and timelines for states to follow with regard to dependent children in out-of-home placement. The Adoption and Safe Families Act passed by Congress in 1997 added more stringent requirements for states to follow, notably a 12-month mandatory timeframe for filing termination of parental rights cases for children in out-of-home care. This put added pressure on courts to resolve dependent cases. Most cases are resolved without a trial even when mediation is not available. However, negotiations are often hindered in dependency cases by the large number of professionals participating, the families' lack of knowledge about the system and the imbalance of power between the family and the professionals involved. Mediation, therefore, becomes a way to move difficult cases through the court system in a timely manner.

Alternative dispute resolution programs for dependency cases have been established in the majority of states. The National Council of Juvenile and Family Court Judges (NCJFCJ) Permanency Planning for Children Department has identified mediation as a best practice. The NCJFCJ notes, "[a]ll juvenile and family court systems should have alternative dispute resolution programs available to the parties so that trials can be avoided whenever possible." There appears to be a growing momentum for dependency cases to be shifted away

from the adversarial model and toward a focus on a mediated agreement.

The growth in dependency mediation can be attributed to many factors. Perhaps the greatest reason for its growth is that *it works*. Agreement is reached on all pending issues in 60 to 80 per cent of dependency cases nationwide. An additional 10 to 20 per cent of mediated cases result in partial agreement.² The high rate of agreement reached in mediation is consistent even though programs vary significantly in their structure regarding mediation models. Yet the benefits for children and their families go far beyond settlements reached.

Benefits

Parental Empowerment. Children and parents often enter the juvenile court system confused, angry and frustrated with the process. Noted mediation authority Nancy Thoennes quotes one guardian ad litem as saying:

“A lot of our parents don’t know what’s going on. Court is really fast. Even if the GAL or... whoever tries to explain things, parents may not believe us. Lots of times they are so confused and scared they wind up fighting about things unnecessarily. In mediation they get to know people, they get to hear the point is to make the child’s life safer.”

An opportunity to meet with an impartial well-trained neutral in mediation gives parents a chance to tell their stories and participate in the process of planning

for their child. They gain a sense of empowerment. The feeling that they are heard and are part of the resolution of problems affecting the welfare of their child makes it much more likely that they will reach an agreement and comply with court orders. People who perceive themselves as valued members of a group are more likely to put self interest aside and act in a way that helps all group members. Relationships that may be irreparably damaged in litigation may be preserved in mediation. Even though the end result of the case may be termination of parental rights, parents leave mediation with a sense of dignity that they would not have in litigation. The best interest of the child is always served when informed parents are able to work with social workers, attorneys, extended family members, and others involved in the case toward a resolution, rather than engage in power struggles that so often hinder progress.

Conservation of Court Resources. Time is required for a successful mediation. Nonetheless, a mediated agreement can produce significant savings of court resources and money as opposed to contested matters that require large blocks of time and that often experience multiple continuances. Mediation can be used at any stage in a dependency case. Referrals can be made upon the filing of the dependency case, adjudication, review, permanency hearing, or termination of parental rights hearing. Rather than routinely referring all cases to mediation at a particular point, mediation can be used as an alternative whenever a case requires a

full-scale trial to move forward. Even if all matters are not resolved in mediation, often the issues are narrowed, thus reducing trial time. Not only is the court’s time conserved by using mediation, but also the time of the social workers, attorneys and other professionals in the case. Clearly, mediation is the highest and best use of the parties’ time as well.

Reduced Time for Permanency. Every child deserves a permanent home achieved in the least time possible. Children in limbo regarding their future suffer the negative emotional effects of dealing with the unknown. Optimal growth and well-being is compromised. In mediation the parties have more control of the schedule and what happens during the time a case remains open. A final disposition in the case may depend on results of psychological evaluations or drug test results that take weeks or months to complete. Parents may need time to establish safe housing, attend parenting classes or take other steps to adequately care for their children. Mediation offers the parties a chance to shape an interim plan before a final agreement is reached. The earlier a case is mediated, the shorter the time frame until case closure and thus permanency.

Improved Case Plans. Mediated case plans can be more detailed and specific with respect to services for both the parents and the children. Mediation provides a setting where input from those involved in the case creates synergy—a system where the final outcome is greater than the sum of its parts. Creative solutions to issues can be produced. It is important that the child’s point of view be understood and given great weight in making a plan for their future.

Depending on the age and developmental stage of the child, they may be included in mediation. The GAL is of paramount importance in deciding if the child client should participate and in explaining the process to the child. Often extended family members or other resource providers are invited to be a part of the mediation. While the inclusion of a greater number of people requires group dynamic skills on the part of the mediator, these extra participants can add a depth and perspective useful in meeting a child’s specific needs.



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The Process

“Mediation is not an exotic process. Mediation is about talking and exchanging ideas in an environment where the discussion is guided by a facilitator,” quips Judge Leonard P. Edwards, the California judge regarded nationally as a pioneer in dependency mediation. Mediation is defined in Alabama as “a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.” *Ala. Code* § 6-6-20. Parties in a mediation are first oriented as to the process, then given a chance to explain why they are there and what they would like to accomplish. Facts are shared without the frequently false assumption that everyone has the same information. Once information is shared the parties can turn to issue development and then problem solving.

Child custody cases have been sent to mediation longer than any other cases in

the child-related legal arena. One noted expert in the field makes the observation that it is ironic that juvenile courts have become more adversarial at the same time that family courts have started to rely more and more on the alternative dispute resolution process.³ *In Re Gault*, 387 U.S. (1967), established “fundamental fairness and due process” in juvenile courts. The case spearheaded much needed reform in our juvenile court system. Yet, the shift away from the informal institution existing prior to *Gault* may have gone too far. Given a proper structure, the success in domestic law mediation can be repeated in dependency cases.

Many factors influence whether mediation is successful. Perhaps foremost is the quality of the mediator. The Alabama Center for Dispute Resolution maintains a roster of mediators who have met certain standards and designates those who have had at least forty hours of specialized training in domestic mediation as well as those who have received additional training in

domestic violence. Dependency mediation training is not a currently recognized designation in Alabama. A background in child psychology, social work, or other behavioral science is helpful in understanding child welfare issues for those mediating dependency cases. Similarly, attorneys who frequently practice in domestic or juvenile court often acquire the understanding and skills to be successful dependency mediators. Whether the mediator is a court employee or independent contractor should not influence result. What is important is that those conducting dependency mediation must not only be familiar with the child welfare system, but also respected by the professionals involved and skilled in handling multiple participants in mediation sessions.

Other factors leading to a successful mediation are confidentiality, inclusiveness of all those who have a legitimate interest in the case, sufficient time, a neutral environment, and collaborative time spent with stakeholders in the process. Perhaps the



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most complicated of these factors is confidentiality. In mediation, confidentiality enables parties to express themselves without the fear that what they say will be later used against them in a court proceeding. Notwithstanding confidentiality, Alabama's Child Abuse and Neglect Reporting Act (the Act) *requires* reporting of child abuse and neglect by certain professionals including social workers and mental health professionals "or any person called upon to render aid or medical assistance to any child when the child is known or suspected to be a victim of child abuse or neglect..." *Ala. Code* § 26-14-3(a). Additionally, the Act allows permissive reporting of child abuse or neglect, *Id.* at § 26-14-4, and grants immunity from liability for reporters. *Id.* at § 26-14-9. Dependency cases deal with *reported* allegations of abuse or neglect, however, the Act would apply to any *new* instances of abuse or neglect that surface. Alabama's recent Mediator Confidentiality Act protects a mediator from being compelled to testify in a later hearing regarding statements made

and documents viewed during a mediation. *Ala. Code* § 6-6-25. Nevertheless, mediators remain bound by Alabama's Mediator Code of Ethics that requires confidentiality "except where required by law to disclose information gathered during the mediation." *Ala. Code of Ethics for Mediators*, standard 6(a). *See also Ala. Civ. Ct. Mediation Rules* 11 (1992). Due to the nature of dependency cases and the need to protect vulnerable children, a child protection mediation program may be served best by allowing an op-out of the confidentiality requirement for mediation. This op-out must be thoroughly explained to all parties. Certainly programs need to have clear guidelines regarding confidentiality, and the issue should be addressed with mediation participants as part of the initial orientation.

Often the GAL, though not a neutral, is in a unique position to bring about an agreement in a case. It is the responsibility of the GAL to advocate for the best interest of the child, focusing on the individual needs of the child. This concentration on what is best for the child is a concept with which, at least ideologically, everyone can agree. The finding of common ground is a cornerstone of mediation and should still be pursued even if no formal dependency mediation program exists. Other mediation techniques, such as active listening, reframing, reality checking, collaboration, empowerment, and focusing on the future, can also be used effectively by the GAL or attorneys for the parties involved in the case in bringing about an agreement. All professionals working with child protection cases could benefit from education in ADR processes and tools.

Not all cases are suitable for mediation. "In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred the court shall not order mediation." *Ala. Code* § 6-6-20(e). It is further mandated that, "[a] mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties..." *Ala. Code* § 6-6-20(f). Thus, dependency mediators must be knowledgeable in domestic violence screening

techniques and instruments. If domestic violence is found, mediation is allowed to continue only if:

- mediation is requested by the victim of the alleged domestic or family violence;
- mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- the victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

Ala. Code § 6-6-20(f)(1)(2) and (3).

Although the above-referenced *Code* sections deal with only court-ordered or referred mediation, a mediator would be wise to follow the statutory guidelines in all cases.

In dependency cases the Department of Human Resources is often the petitioner. Alabama law provides "[a] court shall not order parties into mediation in any action involving...child protective services wherein the Department of Human Resources is a party to said action". *Ala. Code* § 6-6-20(h). Thus, the participation of DHR in its role as a party must be voluntary. The department may provide beneficial services to families in dependency cases even when it is not a party and should be included in mediation when acting as a service provider.

Additionally, mediation may not be the best course of action in cases involving drug addiction or mental illness of a party. The illegal use of drugs is a growing problem in our society and occurs often in dependency court. In my practice I have found that use of cocaine and crystal methamphetamine are two of the greatest offenders in rendering parents unable to provide care for their children. Even if a parent is in remission from drug usage, often certain brain functioning is altered, making a rational agreement difficult. Similarly, some mental illnesses, particularly personality disorders, make it difficult for a mediation participant to collaborate. Mediate or litigate?

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Roadblocks

One of the greatest barriers to establishing dependency mediation in juvenile courts is changing a legal culture that is incompatible with mediation. A switch from adversarial to collaborative is not easily made. Education about a mediated approach is essential for mindsets to change. A pilot project that showcases the advantages of dependency mediation could go a long way in re-shaping attitudes. Success of a pilot is used to educate stakeholders in the process, garner enthusiasm and tell the story. Once the legal and social work communities experience benefits from child protection mediation, it is more likely to spread. One of the best ways to educate judges, attorneys, social workers and parents is to have their counter-parts who have participated in dependency mediation talk to them about the benefits of alternative dispute resolution. Each juvenile court jurisdiction has its own character and successful dependency mediation models are as varied as the courts they serve. It is important to tailor a program to fit the unique needs and resources of each jurisdiction.

Securing adequate funding may be a roadblock more challenging to overcome than creating the motivation to implement a dependency mediation program. In some other states mediation programs are established with court improvement money, but often funding is only for a pilot and only lasts a few years. Until a stable and reliable source of funding is identified, it may be difficult to implement or maintain a dependency mediation program. With the use of volunteer mediators, the budget for a pilot dependency mediation project would be modest. Yet the current uncertainty of the national and state economy makes funding even more elusive. Although a funding source for a formal dependency mediation program in Alabama has not been identified, the seeds of child protection mediation have been planted.

Where Does Alabama Stand?

Dependency mediation for suitable cases could be used in Alabama at any stage of the proceeding including the appellate level. *See Ala R. App. P. 55*. The Department of Human Resources is engaging in limited dependency mediation. However, there are no funds dedicated to pay for mediators, and a lack of funding prevents the widespread use of mediation by DHR. One promising vehicle used by DHR as an outcome of the *R.C. v. Walley* consent decree is the Individualized Service Plan (ISP). An ISP must be developed for all children and families for whom the department is providing services and foster care and reviewed periodically. This is accomplished by meeting with the families and others involved in the child's care. The focus of the meeting is to build on family strengths, identify appropriate services for the families, set goals and recognize the steps needed to accomplish these goals. The meetings usually take place away from the court when parties are calmer, and the climate is often more conducive to a mediated agreement. As a participating GAL in these meetings, I have used and observed mediation techniques that result in moving parties toward collaboration for the child's benefit. The ISP has much in common with the family conferencing model of ADR. In family conferencing emphasis is placed on family strengths. The addition of a trained neutral in initial ISPs could save time and costs for the court and child welfare professionals, and speed permanency.

Because statistics uniformly confirm the effectiveness in reaching agreement, cost savings and other benefits to children, dependency mediation programs are worthy of grant money allocation. Discovering a grant source, a proposal writer and program director are the keys to this funding basis. The use of volunteer mediators is also a source that should not be overlooked. Mediators on the Alabama State Court Mediation Roster must agree to provide ten hours of pro bono work. The *Alabama Code of Ethics for Mediators* states "mediators have a professional responsibility to provide competent service to persons ... including those unable to pay ... a mediator should provide mediation services pro bono ... whenever appro-

priate." *Ala. Code of Ethics for Mediators*, standard 8(b). Alabama lawyers volunteer their time each day throughout the state, and those with domestic mediation training are a promising resource for dependency mediation projects.

Mediate or litigate? In appropriately selected cases mediation is viewed as an effective and safe way to give Alabama's abused and neglected children permanency. Frequently children who linger in the child welfare system repeat destructive patterns when they become parents, landing in the same court system that set out to help them when they were minors. The replacement of hallway negotiations and settlements spearheaded by only one of the parties with mediation is a step in the right direction. Mediation facilitated by a trained neutral will greatly enhance a plan for each of Alabama's dependent children as individualized as they are. Dependent, through no fault of their own, these children deserve no less. ▲▼▲

Endnotes

1. *See* Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CFCC 57, 57 (2004). Judge Edwards is a retired superior court judge from Santa Clara County, California and is a pioneer in the advancement of dependency mediation. He continues to speak and write on the subject. *See* Edwards, *Child Protection Mediation: A 25-Year Perspective*, 47 Fam. Ct. Rev. 69 (2009).
2. *See* Nancy Thoennes, *What We Know Now: Findings From Dependency Mediation Research*, 47 Fam. Ct. Rev. 21 (2009).
3. *See* Kelly Browe Olson, *The Importance of Using Alternative Dispute Resolution Techniques and Processes in the Ethical Representation of Children*, 6 NV. L.J. 1333,1343 (2006).



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Saying “No” to Court?

An Introduction to the Collaborative-Law Process

By Judge Tommy Bryan

In 1990, Stuart Webb, a Minnesota attorney suffering from “family law burnout,”¹ decided he would no longer litigate his cases.² Consequently, Webb created a new type of alternative dispute resolution now commonly known as “collaborative law.”³ Since its inception in 1990, the practice of collaborative law has spread quickly throughout the United States and into Canada, Australia and Western Europe.⁴ Recently, a commentator stated that collaborative law “is one of the most important developments in the American legal system in the past 25 years.”⁵ As of 2008, there were more than 150 collaborative-law practice groups in the United States.⁶ However, collaborative law appears to be a fairly novel concept in Alabama.

Collaborative law has been used almost exclusively in divorces and other family-law cases.⁷ In the typical collaborative process, two clients and their attorneys enter into an agreement, often referred to as a “four-way agreement,” governing the manner in which the participants will seek to reach a settlement.⁸ The essential element in the collaborative process is a disqualification clause providing that, if negotiations fail, the attorneys will be barred from participating in any ensuing litigation between the disputants.⁹ In addition to the disqualification clause, the typical agreement contains provisions in which the attorneys and their clients agree to employ respectful, good-faith bargaining and to provide early, complete and voluntary discovery.¹⁰ As outlined in the agreement, the parties use interest-based negotiations¹¹ in an attempt to reach mutually agreeable solutions.¹² That is, the participants seek as much as possible to work together rather than as adversaries.

Four-way negotiations among the attorneys and the clients typically take place face-to-face. It is common for the meetings

to be held alternately in each attorney's office, with the visiting attorney compiling a memorandum summarizing each meeting.¹³ Communications taking place during the meetings and documents prepared for the collaborative process are confidential and are inadmissible in court if the dispute is later litigated.¹⁴ The attorneys confer with each other and their clients in between meetings, and the attorneys jointly create an agenda for each meeting. The parties may jointly retain expert consultants, and those consultants, like the attorneys, will be disqualified from involvement in litigation should the collaborative process fail.¹⁵ If negotiations reach an impasse, attorneys may use mediation, neutral experts or case evaluation to break the deadlock.¹⁶ Approximately 90 percent of the cases that go through the collaborative process result in a complete settlement agreement.¹⁷ The parties submit the settlement agreement to the court for approval as a final judgment.¹⁸

The disqualification clause encourages attorneys to strive for settlement because they will be unable to collect additional fees if the dispute goes to court.¹⁹ Therefore, the risk of failure in the collaborative process is distributed to the attorney in a manner unique to the process.²⁰ Of course, in litigation-based representation, an attorney will typically work on a case at least until there is a judgment. In collaborative law, an attorney works on a case only as long as the case stays out of court.²¹ Moreover, the disqualification clause provides an incentive for the clients to settle because if the dispute goes to court, the clients must hire new attorneys and will lose the benefit of the time and money already invested in employing the original attorneys.²²

One researcher who studied "collaborative family law" discussed the cooperative nature of the process:

The strong ideological commitment to cooperative negotiation within the [collaborative-family-law] model has a significant impact on the bargaining environment. This impact is strengthened by the "club" culture of [collaborative-family-law] groups, as well as by their sense of shared values. The [collaborative-family-law] groups are investing heavily in the development of a cooperative reputation, and any "adversarial" negotiation

behavior by their members threatens to taint that. Aside from their philosophical commitment to cooperative bargaining, [collaborative-family-law] lawyers also point to pragmatic considerations—when agreement between lawyers and both clients is necessary to settle, positional bargaining simply does not work.²³

One experienced collaborative-law attorney has stated that, in his experience, collaborative-law cases proceed much quicker than litigated cases. That attorney also noted that "litigation provides far more effective tools for complicating, stalling, and wearing down an opponent."²⁴ The privacy and control of settling a dispute outside of court may make the collaborative-law process especially attractive for public figures who often prefer to keep their financial and personal affairs private.²⁵ One commentator has opined how the collaborative process may have lasting profound benefits:

Most fundamentally, Collaborative Law has the potential to be a relationship-preserving process, rather than relationship-destroying. As spouses dissolve their marriage, they may nevertheless need to go on working together productively—particularly if they have children and must share custody, work out visitation arrangements and generally learn to parent separately but in harmony. Collaborative Law seems to offer clients a way through the divorce process that puts their long-term relationship in less jeopardy.²⁶

There are some risks associated with collaborative law. The collaborative process may not be useful if the parties lack the ability to participate effectively. For example, collaborative law may not be appropriate in cases involving domestic violence, substance abuse or mental illness.²⁷ The collaborative process may not work if a party simply does not trust that the other party will negotiate honestly and in good faith.²⁸ Parties may get swept up the positive current of cooperation and develop unrealistic expectations for the process.²⁹ Some parties may feel excessive pressure to settle during the collaborative process.³⁰

The professional ethics committees of at least six states—Kentucky, Minnesota,

Missouri,³¹ New Jersey, North Carolina, and Pennsylvania—have addressed the propriety of collaborative law.³² Each of those committees found collaborative-law practice to be in compliance with legal ethical standards.³³ In 2007, Colorado's legal ethics committee issued an advisory opinion concluding that the disqualification clause found in collaborative-law agreements violated Colorado's ethics rules regarding conflicts of interests.³⁴ Later that year, the American Bar Association's Standing Committee on Ethics and Professionalism addressed the ethical considerations of collaborative law in Formal Opinion 07-447. That opinion concluded that collaborative-law practice represents a permissible limited scope representation under Rule 1.2(c) of the *Model Rules of Professional Conduct*.³⁵ Model Rule 1.2(c) permits an attorney to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Similarly, Rule 1.2(c) of the *Alabama Rules of Professional Conduct* permits an attorney to "limit the objectives of the representation if the client consents after consultation." Although the ethical propriety of collaborative law may continue to be debated, clearly the current weight of authority indicates that collaborative-law practice is ethical.

At least three states—California, North Carolina and Texas—have enacted statutes codifying the practice of collaborative law.³⁶ In July 2009, the American Bar Association's Uniform Law Commission approved a draft of the Uniform Collaborative Law Act ("the UCLA").³⁷ The final draft version of the UCLA is scheduled to be released in October 2009, and the UCLA will be considered by the American Bar Association's House of Delegates in February 2010.³⁸ The UCLA establishes minimum requirements for collaborative-law agreements and details how and when the collaborative-law process begins and ends.³⁹ The UCLA codifies the disqualification clause, but excludes the application of the clause if an emergency order is sought to protect the health, safety or interests of parties and other certain individuals.⁴⁰ The UCLA also provides that, upon the request of another party, "a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery, and shall update promptly information

that has materially changed.”⁴¹ Section 17 of the UCLA creates a broad privilege prohibiting the disclosure of “collaborative law communication” in a legal proceeding. The UCLA also requires a collaborative lawyer to provide a prospective party with information sufficient for that individual to make an informed decision about the material benefits and risks of the collaborative-law process compared to the material risks and benefits of other alternatives, such as litigation or mediation.⁴²

Collaborative law owes a debt to mediation, a method of alternative dispute resolution undoubtedly more familiar to most Alabama attorneys than collaborative law. Like mediation, collaborative law attempts to allow parties a more active role in determining the negotiation process and final terms of settlement.⁴³ As in mediation, parties in the collaborative process often have the chance to communicate directly with each other during negotiations. Like mediators, attorneys practicing collaborative law receive specialized training in skills and strategies useful to the process.⁴⁴ Like mediators, attorneys practicing collaborative law often help parties use strategies to

effectively negotiate and communicate. One attorney who practices collaborative law described a particularly satisfying collaborative-law case as

“[feeling] like the most transformative type of mediation, which is to say that the focus of our interactions involved empowerment, recognition and substantial efforts on the part of each party to identify, understand, and articulate the interests of the other party as well as his or her own interests.”⁴⁵

Very closely related to collaborative law is the method of alternative dispute resolution known as cooperative law. Parties engaging in cooperative practice sign an agreement similar to the agreement used in collaborative practice. However, cooperative practice differs from collaborative practice in at least one significant way: cooperative practice does not use the disqualification clause barring attorneys from litigating the case should negotiations fail.⁴⁶ The agreement used by a Boston law firm practicing cooperative law replaces the disqualification clause

with provisions requiring, if negotiations should break down, a “cooling-off” period and mandatory mediation before the dispute goes to court. Those two provisions encourage parties and attorneys to attempt to settle outside of court even when initial negotiations reach a standstill.⁴⁷

One potential advantage that the cooperative process might have over the collaborative process is that, in the cooperative process, parties might not feel as much undue pressure to settle a dispute.⁴⁸ Furthermore, as noted, a disqualification clause in the collaborative process requires parties to incur the expense of obtaining and educating a new attorney should the dispute be litigated; cooperative practice eliminates that expense. Cooperative practice also remedies the concern that some attorneys and parties have that attorneys essentially “abandon” clients when negotiations fail in collaborative practice. Of course, the lack of a disqualification clause in the cooperative-law process deprives the participants of a significant incentive to settle the dispute.⁴⁹ Further, parties or attorneys committed to avoiding court altogether might prefer to be bound by the disqualification clause provided in the collaborative process.

One commentator has noted that parties may favor the cooperative process over the collaborative process if they:

- 1) trust the other party to some extent but are uncertain about that person’s intent to cooperate, 2) do not want to lose their lawyer’s services in litigation if needed, 3) cannot afford to pay a substantial retainer to hire new litigation counsel in event of an impasse, 4) fear that the other side would exploit the disqualification agreement to gain an advantage, or 5) fear getting stuck in a negotiation process because of financial or other pressures.⁵⁰

Given the “exponential growth” of collaborative law since its inception in 1990,⁵¹ collaborative law will likely be a fixture on Alabama’s alternative dispute resolution landscape in the near future. Although the collaborative process is not ideal for everyone, it appears to be a promising alternative for attorneys and parties who feel a need to resolve family-law matters in a less adversarial manner than litigation. As one legal researcher found:

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The clearest evidence of [collaborative law's] success relates to the satisfaction—joy even—of family lawyers who have embraced collaborative law as an alternative to litigation. The study [on collaborative law] found that the primary motivator for lawyers embracing [collaborative law] was personal value realignment—in other words, finding a way to practice law that fit better with their beliefs and values than the traditional litigation model did.⁵² ▲▼▲

Endnotes

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3. Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision-Making*, *J. Disp. Resol.*, Vol. 2008, No. 1, 163, 163 (2008).
4. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), at 1-2.
5. David A. Hoffman, Introduction to Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* xv (2d ed. 2008).
6. Scott R. Peppet, *The Ethics of Collaborative Law*, *J. Disp. Resol.*, Vol. 2008, No. 1, 131, 133.
7. Schneyer, *supra*, at 290.
8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 2.
9. Mosten, *supra*, at 175.
10. Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* 3-4 (2d ed. 2008). Tesler's book provides a detailed description of the collaborative-law process.
11. Interest-based negotiations emphasize the interests and needs of the parties in framing the negotiation process. Those interests may encompass a broad spectrum of issues, including power, rights, respect, self-esteem, and feelings. Suzanne McCorkle and Melanie J. Reese, *Mediation Theory and Practice* 7-8 (2005).
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23. Julie MacFarlane, "The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases," 77 (Department of Just., Canada, 2005).
24. Hoffman, "Collaborative Law," at 26.
25. Tesler, *supra*, at 18-19.
26. Peppet, *supra*, at 133-34.
27. Mosten, *supra*, at 190.
28. *Id.* at 191.
29. John Lande, "The Promise and Perils of Collaborative Law," *Dispute Resolution Magazine*, fall 2005, at 29.
30. *Id.* at 30.
31. American Bar Association, Collaborative Law Committee <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited August 26, 2009).
32. Peppet, *supra*, at 142.
33. *Id.*
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36. Peppet, *supra*, at 142. See extended footnote citing the laws.
37. American Bar Association, Collaborative Law Committee, *supra*.
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39. UCLA, sections 4 and 5, American Bar Association, Collaborative Law Committee <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited August 26, 2009).
40. *Id.* at Section 9.
41. *Id.* at Section 12.
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47. *Id.*
48. John Lande, "Learning from 'Cooperative' Negotiators in Wisconsin," *Dispute Resolution Magazine*, winter 2009, at 22.
49. *Id.*
50. *Id.*
51. MacFarlane, *supra*, at 1.
52. *Id.* at 77.



Judge Tommy Bryan serves on the Alabama Court of Civil Appeals. He is a member of the Supreme Court Commission on Dispute Resolution, the Supreme Court's Appellate Rules Committee and the Supreme Court's Committee on Rules for Judicial Administration. Judge Bryan is a member of the Alabama State Bar and serves as vice chair of the ASB Quality of Life Committee. He is a former assistant attorney general for the state's environmental department. Judge Bryan thanks **Jeremy Veal**, staff attorney, for his research, writing and general assistance with this article, along with **Jason Hicks**, a third-year student at Jones School of Law, for his research assistance.



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The Arbitration Alternative— Some Common Issues

Injunctive Relief

Unauthorized Practice
of Law Issues

Filing a Law
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By William D. Coleman

This article focuses upon some common issues that the civil litigation practitioner may face when a client's dispute is to be resolved in arbitration. In addition to the "recent" popularity of mediation in Alabama,¹ arbitration as an alternative to litigation has become a more prevalent form of dispute resolution in recent years.² This is especially true for the business world in general and certain industries in particular. The practitioner should be aware of potential pitfalls to be avoided and some ordinary issues that, as a practical matter, will influence the conduct of the arbitration proceedings in the filing, discovery and hearing stages.

Filing a Lawsuit when Demand for Arbitration is Filed

Arbitration is an alternative to litigation. So, if a demand for arbitration is filed, should one also file a lawsuit? Yes, in most cases, and for a number of reasons – usually because of statutes of limitations and occasionally for other reasons, such as statutory venue requirements. The safest practice when demanding arbitration in Alabama is to file suit concurrently with the filing of the demand and to file a concomitant motion with the court to stay the action pending arbitration.

This practice is consistent with Section 3 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 3, which requires that the court grant a stay pending arbitration upon the application of either party:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The practice is routinely, but not always, followed by Alabama attorneys when filing arbitration demands. There are a number of Alabama appellate decisions that have reviewed a trial court's grant or failure to grant a motion to stay. Most recently, the Alabama Supreme Court stated it would "preempt discussion of whether [a party] was entitled to a mandatory stay under § 3 of the FAA" because it concluded the trial court in any event had abused its discretion under Alabama law by not granting a stay pending arbitration. *Johnson v. Jefferson County Racing Ass'n, Inc.*, 1 So. 3d 960, 968 (Ala. 2008) (noting the court's previous decisions had given implicit support to the proposition that the trial court had discretion under Alabama law to determine whether an action compelled to arbitration should be stayed or dismissed).

The statutes of limitations in Alabama generally refer to filing "an action" in court in order to satisfy the timeliness requirements of the statutes. One may argue that Alabama has not squarely addressed the question of whether filing a demand for arbitration would be sufficient for an arbitrator to find the time requirement for filing "an action" satisfied or whether, in all events, the issue of timeliness would be solely for the arbitrator to decide. However, there are a number of Alabama decisions

The safest practice when demanding arbitration in Alabama is to file suit concurrently with the filing of the demand and to file a concomitant motion with the court to stay the action pending arbitration.

that suggest strongly that, unless a lawsuit is filed and not dismissed, the statutes are not tolled.

The Alabama Supreme Court has stated that a stay is preferable to a dismissal of the action because the latter creates the potential for injustice in situations where, through no fault of the plaintiff, the arbitration cannot be concluded or some of the plaintiffs' claims are not arbitrated, resulting in a time bar to refile the unarbitrated claims in court. *Porter v. Colonial Life & Accident Insurance Co.*, 828 So. 2d 907, 908 (Ala. 2002); *See also, Johnson v. Jefferson County Racing Ass'n, Inc.*, 1 So.

3d at 970.

Similarly, in *Mostella v. N & N Motors*, 840 So. 2d 877, 880 (Ala. 2002) the court noted:

When a trial court enters an order compelling arbitration, a stay of the proceedings in the trial court during the pendency of the arbitration protects the plaintiff from facing the prospect of the expiration of an applicable statute of limitations or from paying another filing fee in the event future legal proceedings become necessary. An order compelling arbitration should not constitute an adjudication on the merits; therefore, a trial court should not dismiss with prejudice a case in which arbitration is ordered.

As indicated earlier, another reason to file a lawsuit (and request that it be stayed) is that some statutory causes of actions require an action to be instituted in a specific venue. The Alabama mechanics' and materialmen's lien law (hereinafter "mechanics' lien law") serves as a good example. The limitation period to file "an action" to enforce a mechanics' lien is six months from when the entire indebtedness became due. *Ala. Code* §35-11-221 (1975). The mechanics' lien statute requires that an action for the enforcement of a lien over \$50 be filed in the "circuit court having jurisdiction in the county in which the property is situated." *Ala. Code* §35-11-220 (1975). Since filing suit in accordance with the statute is a step to perfection of the lien, the requirement must be adhered to even if the dispute is subject to an arbitration agreement. Assuming the other steps to perfection are met, by filing suit in the circuit where the project is located, the lien is perfected and the action can then be stayed pending a determination in arbitration of the amount due, if any, on the lien.

Incidentally, it has been held that the filing of a lien prior to the filing of a demand for arbitration does not substantially invoke the litigation process nor does it substantially prejudice the party opposing arbitration. *Paragon Ltd., Inc. v. Boles*, 987 So. 2d 561 (Ala. 2007).

Finally, another reason to file a lawsuit and have it stayed pending arbitration proceedings is to have an involved court

available to assist with the enforcement of subpoenas issued by the arbitrator. See Section IV below.

Unauthorized Practice of Law Issues

Lawyers who represent clients across state lines need to ensure compliance with requirements of the forum state. When considering *pro hac vice* admission in another state, one must consult both the state's professional rules and its rules governing admission. In years past, there was considerable apprehension about those requirements. See generally, Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 Ala. L. Rev. 535 (1999).

Fortunately, for lawyers engaged in an alternative dispute resolution practice that sometimes crosses state lines, many jurisdictions have adopted or substantially adopted Rule 5.5 of the American Bar Association's *Model Rules of Professional Conduct*. Alabama has adopted a modified version of the ABA *Model Rule of Professional Conduct* R. 5.5(c)(3) which allows multijurisdictional arbitration practice without a *pro hac vice* admission. Rule 5.5(B)(2) of the *Alabama Rules of Professional Conduct* permits lawyers admitted in other states to represent clients in Alabama on a temporary or incidental basis "in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held" in Alabama or in another jurisdiction. Although Rule 5.5(B) states it is subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar, it is not apparent that Rule VII requires a *pro hac vice* admission in arbitration proceedings.

Nevertheless, the Office of General Counsel of the Alabama State Bar has opined, albeit only in informal opinions, that foreign attorneys do have to obtain *pro hac vice* admission where a court is involved. The standard informal opinion of the Office of General Counsel states:

In response to your query, the Office of General Counsel has opined in previous informal opinions that a foreign attorney may not participate in a court-annexed or ordered arbitration without first being admitted *pro hac vice*. If the arbitration is not court-annexed or ordered, then the foreign attorney may participate without first obtaining *pro hac vice* admission.

So, if a court in Alabama or another state orders a case or discreet issues in a case to arbitration, and if the hearing will be in Alabama, any foreign attorney who will participate as an advocate in the arbitration proceeding will need to obtain *pro hac vice* admission. However, an attorney participating in an arbitration proceeding as an arbitrator is not "practicing law" and therefore is not required to be admitted *pro hac vice*.

Lawyers who represent clients across state lines need to ensure compliance with requirements of the forum state.

Injunctive Relief

A party to an arbitration agreement who finds a need for interim measures, such as an injunction, usually has alternative routes available to seek relief – either in arbitration or in court – without waiving the right to arbitrate.

Although interim relief arguably would be within the power of any person chosen by the parties to arbitrate their disputes, most ADR organizations expressly provide for such interim relief. See American Arbitration Association Commercial Arbitration Rules and Mediation Procedures,³ Rule R-34, effective June 1, 2009 ("The arbitrator may take whatever interim measures as he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.")

Additionally, as an option to AAA Commercial Rule R-34, the parties may in their arbitration clause or after a dispute arises make the AAA "Optional Rules For Emergency Measures of Protection" applicable. Those rules mandate prompt action toward resolution, including requirements that the AAA appoint a single emergency arbitrator from a special AAA emergency panel within one day from notice of the request for emergency

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Arbitration in some respects can be similar to civil litigation, but there are significant discovery differences.

relief and that the arbitrator proceed as soon as possible, but in any event within two business days of appointment, to establish a schedule for consideration of the application for emergency relief. AAA Optional Rule O-2. Such relief may be granted following a telephone conference or on written submissions as alternatives to a formal hearing (Rule O-3), and the interim award may be conditioned on the posting of appropriate security (Rule O-6).

The AAA Commercial Rules (at Rule R-34(c)) and the Optional Rules (at Rule O-7) provide that a request for interim measures addressed to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. Such no-waiver clauses are consistent with Alabama precedent that a party seeking to avoid arbitration has a heavy burden to prove the other party has waived that right. Both substantial invocation of the litigation process and prejudice are required to establish waiver. *Climastor IV, L.L.C. v. Marshall Constr.*, 4 So. 3d 452 (Ala. 2008) (no waiver when defendant advised plaintiff of its intent to “take steps to have the litigation stayed and the matter referred to arbitration,” and then removed the case to federal district court and filed an answer and counterclaim asserting the action should be dismissed or stayed “with full reservation of...its right to seek arbitration”).

Several federal circuits have found jurisdiction is proper for the district courts to enter injunctive relief to maintain the status quo or to prevent irreparable harm pending arbitration. The Eleventh Circuit has upheld the district court’s authority to grant injunctive relief in a case where the arbitration agreement specifically provides for such relief, but it has not ruled on whether the district courts have such authority when the arbitration agreement is silent. *American Exp. Financial Advisors, Inc. v. Makarewicz*, 122 F.3d 936 (11th Cir. 1997). In 2005, the Middle District of Alabama determined it had jurisdiction to entertain a request for preliminary injunctive relief notwithstanding that the dispute was due to be resolved by arbitration. *Frontier Bank v. R & L Trucking Co., Inc.*, 2005 WL 2654038 (M.D. Ala. 2005) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dunn*, 191 F. Supp. 2d 1346 (M.D. Fla. 2002)).

An Alabama trial court may grant a preliminary injunction to preserve the status quo where the applicable agreement or rules

provide such authority. *Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176-77 (Ala. 2008). The court in *Holiday Isle* determined that Rule R-34(c) of the AAA’s Commercial Rules provided sufficient authority for the trial court to exercise jurisdiction over the request for the preliminary injunction. *Id.* However, the court ultimately held that the trial court erred in granting the preliminary injunction based upon the merits of the case.

Discovery in Arbitration

Arbitration in some respects can be similar to civil litigation, but there are significant discovery differences. Absent agreement by the parties, the applicable arbitration rules, not the state or federal rules of civil procedure, apply to discovery in arbitration proceedings. And those rules do not generally permit the type of wide ranging discovery permitted in court proceedings. Indeed, the arbitrator in the exercise of his or her discretion will be expected to seek to avoid unnecessary discovery so that the arbitration will be an expeditious process that is both cost-effective and fair to the parties.

Scope of Discovery

AAA Commercial Rule R-21, Exchange of Information, provides for the production of “documents and other information” and the identification of “any witnesses to be called.” AAA Rule 31, Evidence, provides that “(a)ll evidence shall be taken in the presence of all of the arbitrators” and that an arbitrator “authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.” The AAA Procedures for Large, Complex Commercial Disputes include a provision that the arbitrator “may” order depositions of persons with information determined by the arbitrator “to be necessary to determination of the matter.” Rule L-4.

Shortly after the arbitrator is selected, the AAA will schedule a telephone conference call for the first Preliminary Hearing (sometimes referred to as Pre-Hearing Conference) from which a Scheduling Order or Management Case Order will be issued. The arbitrator will likely remind the parties that discovery available in the arbitration should not necessarily replicate what would be allowable in court. The arbitrator may be expected to remind the parties that arbitration is a flexible process and to encourage them to be creative in devising time or work-saving strategies for case development and presentation.

Counsel should endeavor to discuss and agree upon the extent and scope of discovery in advance of the Preliminary Hearing. As a practical matter, if the parties have agreed to document exchange, exchange of expert reports, and a reasonable number of depositions, the arbitrator will likely acquiesce to that agreement. Otherwise, after hearing from counsel regarding the issues involved and the nature and scope of discovery desired, the arbitrator will decide the scope of discovery and may limit discovery more than one or more of the parties desire.

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Discovery from Third Parties

When parties to arbitration need to obtain documents or the deposition testimony of non-party witnesses, an arbitrator may execute subpoenas proffered by a party but caution that the parties will be responsible for having the subpoenas enforced, if necessary. As a practical matter, persons served with a subpoena for documents, or even for a deposition, executed by an arbitrator often will comply with the subpoena. However, where the arbitrator signs the subpoena but the person served refuses to comply, the assistance of a court to enforce the subpoena should be considered. Some courts may assist while others will refuse.

Section 7 of the FAA, 9 U.S.C.A. § 7, empowers an arbitrator to “summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” There is a circuit split as to what § 7 actually permits an arbitrator to do.

The Eighth Circuit takes the position that although the FAA is silent on the issue of whether arbitrators are authorized to require a non-party to produce documents only, without personal appearance, this can be implied as part of the FAA. *In re Security Life Ins. Co. of America*, 228 F.3d 865 (8th Cir. 2000). However, the question of subpoenas for third-party deposition testimony is unsettled. *See, e.g., SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 U.S. Dist. LEXIS 389 (D. Minn. 2004).

The Third Circuit has held that a “non-party witness may be compelled to bring documents to an arbitration proceeding but may not simply be subpoenaed to produce documents.” *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). Likewise, the Second Circuit recently decided that § 7 “does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding...” *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008). However, it has confirmed that an arbitrator has the power to compel testimony and documents from non-party witnesses at both preliminary and final hearings conducted by the panel. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005). The Fourth Circuit has held the FAA does not authorize arbitrators to subpoena third parties for pre-hearing document production absent “a showing of special need or hardship.” *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

The Eleventh Circuit has not opined. One approach used when seeking documents from a non-party is to subpoena the non-party to appear before the arbitrator at a prehearing, prior to the actual arbitration hearing when testimony will be presented, and to bring the requested documents. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d at 413-414 (Chertoff, J., concurring) (noting that often “the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence”).

Territorial Limits

The law regarding the territorial limitations of arbitration subpoenas is unsettled. Section 7 of the FAA requires that a subpoena be “served in the same manner as subpoenas to appear and

testify before the court” and may be enforced by the “district court for the district in which such arbitrators, or a majority of them, are sitting.” Because § 7 requires that a subpoena be “served in the same manner as subpoenas to appear and testify before the court,” many courts require adherence to Rule 45(b)(2)’s territorial limits. *See, e.g., Dynegy Midstream Services v. Trammochem*, 451 F.3d 89 (2nd Cir. 2006); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26 (3rd Cir. 2003). The Eighth Circuit has held that subpoenas for the production of documents in an arbitration proceeding need not comply with Rule 45(b)(2). *In re Security Life Insurance Company of America*, 228 F.3d 865, 871-72 (8th Cir. 2000). However, it declined to rule on the “thorny question ... presenting what may be a serious problem in the enforcement of witness subpoenas under the FAA” of whether or not a subpoena for witness testimony in an arbitration proceeding must comply with the territorial limits of Rule 45. *Id.* Some courts have held that § 7 of the FAA in essence authorizes nationwide service of process. *See, e.g., Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 432 F. Supp. 2d 1375, 1378-79 (N.D. Ga. 2006).

Thus, due to the unsettled authority, if a non-party witness resides in a state other than the state where the arbitration hearing is to be held, some arbitrators may be reluctant and may

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refuse to issue an arbitral subpoena for documents. Some attorneys and arbitrators believe a viable solution to this problem may be to hold a prehearing for document production in the district where the witness resides with the subpoena returnable to that hearing. If the witness fails to appear, the party requesting the subpoena could ask the district court in that location to enforce the subpoena and for purposes of § 7 of the FAA the arbitrator would be “sitting” in that district.

It should also be noted that Federal Rule of Civil Procedure 45(b)(2)(C) allows a subpoena to be served “within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production or inspection.” Alabama Rule of Civil Procedure 45(b)(1) provides for service of a subpoena at any place within the state and further provides that a non-party’s attendance at a place more than 100 miles from his or her residence may be secured by tendering to that person the fees for one day’s attendance and an amount to reimburse mileage. Thus, in Alabama an enforceable subpoena for attendance at a hearing may be issued by an arbitrator to a non-party anywhere within the state upon compliance with the requirements for tendering fees and expenses to non-parties who reside more than 100 miles from the place of the hearing.

Subpoenas would have to be enforced in state courts where there is no independent basis for federal jurisdiction, such as diversity or federal question jurisdiction. Thus, state statutes in other states may come into play when discovery and related subpoena issues arise. Section 17(a) of the Uniform Arbitration Act and the Revised Uniform Arbitration Act provides authority for an arbitrator to issue subpoenas for the attendance of witnesses and the production of records and other evidence. Section 17(d) provides that if an arbitrator permits discovery, the arbitrator may issue subpoenas for the attendance of witnesses and for the production of records “at a discovery proceeding.” Forty-nine states have modern arbitration statutes: 35 have adopted the UAA and 14 have adopted substantially similar legislation. Unfortunately, Alabama is the lone state without a modern arbitration statute. Its arbitration statutes provide only for deposition subpoenas for witnesses who reside “out of the county.” *Ala. Code* 6-6-7 (1975). The antiquated statute also humorously provides for compensation of arbitrators: “The arbitrators are, if demanded by them, entitled each to \$2 per day while actually engaged in the arbitration.” *Id.*, §6-6-10.

Standard or Reasoned Award

At the initial preliminary hearing the arbitrator likely will inquire of counsel regarding the type of award desired. Arbitration awards vary across the spectrum from a simple lump sum verdict award, similar to most jury verdicts, to opinions with detailed findings of fact and conclusions of law. Generally, a “standard” award will be a concise statement of the relief awarded for each claim

At the initial preliminary hearing the arbitrator likely will inquire of counsel regarding the type of award desired.

asserted. Another type of award is a “reasoned” award, which will be rendered if requested in writing by the parties prior to appointment or if the arbitrator determines a reasoned award is appropriate. A reasoned award will normally break down the components of the award and provide a written explanation for the award. A reasoned award will include more detail than a standard

award, although it would not contain detailed findings of fact and conclusions of law on each issue.

Awards of Attorneys Fees and/or Expenses

It is not uncommon for attorneys filing lawsuits to include a catch-all request for “attorneys’ fees and costs” even where there is no legal or contractual ground to recover attorneys’ fees. The response to such demands may include a similar request for attorneys’ fees. Although such opposing demands might violate prohibitions of Rule 11 of the Alabama Rules of Civil Procedure and/or the Alabama Litigation Accountability Act, such requests are routinely ignored and usually have no real significance.

In arbitration, such requests could result in substantial unintended consequences. Arbitration rules sometimes include a provision that if all parties request attorneys’ fees, the arbitrator thereby may award them. For example, under Rule R-43(d) of the AAA Commercial Rules, the award of the arbitrator may include “an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.” Thus, under this common AAA rule, it appears that the arbitrator may award attorneys fees even where no other legal or contractual grounds existed before the arbitration demands were filed seeking such fees.

An interesting decision of the Second Circuit involving coin-surance agreements held that where arbitrators determined a party had arbitrated in bad faith, the arbitrators could sanction the party and that the sanction may include an award of attorneys’ fees, despite the statement in the arbitration agreement that each party is to bear its own attorneys’ fees. *ReliaStar Life Ins. Co. of New York v. EMC National Life Co.*, 564 F.3d 81 (2nd Cir. 2009).

Vacancies on the Arbitration Panel

What happens when a vacancy of an arbitration panel occurs when the arbitration is underway? A mid-stream vacancy of a lengthy arbitration is not a particularly unusual event. Vacancies can occur for a variety of reasons, including: the realization by the arbitrator of a conflict involving a party or witness; as a result of a challenge by a party due to an incomplete initial conflicts disclosure by an arbitrator; due to some action or inaction of the arbitrator in connection with his or her service; or for health reasons.

Where an arbitration agreement incorporates AAA Commercial Arbitration Rules for Large Complex Commercial Disputes to govern disputes, but does not specifically provide for a panel consisting of a specific number of arbitrators or for how to proceed in the event of a vacancy, if a vacancy occurs after the hearings have begun, the panel may proceed with the remaining arbitrator(s) absent an agreement by the parties to fill the vacancy. AAA Rule 19(b) of the Commercial Arbitration Rules for Large Complex Commercial Disputes provides that “[i]n the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.”

Connecticut’s Supreme Court has upheld the application of the AAA vacancy rule. *C.R. Klewin Northeast, LLC v. City of Bridgeport*, 919 A.2d 1002, 1032-34 (Conn. 2007). In *Klewin*, the parties had incorporated the AAA Commercial Arbitration Rules for Large Complex Commercial Disputes into their arbitration agreement and did not otherwise provide for vacancies or agree to a specific number of arbitrators in order to go forward with hearings and render a decision. Upon a vacancy, Klewin agreed to proceed and Bridgeport objected. The panel of two decided to proceed based upon Rule 19(b). As a result, Bridgeport sought an ex parte temporary injunction from the trial court, which it denied, concluding that the decision whether to proceed with a two-person arbitrator panel was a decision for the panel. The panel ultimately decided the matter in favor of Klewin, and the trial court confirmed the award. On appeal, the Connecticut Supreme Court upheld the trial court’s conclusion that whether to proceed with a two-arbitrator panel was for the panel to decide. Interestingly, the trial court and the Connecticut Supreme Court both held, upholding the two arbitrators, that because the parties incorporated the AAA rules into their arbitration agreement, which itself was silent regarding the number of arbitrators required for a panel to decide disputes which arise between the parties, the parties did not “agree otherwise.”

In another case regarding a panel vacancy, the Seventh Circuit applied Section 5 of the FAA, which provides for the appointment of an arbitrator for the filling of a vacancy by the district court upon petition by either party, to uphold the replacement of a panel member. *WellPoint, Inc. v. John Hancock Life Ins. Co.*, 2009 WL 2431995 (7th Cir. 2009). The arbitration agreement in *WellPoint* required a panel of three arbitrators of specific backgrounds, one each chosen by the parties and the third chosen by the two arbitrators appointed by the parties. In the event the arbitrators could not agree, the decision was deferred to AAA. (It is not clear from the decision whether the above-mentioned AAA vacancy rule was applicable. If so, it is not clear whether its application was raised by the parties.) After much discovery had taken place and the panel had been called upon several times to resolve discovery disputes, WellPoint requested that its chosen arbitrator resign. John Hancock objected to the resignation and

Historically, there has been some question as to whether an arbitrator has the power to grant summary judgment absent applicable rules which specifically allow for such a procedure or an agreement to such a procedure by the parties.

the appointment of the new arbitrator, but proceeded under protest. On appeal, John Hancock argued that where an arbitration agreement does not address the process for the replacement of a panel member, the general rule is that the entire process must start anew, citing *Marine Prods. Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2nd Cir. 1992). Because the panel did not comply with the “general rule,” John Hancock asserted, the panel’s award went beyond its powers and must be vacated under § 10(a)(4) of the FAA. The court rejected this argument, holding that by failing to utilize § 5 of the FAA which provides for the appointment of an arbitrator

for the filling of a vacancy by the district court upon petition by either party, John Hancock waived the issue on appeal.

The above cases highlight two vehicles for default rules where arbitration agreements do not specify procedures for vacancies which occur on panels after the arbitration process is underway. A working knowledge of the rules which are incorporated into a particular arbitration agreement and clarity in the drafting of arbitration agreements can minimize potential difficulties such as a panel vacancy.

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Summary Judgment

Historically, there has been some question as to whether an arbitrator has the power to grant summary judgment absent applicable rules which specifically allow for such a procedure or an agreement to such a procedure by the parties. Aggrieved parties have argued that since Section 10(a)(3) of the FAA allows a court to vacate an award if the arbitrator is “guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . .,” arbitrators who have not been expressly granted the power to dispose of a dispute at the summary judgment stage are acting outside of their authority to do so. *See e.g., Chem-Met v. Metaland International, Inc.*, 1998 WL 35272368 (D.D.C. 1998).

In recent years arbitrators have become more willing to grant summary judgment on claims or defenses. The AAA arbitrator training materials discuss the “pros” – saves the parties time and money, and demonstrates that arbitration is an efficient means of resolution against a baseless or frivolous claim, as well as the “cons” – it might result in an appeal with a party complaining it was prevented from proving a triable issue of fact. Most arbitrators approach such motions carefully but will not feel restrained from granting a motion for summary judgment when satisfied the claim or defense would not survive a motion in court under the applicable rules of civil procedure.

Courts have upheld the authority of arbitrators to grant summary judgment despite the lack of a specific grant of such authority by the applicable rules. *See, e.g., Sherrock Brothers, Inc. v. Daimler-Chrysler Motors Co., LLC*, 260 Fed. Appx. 497, 501-502 (3rd Cir. 2008). In *Sherrock*, the Third Circuit held that “...fundamental fairness is not implicated by an arbitration panel’s decision to forego an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case.” *Id.*; *see also Campbell v. American Family Life Assurance Company of Columbus, Inc.*, 613 F. Supp. 2d 1114, 116-119 (D. Minn. 2009) (rejecting plaintiffs’ blanket assertion that summary judgment in arbitration governed by the FAA and the AAA Commercial Arbitration Rules is impermissible except in cases where the claim is barred by *res judicata*, collateral estoppel, waiver, or a statute of limitations”); *Hamilton v. Sirius Satellite Radio, Inc.*, 375 F. Supp. 2d 269, 278 (S.D.N.Y. 2005).

Manifest Disregard of the Law

It may be generally thought that the “manifest disregard of the law” standard is no longer available as a ground for vacating an arbitration award under the FAA. The manifest disregard of the law doctrine is a judicially created standard which originated in dicta in the United States Supreme Court’s decision of *Wilko v. Swann*, 346 U.S. 427, 436 (1953). Last year, the Supreme Court revisited the standard, limiting appeals to the procedures available under the FAA and rejecting extra-statutory grounds for vacating an award, including “manifest disregard of the law.” *Hall Street*

Prior to 2009 it was difficult to be certain of the appropriate procedures for post-award proceedings to confirm or contest awards.

Associates, LLC v. Mattel, Inc., 552 U.S. 1 (2008). The Alabama Supreme Court has rejected the “manifest disregard of the law” standard for vacating arbitration awards under the FAA in accordance with the *Hall Street* opinion. *Hereford v. D.R. Horton, Inc.*, 2009 WL 104666 (Ala. 2009) (refusing to vacate an award of summary judgment under the FAA where the only ground raised by the petitioner was “manifest disregard of the law”).⁴ The *Hereford* court

noted that some courts have continued to recognize the standard as a “gloss” on the statutory language of § 10(a) of the FAA or as shorthand for § 10(a)(3) and § 10(a)(4). *Id.* at *5, n.1.

Notwithstanding what may have been considered a dead issue after *Hall Street*, some courts have continued to consider the “manifest disregard of the law” doctrine as a valid ground to modify or vacate an arbitration award. *See, e.g., Kashner Davidson Securities Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008) (arbitration award vacated based on manifest disregard of the law); *Stolt-Nielsen Transportation Group Ltd. V. Animal Feeds International Corp.*, 548 F.3d 85 (2nd Cir. Nov. 4, 2008) (not followed by the Alabama Supreme Court in *Hereford*, discussed above); *Fitzgerald v. H&R Block Financial Advisors Inc.*, 2008 WL 2397636 (E.D. Mich. June 11, 2008) (manifest disregard of the law is a separate standard, distinct from the FAA). It is apparent the United States Supreme Court will be provided another occasion to state whether the doctrine of manifest disregard of the law remains under any context as a valid ground for modification or vacatur of an arbitration award. However, it appears not to be a valid ground at this time in Alabama.

Appeals from and Enforcement of Awards

Prior to 2009 it was difficult to be certain of the appropriate procedures for post-award proceedings to confirm or contest awards. On February 1, 2009, welcome changes became effective to the *Alabama Rules of Civil Procedure* and *Alabama Rules of Appellate Procedure* regarding arbitration. Rules 71B and 71C were adopted into the *Alabama Rules of Civil Procedure*. Rule 4(a)(1) of the *Alabama Rules of Appellate Procedure* was amended and Rule 4(e) was adopted. These rules were developed to set out a clear, easily understood procedure and trigger date for the time to appeal an arbitration award, in accordance with the guidance laid down in opinions by Justice Lyons’s concurring opinion in *Birmingham News Co. v. Horn*, 901 So. 2d 27, 45 (Ala. 2004) and the Alabama Supreme Court in *Horton Homes, Inc. v. Shaner*, 999 So. 2d 462 (Ala. 2008), in response to the confusing collection of conflicting statutes, rules and common law that was in effect prior to this undertaking.

Rule 71B supersedes the procedure set out in § 6-6-15 of the *Code of Alabama* (1975) for taking an appeal from an arbitration award. Appeals from arbitration awards must be filed in circuit court within 30 days after service of the arbitration award. If the

action was pending in a circuit court, the appeal must be filed in that court. If no action was pending, the appeal should be filed in the circuit court of the county where the award was made. *Ala. R. Civ. P.* 71B(c). Upon entry of the award as a final judgment by the clerk, a party contesting the award must file a Rule 59 motion to set aside or vacate the judgment based upon grounds specified in § 6-6-14 of the *Alabama Code* or other applicable law. An appeal may be taken from the grant or denial of the Rule 59 motion by filing the notice of appeal pursuant to Rule 4 of the *Alabama Rules of Appellate Procedure*.

Rule 71C governs the enforcement of arbitration awards. If no appeal has been filed within 30 days of service of the award pursuant to Rule 71B, any party may seek enforcement of the award by filing a motion for entry of judgment in the circuit court where the action was pending or the circuit court in the county where the award was made. Once the clerk has entered judgment, the party may execute on the judgment in accordance with the rules.

The amendment to Rule 4(a)(1) and the adoption of Rule 4(e) incorporate into the *Rules of Appellate Procedure* the method for taking an appeal from an arbitration award set out in the newly adopted Rule 71B.

AAA Suspends Administration of Consumer Debt Collection Matters

On July 27, 2009, the AAA suspended its administration of certain consumer debt collection arbitrations in response to the evaluation of a recently concluded program in this area which showed weaknesses in the consumer debt collection arbitration process. The following matters are included in the moratorium:

1. Consumer debt collections programs or bulk filings;
2. Individual case filings in which:
 - a. The company is the filing party, and
 - b. The consumer has not agreed to arbitrate at the time of the dispute, and
 - c. The case involves a credit card bill, a telecom bill or a consumer finance matter.

The AAA will continue to administer all demands for arbitration filed by consumers against businesses and all other types of consumer arbitrations. The AAA has concluded that additional protections for these areas of consumer arbitration are needed, beyond those already provided by the Association's Consumer Due Process Protocol.⁵

Class Actions

On June 15, 2009, the United States Supreme Court agreed to decide whether the FAA permits arbitrators to impose class arbitration where the agreement to arbitrate is silent on the issue of class arbitration. *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Group*, 548 F.3d

85 (2nd Cir. 2008), *cert. granted*, 77 U.S. 3562 (2009). The question was left open six years ago in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Whether class action waivers in arbitration agreements are enforceable is still an open question as well.⁶

Conclusion

Although the rules of the AAA and other providers of ADR services are written in plain English and seem straight-forward enough, there are common issues not clearly addressed in those rules that can be encountered. And the interplay between court rules and arbitration rules is oftentimes elusive. As arbitration becomes more prevalent in Alabama, recognizing potential pitfalls and common issues in advance will help all of us better represent our clients in the arbitration arena. ▲▲▲

Endnotes

1. Fifteen years ago few Alabama attorneys had been involved in a dispute resolution process known as mediation. See, generally, William D. Coleman, *The Mediation Alternative: Participating in a Problem-Solving Process*, THE ALABAMA LAWYER, Vol. 56, No. 2, p. 100 (Mar. 1995). Today the mediation process is a familiar one to any attorney with an active litigation practice.
2. According to the American Arbitration Association, in 2008 the AAA administered 288 arbitrations with an Alabama hearing locale selected. Through September 2009 it has administered 248 Alabama based arbitrations. About half each of these years have been construction disputes, just under forty percent have been labor/employment disputes, and just over ten percent have been commercial disputes including consumer arbitrations.
3. Inasmuch as most arbitration proceedings in Alabama are administered subject to the rules of the American Arbitration Association, for simplicity its commercial rules will be generally assumed herein to apply. The AAA has many sets of rules, tailored to various industries or types of disputes, which are available to the public on line at www.adr.org. Similarly to AAA Rule 34, see CPR Institute for Conflict Prevention & Resolution Rules for Non-Administered Arbitration, Rules 13-15, effective November 1, 2007, and CPR Global Rules For Accelerated Commercial Arbitration, Accelerated Rule 9, effective August 20, 2009, both available at www.cpradr.org.
4. For additional information regarding judicial review of arbitration awards in Alabama, see William Hardie, Jr., *Judicial Review of Arbitration Awards in Alabama Courts*, THE ALABAMA LAWYER, Vol. 69, No.6, p.435 (Nov. 2008).
5. The Consumer Due Process Protocol is a set of principles for a fundamentally fair ADR process created in 1998 by representatives of the bar, government agencies, and consumer and other nonprofit organizations, including the AAA.
6. For a discussion of class actions in arbitration, see Randall D. Quarles, *Courts Disagree: Is Arbitration a "Class" Act?*, THE ALABAMA LAWYER, Vol. 68, No. 6, p. 476 (Nov. 2007).



William D. Coleman is with the Montgomery firm of Capell & Howard PC. His practice focuses on dispute resolution with emphasis on construction industry disputes, often serving as a neutral mediator or arbitrator. Coleman has served on the Alabama Supreme Court Commission on Dispute Resolution (chair, 1996-98) since it was created and he served as the first chair (1994-96) of the Alabama State Bar Committee on Alternative Methods of

Dispute Resolution. He has served as president and board member of the Alabama Center for Dispute Resolution, Inc. since its creation in 1994. Coleman expresses appreciation to Arden Reed Pathak, an associate with the firm, for her assistance in the preparation of this article.

From Power to Service: The Story of Lawyers in Alabama

By Pat Boyd Rumore

Introduction

Lawyers are, as a group, engaged and engaging. They are people who tend to be bright, curious, energetic, multi-talented, disciplined workers, who also, when they can, take time to relax and enjoy their friends and the good things life has to offer. Their training prepares them to move from one arena to the next with the energy and ability to contribute in many ways that are not always tied to “the law.” Their profession gives them many opportunities to expand their horizons and broaden their minds.

In fact, once you pay attention, you realize that lawyers weigh in everywhere in society: of course, in the courts, but also in academia, politics and government, business, non-profit, religion, literary and art endeavors, and anywhere people are making a difference. And lawyers are born to be leaders. Thus, when I was asked by 2004-2005 state bar **President Douglas McElvy** to write a book about lawyers in Alabama I was immediately engaged, because I like and respect lawyers and I knew that I would be learning not only about individuals but also about Alabama’s development as a state from every aspect, since lawyers are always among the movers and shakers in society.

With that said, having already written a similar book about the Birmingham bar, I also knew that lawyers would be not only heroes but also villains, depending on one’s values and outlook. They would be pushing the state forward and holding it back. They would be reforming it and corrupting it. They would be

among both the enlightened and the bigoted. That is because lawyers advocate, both for their clients and for themselves, and one’s opinion of lawyers, both as a group and as individuals, often depends on the positions they hold and the positions they take relative to the positions you hold and take. And, of course, not all lawyers fit my optimistic assessment of my fellow professionals. Individual lawyers can be lazy, greedy, ignorant, selfishly ambitious, and crooked. So, to write about lawyers is to write about the best and the worst of being human.

And there is also the problem of looking back, especially in a state like Alabama, which in many ways has a tortured history. I have written about lawyers who were of their times, and whose actions contributed to the historical pain this state continues to suffer. I was told by a historian who reviewed the manuscript that I have been somewhat harsh in my frankness, but that she wouldn’t suggest any changes. I felt moved to be “harsh,” because it seems to me that the lawyers of this state need to

be especially conscious of their importance to the state’s history and its future. To be shown the impact of their predecessors hopefully can serve as a cautionary tale about the potential impact of their own words and actions.

Their oratory and their conduct affect the lives of real people. In truth, at least in my opinion, lawyers need to act for the greater good, regardless who their clients are, because their words and actions resonate throughout the years. The profession has high standards of ethics and conduct, standards which can aid lawyers in contributing their best to society. There are many examples in the book which illustrate the damage done when lawyers violate those standards as well as the honorable legacy left by those who epitomize the best of the profession. The lesson I learned was that lawyers can do great good when they realize how sacred their work is and great harm when they act from selfish or corrupt interests.

I did not title the book until I had completed the four years that it took me to research and write it. The title reflects my



Douglas McElvy



Alabama State Bar, Montgomery

opinion of the work done by the Alabama State Bar as an association to serve the good of individual lawyers, the profession itself and the people of the state of Alabama, especially during the last 45 or so years of its history. It is my hope that the profession and the individuals who comprise it continue to mature so that the service they provide to all is given with sufficient detachment to demonstrate an orientation toward the greater good regardless of parochial interests.

Resources

What I have said about the broad range of abilities and interests of lawyers is illustrated by the resources I used to write the book. One of my major references concerning Alabama's political history was a series of essays about Alabama's governors, the majority of whom have been lawyers, co-edited by **Samuel L. Webb**, now an associate professor in the history department at UAB, who was an assistant attorney general under **Attorney General Bill Baxley** when I graduated from law school in 1975. Another major source was a history and biographical dictionary published in 1921 by **Thomas McAdory Owen**, a lawyer who founded and directed the Alabama Department of Archives and History, the first such department in the country. He and his wife, **Marie Bankhead Owen** (whose brothers were



Governor Albert Brewer

attorney-politicians and who led the department after her husband's death) gathered biographical data about thousands of those who populated the state during its first century. Because of their work, I was able to find information on almost every attorney from this period whose name I came across in other sources, including the almost 100 attorney-delegates to the 1901 constitutional convention.

One of the first things I did was to survey about 50 years of the *Alabama Review*, the journal of the Alabama Historical Association, for articles about lawyers. I found dozens, many containing interesting stories I probably would not have found anywhere else, and some written by such amateur historians as attorney **David Bagwell**, a 1973 law school graduate who has practiced in the Mobile area for most of his career, and **Albert Brewer**, former legislator and

governor and now professor at Cumberland School of Law.

The interesting thing about many of these articles was that the lawyers who were their subjects were as often as not also on the list of former Alabama State Bar presidents, providing me with tidbits about many bar presidents that were unrelated to their presidencies. I also discovered that such military heroes as **Joseph Wheeler**, **Raphael Semmes**, **E.W. Pettus** and **John Tyler Morgan** were attorneys.

The state bar provided me with copies of proceedings of years of state bar conventions at a time when the attendance was relatively small and the proceedings were transcribed verbatim, including many comments and debates which were a treasure trove of information from the "horses' mouths." Many of the comments seem to capture something of the personality or character of the person speaking. These proceedings also listed attendees and what local bar associations they represented, allowing me to see who were the bar activists from around the state. The proceedings were highlighted by speeches on the important legal and political issues of the day and provided background for the continuing evolution of the bar as an association and also the court and legal system in the state.

I also had access to proceedings of the Board of Bar Commissioners, which



Joseph Wheeler



John Tyler Morgan



Hugo Black



Lister Hill being sworn in by Vice President Garner

were especially helpful during the period of major reform and expansion after 1964. Then, too, *The Alabama Lawyer* began publication in 1940 and provided a wealth of information about the growth of both membership and services and about the attitude of the bar as a profession during a period of great change in the state and in the bar.

Old Martindale-Hubbell legal directories also were great sources of information, especially when it came to tracing the lineage of law firms in various parts of the state and determining the kinds of practices lawyers and their firms have engaged in throughout the years.



Senator Howell Heflin

Biographies of some of Alabama's great lawyers, including **Hugo Black**, **Lister Hill**, **Frank Johnson** and **Howell Heflin**, and books about the Scottsboro Boys, Phenix City and the political careers of **John Patterson** and **George Wallace** also gave insight to the story of lawyers in 20th-century Alabama. I was able to find details about many important Alabama cases of the civil rights era because attorney **Fred Gray** wrote an autobiography in which he included not only the facts and clients but also their attorneys and the judges who heard these cases. Attorney **Nina Miglionico** allowed me the use of several notebooks of information regarding female attorneys in the state which she had put together over the course of her more than 70 years in the profession.



Nina Miglionico

There are also historians who have spent at least part of their careers focused on Alabama, such as **Dan Carter**, **J. Mills Thornton**, **Malcolm McMillan** and **Leah Rawls Atkins**, whose works I relied upon heavily. An unpublished manuscript written by **Paul Pruitt**, **Howard Walthall**, **Tony Freyer** and **Timothy Dixon** about the Alabama Supreme Court and the legal profession was also made available to me.

I did some interviewing to give me direction, including conversations over the years with **Howell Heflin**, **Bill Hairston**, **Ira Burleson**, **Reggie Hamner**, **Frank Donaldson**, **George Peach Taylor**, **Rod Nachman**, **Atley Kitchings**, **Oakley Melton**, **Keith Norman**, **Judge Harold Albritton**, and, of course, my husband, **Sam Rumore**. I also had the input and comments of members of the **History and Archives Committee**, whose chairman is **Ben Spratling**. Still, I relied mostly on written sources so that I could thoroughly read and absorb information with the hope of enhancing the accuracy of my interpretation of what I learned. I can't be sure that I have been as accurate or thorough as I should have been since my mind is definitely not a steel trap, but I have tried and I apologize for any mistakes or injured feelings. I don't claim that this book is all original scholarship, as one can see from the variety of authors I have relied upon. I hope my attributions are adequate.



George Peach Taylor



Keith Norman

Did you know...?

Here are some tidbits of information which struck me as I read about lawyers and their lineages in the various biographical dictionaries and historical works available to me. Not all of these ended up in the book.

Some of our historically prominent legal families can trace their lineage to the Harrison family that produced two presidents, the Lee family of Old Virginia and that state's House of Burgesses, the Jones family (of John Paul Jones fame), and to members of the various delegations to the conventions which adopted the Declaration of Independence and the

U.S. Constitution. There was a definite sense of *noblesse oblige* among many of our attorney forefathers, some of whom (regretfully) led us into civil war, its corrupt Bourbon aftermath and the adoption of the 1901 constitution.

In the 1800s, it was not uncommon for families to be very large. The sons would usually become planters, doctors, ministers or lawyers. Sometimes the families would have to spread throughout multiple counties in order to have enough population centers to give them a living. Family names became associated with geographical regions. Today, these associations continue, but not nearly to the extent as during the 19th and 20th centuries because the major cities and large law firms have drawn lawyers away from smaller towns since the cities are the centers of government and commerce.

I found examples of families where the father had multiple sets of children because of the death of his first wife and remarriage to a younger woman. In some cases the half-families grew up at different ends of the state, producing two prominent legal families with common ancestors and common names.

I found myself becoming confused sometimes about who did what because of the many families with multiple generations of lawyers having the same name. An example is the family of **Alto Vela** and **William Lovard Lee**. The first Alto Vela Lee I found in Alabama was a lawyer born in 1844 in Barbour County. He had several sons, born in the 1860s and 1870s, who became lawyers, including **Alto Vela, Jr.** (who practiced in Gadsden) and **William Lovard**. **Alto Vela Lee III** of Dothan, who entered the bar in 1937, was president of the ASB in 1974-75. He practiced law with William Lovard Lee, who entered the bar in 1895, and **William Lovard Lee III**, who entered the bar in 1968. Although there is no Alto V. Lee in the bar today, William Lovard Lee III and **William Lovard Lee IV** (1995) currently practice together in Dothan.

Another interesting tidbit from Alabama's early history was the number of sisters in lawyer families who married into lawyer families and the number of wives who came from lawyer families. For instance, Vela, daughter of the origi-



Governor George Wallace blocking the door at University of Alabama

nal Alto Vela Lee, married lawyer **George W. Peach** of Clayton (the father of 1925-26 ASB President **John H. Peach** and grandfather of former University of Alabama law school Professor George Peach Taylor). Vela's brother, **Lawrence Haywood Lee**, also a lawyer, married Augusta Alston, daughter of **Augustus Holmes Alston** who was a lawyer and, later, supernumerary circuit judge. Of course, today, with the presence of many women lawyers, lawyers very often marry lawyers. There are a lot of interconnections and many proud heritages.

And, also...

Alabama's political history has been dominated by lawyers. One reason is that during the 19th and early 20th century, becoming a lawyer was primarily a matter of reading the law in a local firm and being admitted by local judges into the bar. Thus, a law license was easily come by and was a good credential for someone with political ambitions. Holding political office was a natural outgrowth of a lawyer's place in the local community and in the state.

Today, Alabama's bar has over 16,000 members, but more and more non-lawyers are dominating state politics outside the judicial branch. Commentators

say this is because there are fewer and fewer lawyers who can afford the time needed for politics because of the trend to tie income to the hourly rate they charge their clients. Hours away from their practices have a direct impact on income, and today's lawyers have greater expectations about what their income and lifestyles should be, expectations that some of today's "old-timers" have told me were not present when they entered practice in the 1950s and 1960s.

Also, the laws that attorneys work with in their day-to-day dealings have become much more complex and specialized in the last 50 years. Giving advice and ensuring compliance has become more time- and energy-intensive, leaving less time for the kind of service politics requires. And legal work has become multi-jurisdictional and even international, expanding the arena in which today's lawyers operate.

Another factor affecting public service is today's high cost of education, generally, and legal education, specifically. Many lawyers practicing today have substantial education debts to pay at a time when they are also establishing their professional and family lives. Their expenses can be huge and must be matched by their incomes. Their firms make demands for large numbers of billable hours as well.

Fortunately, lawmakers today have access to legal services from both the Legislative Reference Service and the Alabama Law Institute, institutions dating from the 1960s, when a great wave of reform swept the bar and the legal system in Alabama. Therefore, being a lawyer is not quite as important as it might once have been to a legislator. Still, legal training continues to be a great credential for political leaders and political life will continue to attract lawyers, even if the numbers are smaller.

Personalities...

The book is full of personalities. It does not contain the humorous “war stories” lawyers like to share, because there were so many important historical stories to tell. I am not going to highlight any here that are in the book. I will include one story that was too long to cover in the book, but that I found intriguing.

This story is about **Clement R. Wood**, whom I first came across in the 1912 proceedings of the state bar convention. He gave an address entitled “Progressive Ideals for the Lawyer.” At the time, he was 24 years old and very much the idealist, lecturing his elders on their failure to bring about adequate legal reform and adjuring them to lead the way to a progressive future in the state. He quoted a Yale law professor as saying, “Bluntly put, the American lawyer is a failure. In the administration of the law, America lags two generations behind the rest of the civilized world.”

Wood spoke specifically of the Alabama legal system as being antiquated, overly technical, exploitative of the poor and ruled by special interests, prejudice and undue influence, rather than impartiality. He then criticized the bar itself for dishonesty and “sharp practice.” Lawyers, he stated, are useless members of the social body if they do not fulfill their duty to see that justice is administered between man and man. They poison that social body if their activities cause delay or defeat justice or result in injustice or if they foment and stir up strife and litigation. He also criticized his fellow lawyers for their role in restricting voter eligibility in Alabama (which was described by a convention attendee to be something like five percent

of the population at the time), arguing that both the poor and women should be eligible to vote and the illiterate should be educated to take up the responsibilities of citizenship.

Wood’s talk was made during what is known in history as the “progressive era.” He defined a “progressive” as a person who held that the rights of the people were more important than the rights of property—the rights of the whole people and not of any class or division of them. He defined “a conservative” as one who stood for the continuance of “our present system of property rights and practices, and sees no need for any decided change in the system.” He stated that “the evils of the system often are a denial of justice to the poor and needy, rarely the rich and prosperous; the remedy is the restoring of the balance until it swings true for the poorest man as for the richest.”

During this period of the state bar’s history, time was set aside for discussion of papers. As you can imagine, Clement Wood’s talk stirred discussion. Emmet O’Neal, governor at the time, was in attendance and took particular offense with Wood’s remarks and let him, and the rest of those in attendance, know it. As I reviewed subsequent bar proceedings, I noted that Clement Wood did not attend another state bar convention.

My curiosity was piqued when I realized how young Wood was. How did he get the pulpit at the bar after only a year of practice? I found his biographical sketch in Owen’s *Dictionary of Alabama Biography* and became even more interested when I saw that he described himself as a member of Phi Gamma Delta college fraternity, a Methodist and a Socialist. I believe he is the only self-described Socialist I came across in all my research.

Clement Wood was the son of **Sterling Alexander Wood**, a lawyer who practiced in Birmingham, served terms as secretary (1884-1887) and clerk (1892-98) of the Alabama Supreme Court and was president of the Birmingham Chamber of Commerce in 1910, leading the legislative effort that year that expanded the City of Birmingham by incorporating several smaller towns into its city limits, resulting in Birmingham becoming the “Magic City.” Clement

was the grandson of **Sterling Alexander Martin Wood**, also a lawyer, who was a brigadier general in the Civil War.

Sterling Alexander Martin Wood served as attorney for Alabama Great Southern Railroad from its beginning after the war until his death in Tuscaloosa in 1891. His son, **William J. Wood**, was a lawyer who was third vice president of the L & N Railroad in Indiana and a member of the Ku Klux Klan.

Clement graduated from the University of Alabama, having served as editor of the *Corolla* and a representative to the southern intercollegiate oratorical contest. He went to Yale Law School, where he was an intercollegiate debater and assistant editor of the *Yale Law Journal*. Upon graduation, he entered practice in 1911 with his father. In addition to the speech he gave at the bar convention in 1912, he delivered two speeches entitled “Criminal Law and Women in Alabama” and “Scientific Basis for Equal Suffrage” before the Birmingham Equal Suffrage Association. These were not mainstream topics at that time in Alabama.

At about the same time, he was appointed judge of the Birmingham Recorder’s Court to replace Hugo Black, who had served the previous 18 months. In this position, Clement Wood had to deal with an entrenched system of law enforcement which harassed poor blacks, often trumping up charges to arrest vagrants and put them on forced labor gangs to collect the costs which paid law officers’ salaries. This system was the antithesis of Wood’s progressive ideals. He left that bench and ran as one of three candidates for Birmingham mayor in 1913. He came in second.

Soon Wood removed himself from the Birmingham legal scene, moved to New York City and became a prolific and successful writer of novels, essays, poems and even dictionaries and histories. There are close to 40 titles of his works in the stacks of the Linn-Henley Southern History Department of the Birmingham library, including an autobiography entitled *The Glory Road*.

In that book, where he described his youth in Birmingham, Wood called himself a rebel against his father’s politics and religion (Roman Catholic) and conservatism and everything for which he stood. He

wrote, “For years we were not on speaking terms... If I couldn’t remember so clearly the daily thrashings he used to give me, to cure me of what he called my laziness, and what I still think was my differentness, we might have been better friends later on. I admire him still, somewhat as I admire Gibraltar.”

After arriving in New York, he “waited on tables at a Socialist eatery, scribbling poems on my way to and from the kitchen, as I had scribbled them during the boring arguments of windy lawyers in the recorder’s court.”

He continued,

“I worked at night for the Rockefeller Vice Investigation, and by day for Upton Sinclair, at a moment when the two were as thick as two clawing Kilkenny cats. I became a teacher and then vice-principal at a conservative boys’ preparatory school; and, at night, soapboxed the East Side as a Socialist candidate for alderman or something easily as cosmic. Editors began paying me for my stories and books, to my amazement, and I hard-heartedly let the field of pedagogy stagger along as best it could without me thereafter. I married. I learned a lot about girls and women. I had some share in the making of two splendid children, and was quite impotent to persuade their mother that a woman could be mother and wife both. She was certainly an excellent mother. After I was divorced, I was luckier than most people and found out what love was...”

In a section about his memories of Birmingham, Wood wrote,

“Would you see what the city hides? Go to her police courts. I presided over one, until my lack of tact, in jailing the Democratic boss for being caught with a girl and then boasting that he had fixed it with me, eased me into friendlier service.

“I presided over one. I have not forgotten. Thirty-seven Negroes jugged at a ‘chitterling party’ for laughing louder than Ordinance 99 allows.

“‘Five dollars and costs,’ the judge yawns. The officer earns thirty-seven convictions... thirty-seven sets of costs.

“Five dollars means ten days; costs, two weeks more. Thirty-seven Negroes...”

“I heard a woman singing softly, as her barred slavery began: ‘I am so glad that Jesus loves me, Jesus loves me, Jesus loves...’

“‘Shut up, you black sow.’

“‘What the city hides...’”

In another part of the chapter about Birmingham he wrote:

“You talk a lot about leading law-abiding lives, and earning Heaven.

“Your penny-greedy department stores start their girls on six a week. They find Heaven, of course.

“Your Negro workers find the white hand heavy. The merchant lies: ‘This bill was never settled.’ The lawyer lies: ‘This title is not good.’ The farmer lies: ‘Your cotton’s underweight.’ The poll clerk lies: ‘The law won’t let you vote.’ The detective lies: ‘I seen him do it, Yer Ronner.’ The jury lies: ‘We find the defendant guilty.’ The old judge lies: ‘You need a life sentence...’ The lynching rope, the lynching fire, don’t lie, in their rare black words. The Negroes find Heaven, of course.

“The white workers get more wages, enough to bribe death briefly. They find Heaven, of course.

“The women can go to church in last year’s suit. Their men are often polite and loving in public. My father was. They don’t need justice: they have chivalry. They find Heaven, of course.

“But the rich lead stainless lives, meekly receive their dividends, enjoy their women, and I said women, with Christian humility, please the heart of Christ by gifts to charity and the Democratic party, and go to glory in twelve-cylinder limousines. They find Heaven!”

Finally, he wrote:

“The next thing is hard to say. In 1900 it was the L & N. In 1910, it was the Steel Trust. In 1920, it was the Power Trust. In 1930—but the Power Trust hasn’t moved.

“Shall Birmingham have prohibition? See what the Power Trust says.

“Shall its legislators vote for equal suffrage? See what the Power Trust says.

“Shall its papers publish this truth or that lie? See what the Power Trust says.

“Shall its preachers thunder for this cause, or damn it with the ancient curse? See what the Power Trust says.”

I include this story here because Clement Wood was an Alabama lawyer, even though he did not stay in the state and practice law very long. His legal training and perspective and family ties and upbringing informed his outlook on life. His story influenced my writing of *From Power to Service* even though I don’t believe I even mentioned him. To me, he is part of the story of lawyers in Alabama. My definition is broad because I find it fascinating to see the twists and turns lawyers’ lives can take and I also feel that legal training forms a person to have a definite outlook, that of a lawyer.

At the time this issue went to press, *From Power to Service: The Story of Lawyers in Alabama* was scheduled to be published in February 2010. A pre-publication discount (shipping and handling charges will be waived on all orders for a specified period of time) will be offered to those who purchase the book. The book can be ordered only by using a credit card. See the ad in the January 2010 issue of *The Alabama Lawyer* and look for e-mail announcements and information posted online at www.alabar.org/historybook. ▲▲▲



Pat Boyd Rumore has been a member of the Alabama State Bar since 1975. She attended the University of Alabama School of Law, was a law clerk for Chief Justice Howell T. Heflin of the

Alabama Supreme Court and has practiced law in various capacities for almost 35 years. Her book *Lawyers in a New South City*, written for the Birmingham Bar Association, was published in 2000, with a second edition in 2006. She lives in Birmingham with her husband (and law partner), former ASB president Sam Rumore.

Alabama Attorneys Complete Work at Annual Uniform Law Conference

By Representative Cam Ward

As they've done each summer since 1892, uniform law commissioners gathered for a full week to discuss—and debate line by line and word by word—legislative proposals drafted by their colleagues during the year. Once again, commissioners from Alabama were heavily involved in the debate of new acts approved by the conference.

This year, the Uniform Law Commission (ULC), at its 118th Annual Meeting in Santa Fe, approved five new acts dealing with issues ranging from a new law that addresses the various penalties and disqualifications that individuals might face incidental to criminal sentencing to a new act regulating the non-probate transfer of real property upon an owner's death.

The ULC has worked for the uniformity of state laws since 1892. It was originally created by state governments to consider state law, determine in which areas of the law uniformity is important and then draft uniform and model acts for consideration by the states. For well over a century, the ULC's work has brought consistency, clarity and stability to state statutory law.

Uniform law commissioners are appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The commissioners draft proposals for uniform laws on issues where disparity between the states is a problem.

Alabama commissioners **Jerry Bassett, Bill Henning, former Chief Justice Gorman Houston, Tom Jones, state Senator Ted Little, Bob McCurley, Bruce McKee, state Representative Cam Ward, and Joe Colquit** attended the meeting along with more than 200 lawyers, judges, law professors, legislators, and government attorneys appointed in their respective jurisdictions to serve as uniform law commissioners.

The five acts recently approved by the ULC and now available for state enactment include:

The **Uniform Collateral Consequences of Conviction Act** addresses the various penalties and disqualifications that individuals face incidental to criminal sentencing, which are often known as “collateral consequences” and include such penalties as disqualification from voting, prohibitions from running for office, exclusion from certain types of employment, etc. The provisions in the act are largely procedural, and designed to rationalize and clarify policies and provisions which are already widely accepted by the states. The act includes provisions to ensure that defendants are aware of the existence of collateral sanctions before sentencing.

The **Uniform Real Property Transfer on Death Act** provides a mechanism for the

non-probate transfer of land. The act allows an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. The property passes by means of a recorded transfer on death (TOD) deed. During the owner's lifetime, the beneficiary of a TOD deed has no interest in the property and the owner retains full power to transfer or encumber the property or to revoke the deed.

The **Uniform Law Enforcement Access to Entity Information Act** is designed to be a substitute for the Incorporation Transparency and Law Enforcement Assistance Act (S.569), currently pending in Congress (co-sponsored by senators Levin, Grassley and McCaskill). S.569 would require virtually all corporations and limited liability companies to file “beneficial ownership” information with the secretary of state. The Uniform Act, a joint project with the ULC and the American Bar Association Committee on Corporate Laws, and supported by the National Association of Secretaries of State, would preserve the traditional confidentiality of entity ownership and would instead require the filing of the name of an individual (a records-contact) who would be responsible for obtaining, maintaining and verifying record ownership information.

The **Uniform Collaborative Law Act** will regulate the use of collaborative law, a form of alternative dispute resolution that is becoming more popular in the states. As one of the commissioners serving on this drafting committee I am glad to see over two years of work finally come to fruition. Collaborative law is now used mainly in family law disputes, but its practice has spread to other areas of the law, including the settlement of contract and insurance disputes. States have approached the regulation of collaborative law through a variety of means, including statutes, court rules and independent boards. This new act standardizes the

most important features of collaborative law participation, mindful of ethical concerns as well as questions of evidentiary privilege.

The **Uniform Statutory Trust Entity Act** governs the use of statutory trusts as a mode of business organization. A statutory trust provides a flexible business entity that can be used as an alternative to the partnership, limited partnership, limited liability corporation and corporate forms of organization. Statutory trusts are commonly used in the mutual fund and securitization industries, and are also used in certain tax-advantaged real estate transactions. The Uniform Act modernizes the existing, but outdated, laws governing these types of entities.



A portion of the **Uniform Business Organizations Act** (UBOA), containing language to harmonize common provisions found throughout existing business organization acts, such as the Uniform Partnership Act and the Uniform Limited Partnership Act, was also approved. This portion of the project establishes common definitions, and makes the mechanics of filing, qualification of foreign entities and entity transaction provisions on mergers, interest exchanges and domestications consistent between the various business entity acts. Work continues on the rest of the UBOA.

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.

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 58 uniform or model acts promulgated by the ULC. Alabama currently has nine uniform law commissioners appointed to the ULC: Jerry Bassett, former Tuscaloosa Circuit Judge Joe Colquit, Bill Henning, former Chief Justice Gorman Houston, Tom Jones, state Senator Ted Little, Bob McCurley, Bruce McKee, and state Representative Cam Ward.

The procedures of the ULC 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.

The ULC continues to strengthen the role of state law in our federal system. As new technology wears away geographical borders and matters of law implicate more than one state, consistency in rules and procedures becomes ever more critical. The Uniform Law Commission continues its commitment to help sustain the independence of the states, while achieving a uniform legal system for the nation. ▲▼▲



***Representative Cam Ward** serves in the Alabama House of Representatives for District 14, which includes Bibb, Chilton, Jefferson and Shelby counties, and is the executive director of the Alabaster Industrial Development Board. He is a graduate of Troy University and 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. He also volunteers time as chair of the Alabama Autism Task Force.*

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PRO BONO LEGAL SERVICES: No “Shuckin’ and Jivin’”

By Pamela H. Bucy

On July 9, 2006, Bill Redmond,² age 77, passed away. When he became sick with lung disease years before, he became confined to a wheelchair and bed. At that time he told Debby,³ his wife, that he did not want to go to a nursing home. She said, that’s fine, I will take care of you. And she did.

Over 6 feet tall, Mr. Redmond was not easy to move. Yet sometimes alone, sometimes with the help of their children, Mrs. Redmond moved her husband multiple times a day, year after year, from a bed to a wheelchair, to a car, back to the wheelchair, to a couch, and back to the bed. During the years she cared for her husband, Mrs. Redmond, then in her mid-sixties, had a series of strokes. But she kept taking care of her husband. As she says, “it was the sick taking care of the sick.”

Mr. and Mrs. Redmond had been married for over twenty years when Mr. Redmond passed away, in 2006. During that time they lived with Mrs. Redmond’s ten children, in a small house on “their property,” outside of Daphne, Alabama. The property had been given to Mr. Redmond and his three siblings by their father who had farmed it during his lifetime. In his will, Bill Redmond left everything he owned to his wife, including his share to his family’s “their property.”

Mr. Redmond’s siblings treated Mrs. Redmond, whom they called “Sis,” graciously throughout the twenty-year Redmonds’ marriage. Mrs. Redmond was stunned to come home from her husband’s funeral to find a “For Sale” sign in front of their home. Her in-laws had decided that she owned no interest in the

property, that they owned it all, and that they could sell the property as they wished. At no time had Mrs. Redmond’s in-laws lived on the property, maintained it, or paid taxes on it. Bill and Debby Redmond had lived in the home continuously for over twenty years, made improvements on the home, maintained the property, enlarged the house, and had paid all taxes on the property.

Hurt and surprised by her in-laws’ action, Mrs. Redmond asked them what was going on. Her brother-in-law advised: “Let’s keep other people out of this. Let’s keep it between us. I’ll take care of you.” Meanwhile, these in-laws told the real estate agent with whom they had listed the property that Mrs. Redmond was not entitled to any portion of the property and that it was fine to sell the property because “Sis can go live with one of the kids.”

At this point a local property appraiser who saw what was happening asked Sam Crosby if he would help Mrs. Redmond. It would be a pro bono case. Mrs. Redmond, disabled by strokes and unable to work, had no funds. By any measure, her home, her only asset, is exceedingly modest although as Sam Crosby says, “You could offer her the Taj Mahal and she would choose her house.”

Sam Crosby took on Mrs. Redmond’s case. After three years, a title search, a petition for division, a counterclaim for partition and reimbursement, multiple conferences in probate court, a scheduled trial, and tense settlement conferences on the eve of trial, Mrs. Redmond won. Thanks to Sam Crosby, she now has the

title to her home, one-half of the road frontage of the property, and over two of the nine acres in the original plot.

What does Mrs. Redmond have to say about Sam Crosby? “They were hammering me down. If it hadn’t been for Mr. Crosby, I wouldn’t have made it.”

Why does Sam Crosby, a former State Bar President, do pro bono legal work? Here is his answer: “We can wiggle around, shuck and jive, and avoid lots of stuff, but it’s clear that the obligation of a lawyer is to serve the poor.”⁴ Sam has advice for new lawyers struggling to build their careers and practices: “Whenever you do pro bono work it comes back to help you. If you have down time – and we all do – spend it doing some pro bono work.” ▲▼▲

Endnotes

1. Quoting Samuel N. Crosby, Stone, Granade & Crosby PC; past president, Alabama State Bar, 2007-08
2. A pseudonym
3. A pseudonym
4. Sam cites to the Preamble of the *Alabama Rules of Professional Conduct*.



Pamela H. Bucy is the Bainbridge-Mims Professor of Law at the University of Alabama. She has served as a member of the Alabama State Bar Access to Legal Services Committee, as an at-large bar

commissioner and as vice president of the Alabama State Bar.

The Alabama Administrative Office of Courts recently updated the Juvenile Court Attorney's Fee Declaration Form to be used by attorneys who handle appointed work in juvenile court, effective October 1.

State of Alabama Unified Judicial System Form C-62B Rev.10/09	ATTORNEY'S FEE DECLARATION (Juvenile) [For Work Submitted for Payment On or After 10/01/2009]	County Code — —	Case Number Jurisdiction Year Case Suffix
---	---	-----------------------	--

IN THE JUVENILE COURT OF _____ COUNTY In the matter of juvenile case number above	Attorney Name (Please type or print) _____ Social Security Number or FEIN _____
--	--

Appeal to: <input type="checkbox"/> Alabama Court of Criminal Appeals <input type="checkbox"/> Alabama Court of Civil Appeals <input type="checkbox"/> Supreme Court of Alabama	Type of Case: <input type="checkbox"/> Delinquency <input type="checkbox"/> Dependency <input type="checkbox"/> In Need of Supervision <input type="checkbox"/> Other (describe): _____	Role: <input type="checkbox"/> Guardian Ad Litem <input type="checkbox"/> Child's Attorney <input type="checkbox"/> Parent's Attorney <input type="checkbox"/> Other (describe): _____
--	---	--

The undersigned attorney declares that on (date) _____, the Honorable _____ Judge, appointed the undersigned to represent the child parent/legal guardian/legal custodian, petitioner and on (date) _____, the case was disposed of by _____
(Adjudication of dependency, in need of supervision or delinquency, cert. denied, etc.)

The undersigned attorney further declares that he/she has provided services in the case as attorney or guardian and item and makes the following claims for such services:

(1) In-court Appearance (Trial Level or Post-Conviction Proceeding)	Total Hours _____ x \$ 60.00 per hour = _____
(2) Out-of-Court Preparation (Trial Level or Post-Conviction Proceeding)	Total Hours _____ x \$ 40.00 per hour = _____
(3) Preparation (Appellate Level)	Total Hours _____ x \$ 60.00 per hour = _____
(4) Extraordinary Expenses (if approved in advance by court)	_____
(5) Overhead Expenses (if approved in advance by court)	Total Hours _____ x \$ _____ Per hour = _____
TOTAL CLAIM OF ATTORNEY _____	

NOTICE TO ATTORNEY: Complete this form. Attach a copy of a complete itemization of (1) in-court appearance; (2) out-of-court preparation; (3) preparation for appeals; (4) extraordinary expenses; and/or (5) overhead expenses reflecting the date of actions and amount of time involved in each activity. Make a copy of same for the court's record and a copy for your records. * NOTE: In juvenile cases, this fee shall not exceed \$2,000. Attorneys serving in the capacity of Guardian Ad Litem must be certified as per Ala. Code 1975, §12-15-304.

The undersigned attorney further declares that the above claim is true and correct and represents the services actually rendered by him/her as an attorney and the amount is due and payable. I further declare that the above claim is not a duplication of charges and expenses in any case (companion or otherwise) and that if serving as a Child's Attorney or Guardian Ad Litem, I have performed the duties required under Ala. Code 1975, §§12-15-202 and/or 12-15-304 as applicable.

Sworn to and subscribed before me this _____ day of _____ _____ Notary Public	Signature of Attorney _____ Attorney Code _____ Mailing Address of Attorney (please type or print) (including city, state, and zip code) _____ _____ Telephone Number _____ Fax Number _____
---	--

I, the undersigned judge, hereby certify that the foregoing claim has been presented to me, and I have reviewed the same and believe the same to be true and correct. I am further of the opinion that the attorney is not duplicating these charges and expenses in any case (companion or otherwise).

Based on the above, I hereby approve the declaration and claim in the amount of \$ _____

Done this _____ day of _____

 Judge's Signature

NOTICE TO ATTORNEY AND JUDGE: Ala. Code §§ 15-12-21 through 15-12-23, provide that fees and expenses of court appointed attorneys shall be paid by the State of Alabama.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, FILE WITH THE CLERK, WHO SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER FOR AUDIT.

MAIL TO: State Comptroller, Indigent Defense Section, P.O. BOX 302602, Montgomery, Alabama 36130-2602.

Filed in the Clerk's Office at _____ Alabama, on _____ date _____.

It is that time of year again.

Most of us will be making plans to spend time with friends and family. The holidays have a way of reuniting us in celebration. As I write this introduction, I am cognizant of the Alabama lawyer who took his life last week and the other Alabama lawyer who, the week before, died as a direct result of his addiction to alcohol. This holiday season these two families will be experiencing their first holidays without their loved ones.

Each year, prior to attending our National Conference on Lawyer Assistance Programs, I am asked to fill out a program update. This update inquires about program achievements, goals and activities for the year. The one question I dread answering every year is the question regarding program setbacks or disappointments. I have answered this question consistently for 12 years in the same identical manner. The primary setback in Alabama is that we still have lawyers and judges who died needlessly from an addiction or other mental health related disorder. These illnesses are treatable and hundreds of Alabama lawyers have who have received assistance through ALAP are active members of their families and successfully practicing law today.

Education is the best form of prevention. Unfortunately, ignorance about these illnesses is still prevalent amongst the most educated.

Stigma prevents those in need of help from seeking help and those who see it, from exposing it; and as the disease is permitted to progress the probability of recovery decreases. Let's make 2010 the year in which no Alabama lawyer has to lose his/her life needlessly to one of these illnesses. If you or somebody you care about is struggling, I encourage you to call ALAP for **confidential** assistance or visit our Web site for additional information at www.alabar.org under the Lawyer Assistance Program.

—Jeanne Marie Leslie RN, M.Ed. MLAP, Alabama Lawyer Assistance Program Director

(ALAP and the Lawyers Helping Lawyers Committee of the Alabama State Bar wish you and your families a blessed holiday season. Please remember our loved ones are on the road so don't drink and drive.)



A Trip Through Depression

By an Alabama lawyer

I hope this description of my trip through depression will help someone else recognize he or she has a problem and seek help before it reaches a crisis.

In school, I succeeded without trying, graduating in the top 10 percent of my high school class and, after a sojourn in the “real” world where I received promotion after promotion, with a 3.9 undergraduate GPA and in the top 10 percent of my law school class. In law school, I also made it to the final round of its voluntary moot court competition and was elected head of the moot court board. At the large law firm in a mid-size Southern city with which I started practicing, I worked on large complicated matters, was known for a keen insight on legal issues and for meeting deadlines, became a partner and was elected to its executive committee. I lived in an expensive house,

owned a beach house and had a wonderful daughter.

But, after 20 years of practice, I could no longer focus on work and began missing deadlines. I knew something was wrong but had no idea what it was. I even thought I might have a brain tumor. Luckily, one of my partners suggested I see a psychologist.

A personality profile test revealed that I was depressed, anxious, not thinking rationally and suffering from several other psychological impairments (all brought on by the depression). The clinching symptom was suicidal ideation—knowing how I would commit suicide if I was going to do it. In fact, although I was never tempted to attempt suicide, I looked for the opportunity every day. Even though the personality profile indicated I was not open to

psychoanalysis, I knew I had to have help and gave it a chance. I also started depression medication.

Within two months I felt an emotion for the first time in at least two years, and as perverse as it may sound, I was happy a few weeks later when I had a slight downturn in mood because it made me realize that I was feeling enough better to have a downturn.

However, all still was not well. The anxiety caused me not to be able to sleep or eat—I had lost 15 pounds in six weeks. My initial medication contributed to those symptoms. Because I needed more medication, my psychiatrist added another one that had side effects of drowsiness and increased appetite. My psychiatrist also recognized that, in addition to depression and anxiety, I had attention deficit disorder and began medicating me for it.

During therapy, I recognized that my professional life was contributing to my depression and anxiety so I told my partners about my condition and turned in my resignation. To protect the firm, I suggested that it begin an immediate review of my files and that a partner or partners be assigned to monitor my work until I left. The firm agreed and we began the process of a friendly separation (for which I will forever be grateful to my former partners). During that process, I introduced my partners to each of my clients so that the clients would have a smooth transition regardless of what happened with my future as a lawyer.

Within three or four months, I could tell that the medicine and psychoanalysis were having a long-term effect but I was far from “cured.” Further improvement required “tinkering” with my medication numerous times. Each “tinkering” ran the risk that I would slide backward instead of moving forward. Throughout this entire period, I was receiving psychotherapeutic counseling—weekly at first, then bi-weekly, then monthly and finally every six weeks. Even today, I return every six months for a “check-up.”


Finally, about two years after I started treatment, I had recovered to the point of starting to reduce my medication—but even then; I had not reached maximum recovery. One evening at about the three-year point, I sat down to work on a brief and did not get up until the brief was finished, six or eight hours later—I could finally concentrate the way I had early in my career. However, I also had realized that I needed periodic breaks to protect my emotional and mental states.

Finally, six years into my treatment, I reached the best emotional state I had ever experienced in my life. I am happier than I have ever been, I again enjoy practicing law and am again good at it, I handle people better than I ever have, I have more business than I ever would have had if I had stayed with the large firm with which I practiced for over 20 years, and most of my former clients are still or again my clients.

What did I learn as a result of this process?

1. Without realizing it, I had been clinically depressed at least four times in my life—once as a teenager, once when my first marriage disintegrated, once when my father died and the extended period just before I sought treatment.
2. If you know how you would commit suicide, you are severely depressed and need treatment even if you are never tempted to commit suicide.

3. Depression and anxiety often go hand in hand, and there are medications that treat them both at the same time. Frequent headaches at work or while thinking about work, your scalp feeling like it is crawling around on your head, knots in your stomach, or mental paralysis are among the symptoms of anxiety.
4. Depression and addictions such as alcohol or drug addiction frequently go hand in hand and many people with depression end up in jail. I was lucky enough not to have those problems.
5. Treatment works—if you are depressed, you will likely need both medication and psychotherapy. Many people with single-episode depression can discontinue medication once the depressive episode is over but people with multiple episodes of depression will likely have to continue medication all their lives.
6. Although treatment works, it takes a long time—don’t get discouraged.
7. Once you are comfortable doing so, don’t be afraid to talk about your depression (at the same time, I don’t advertise that I suffered from depression). If you convey that you are comfortable with yourself despite a depressive history, you have nothing to fear. Others will likely be impressed with your recovery, you will likely make some others realize that they do not have to be ashamed of a depressive history and you may make someone else recognize he or she needs treatment. You also will be surprised at how many others have suffered from depression.
8. To recover, I had to become comfortable with myself. For me, that meant I had to learn what was important to me, not what I thought was necessary to impress others. I reached that point when I realized that I could be satisfied living in the worst house I had ever lived in as long as I was comfortable with myself. To get there, I had to give up a law practice that most lawyers would envy; leave a marriage to a wonderful woman who supported me throughout my depression but who is not the right person for me to be married to; face my partners, friends and family and tell them I had a depression problem; learn to take a couple of 10- to 15-minute breaks a day from work; realize that it is better to hire someone else to do many things I could but should not do, such as work on our computers, and to give up control of my mail, desk, to some extent my calendar and some of the work I bring in (giving up control probably was the hardest thing for me to do) to other people I work with; and surround myself with co-workers whom I enjoy being with.

My life is not, and will not be, perfect all the time. But I have learned to accept myself. That allows me to successfully deal with many problems that at one time could have sent me spiraling downward. To get there, it took three years of therapy and six years of tinkering with my medication—but it was worth it. If I had started earlier, it would have taken less time. To stay where I am will take continued medication and the continual application of the coping mechanisms I learned. However, without the major depression I suffered, I never would have felt as good as I now feel. Hopefully, this description of my experiences will help someone else avoid experiencing the depth of depression I experienced. 

by an affidavit corresponding to that prescribed in Form 15 (and that affidavit shall include answers to the questions set out in Form 15).

The docket fees herein prescribed shall be in lieu of all other court costs in the particular proceeding before the appellate court, unless the court orders otherwise, and may be taxed as costs, as provided by Rule 35.

- (b) **Docket Fees in Criminal Cases.** Unless an appellant proceeded before the trial court in forma pauperis and that status has not since been revoked, or unless the appellant is granted permission to proceed on appeal in forma pauperis either by the trial court or by the Court of Criminal Appeals, the appellant shall pay a \$200.00 docket fee to prosecute his or her appeal in the Court of Criminal Appeals; provided, however, that that fee shall be waived in any appeal in which the State is the appellant. The docket fee prescribed herein shall be in lieu of all other fees and costs prescribed by law for appeals to the Court of Criminal Appeals and shall be paid to the clerk of the trial court at the time the appellant files his or her notice of appeal. The clerk of the trial court shall then remit the docket fee to the clerk of the Court of Criminal Appeals as provided in Rule 3(d)(2). After the docket fee has been paid, in whole or in part, the Court of Criminal

Appeals shall not be required to refund any portion thereof because the appellant, on whose behalf it was paid, is subsequently granted in forma pauperis status or because the appellant's appeal is subsequently dismissed without a decision on the merits.

Upon receipt of the trial court clerk's transmittal of an appellant's notice of appeal, the clerk of the Court of Criminal Appeals shall docket the appeal regardless of whether the transmittal is accompanied by the docket fee prescribed herein. After docketing an appeal in a case in which it appears that the docket fee is due, in whole or in part, the clerk of the Court of Criminal Appeals shall issue a deficiency notice advising the appellant that the appeal will be dismissed with prejudice unless the appellant has, within the time prescribed in said deficiency notice, either paid the docket fee in full or sought leave to proceed on appeal in forma pauperis as authorized in Rule 24(a). If, within fourteen (14) days of the date of issuance of the deficiency notice, the appellant has not paid the docket fee in full or sought leave to proceed on appeal in forma pauperis or otherwise shown that the docket fee is inapplicable, the appeal shall be dismissed with prejudice and may not thereafter be reinstated except on motion for good cause shown made within 14 days from the date of the certificate of dismissal. ▲▼▲



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Better Me than You



By *Samuel S. Partridge*

Some con artist in a far-off place does not like me anymore. For a couple of weeks we were best pals. I was just the right lawyer and he was a very responsive client who followed all of my advice. He was so pleased that I was representing him with his collection matters that even in these dark economic times, he eventually offered to double my fee. What a guy. Clients like him do not just grow on trees but con artists are a dime a dozen. I was a big fish on his line and he was deftly trying to land me and mount me on his living room wall. He believed that once caught, my wallet would overflow with a nice little payday to the tune of around \$200,000. Fortunately for me, I found some rocks near the bottom and broke the line. I get the feeling that as I tell this story, he is still wondering how it all went so horribly wrong.

It all starts with a nice little e-mail from parties located in whereabouts unknown. These individuals own a large foreign entity. They got your name from a lawyer in another state. You are the man for this job as your stellar legal reputation precedes you. All you have to do is collect a little money for them and

they will make it worth your while. They have some clients here in the U.S. whose accounts are delinquent and they need you to initiate collection efforts. Name your retainer. I guarantee you they will pay it, or at least promise they will.

In early June 2009, my new best client called himself Mr. Robert Weng and his trusted business associate referred to herself as Ms. Aletha Patrick. Their business, Matilla Manufacturing, is located somewhere in China. They really needed my help. I e-mailed them back and told them I was a helpful kind of guy. They were so pleased. I told them that in order to begin my efforts on their behalf, I would require a \$10,000 retainer. They needed to think about it for a minute or two and accepted almost immediately. Just a few days later I received a voicemail from a foreign gentleman named Sam Moore. He needed to verify my address so that he could send me a cashier's check. I knew at this point that my little reverse scam operation was likely finished. My voicemail identifies my title as assistant general counsel and our receptionist had answered the switchboard with her familiar greeting



"Not worth the paper it's written on" – above is the \$361,000 check Sam Partridge received from a "friend."

"Alabama State Bar." I returned his call but he was none the wiser. The check was on the way.

I then got the best news of the year. My clients had taken it upon themselves to contact one of their customers to inform them that I was onboard. The customer became fearful that I was about to unleash a brutal legal assault. Of course, they paid up. Wow, I thought. Just the mere mention of my name and the money was flowing. I must be a pretty scary guy. The customer was sending me the check directly and I could take my retainer out of the proceeds I collected. I could even take an extra \$10,000 for future legal work. Great! Now I could buy that new boat I had been eyeing. All I had to do was wire the balance to their corporate account in China.

Within a few days the check arrived. It was drawn on a Citibank account made payable to "yours truly" for \$361,000. The return address was Ontario, Canada. I was instructed to deposit it in my trust account and wire out \$200,000. They informed me to hold the balance in my trust account and await future instructions. I informed my client that I would be depositing the check that afternoon. Immediately thereafter, I received my wiring instructions. Then the unthinkable happened. I disappeared and was never heard from again.

They sent desperate emails and even Mr. Weng himself left me a voicemail. They needed their money now or they were going to be in breach of contract with one of their associates. It was a bleak situation. Their vast manufacturing empire was crumbling around them and it was all my fault. Where had their trusted lawyer gone? I think I may have even violated the

Alabama Rules of Professional Conduct when I stopped communicating with them and failed to inform them of my withdrawal. I guess I will need to self report.

It is easy to make light of this situation and I must admit that I did smile as I was scamming these scammers. The scary side of this charade is that, on occasion, it works. There are law firms that have wired out large sums of money to foreign banks. The check that they received allowed the funds to become available for a short period of time. Later, the bank informs them that the check is actually a forgery and that they are the responsible party. When I called Citibank I was informed that the account number is valid and belongs to Citibank of Canada.

If you receive a suspicious e-mail or telephone call, stay on alert. My Matilla Manufacturing friends were easy to recognize from the onset as a fraud but I have heard of some scammers who can be particularly savvy. If you think that a potential client is a con artist, I can guarantee you that they probably are. I would suggest not responding but, in my case, I could not resist. It was just too much fun to waste some of their time and effort and, along the way, I knew that they could not use some of that time to scam somebody else. ▲▼▲



Samuel S. Partridge is an assistant general counsel of the Alabama State Bar.

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J. ANTHONY MCLAIN

Contact with Employees of Opposing Party—Refined Opinion

QUESTION:

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

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

ANSWER:

Pursuant to Rule 4.2 of the *Rules of Professional Conduct* of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of

OPINIONS OF THE GENERAL COUNSEL Continued from page 465

the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a “person . . . whose statement may constitute an admission on the part of the organization” should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

DISCUSSION:

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

“Rule 4.2 Communication With Person Represented by Counsel

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

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

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

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

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

statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation.

Others have held that the prohibition applies to any employee whose statement would constitute an “admission against interest” exception to the hearsay rule, as provided in Rule 801(d)(2) of the *Rules of Evidence*. Still others have interpreted the Rule narrowly to prohibit contact with only a “control group,” which is limited to the company’s highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

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

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

* * *

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

* * *

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

* * *

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

* * *

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

* * *

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

* * *

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

sufficient to give them the right to speak for, and bind, the corporation.'

* * *

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

* * *

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper



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OPINIONS OF THE GENERAL COUNSEL Continued from page 467

advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over non-organizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

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

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

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

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

"Rule 4.1 Truthfulness in Statements to Others


In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

* * *

"Rule 4.3 Dealing with Unrepresented Person

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

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication. [RO-02-03] 

Endnotes

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



ROBERT L. MCCURLEY, JR.

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

The Alabama legislature convenes January 12, 2010. The following is a summary of the new revisions the Institute will ask the legislature to consider.

Alabama Power of Attorney Act

The Alabama Law Institute has completed a two-year study of Alabama's Power of Attorney Act statute. This committee, chaired by **Richard Cater** of Montgomery, included the following committee members:

Lee Armstrong, Auburn
 John Daniel, Birmingham
 Edward Dean, Birmingham
 Professor Michael Floyd, Birmingham
 Randy Fowler, Tuscaloosa
 Anna Funderburk Buckner, Birmingham
 Professor Tom Jones, Tuscaloosa
 Bruce McKee, Birmingham
 Robert Meadows, III, Opelika
 Marcus Reid, Gadsden
 Ronald Sims, Birmingham
 Carol Ann Smith, Birmingham
 Finis St. John, IV, Cullman
 L. Vastine Stabler, Jr., Birmingham
 Leonard Wertheimer, III, Birmingham
 Brian Williams, Birmingham
 Scott Adams, Birmingham

A "power of attorney" is an authorization for one person to act on someone else's behalf in a legal or business matter. The person authorized to act is the "agent" and the person granting the authorization is the "principal." A durable power of attorney is a power that continues or becomes effective after the principal becomes incapacitated. The concept of a durable power of attorney was first incorporated into the *Uniform Probate Code* in 1969 to offer an inexpensive method of allowing another decision maker to those whose modest assets did not justify a trust or property management with a conservator appointed by the court.

LEGISLATIVE WRAP-UP

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Alabama passed our current durable power of attorney statute in 1997 (*See Ala. Code § 26-1-2*). This is the only *Code* section relating to durable power of attorneys. One must designate the power of attorney as “durable” for it to remain in effect even when the maker subsequently becomes incompetent. The default rule remains for powers of attorney to be void when the maker becomes incompetent and has not specifically designated the power to continue when the maker is incompetent. This act preserves the effectiveness of durable powers as a low-cost, flexible and private form of decision-making for property, and does not include health care decisions.

The act offers clear guidelines for the agent, who is often a trusted family member. The act:

- Recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests;
- Permits a principal to include in the power of attorney an exoneration provision for the benefit of the agent; and
- Provides ways for the agent to give notice of resignation if the principal is incapacitated.

The act encourages acceptance of a power of attorney by third parties by:

- Providing broad protections for the good faith acceptance or refusal of an acknowledged power of attorney;
- Recognizing portability of powers of attorney validly created in other states;
- Offering an additional protective measure for the principal by providing that third persons may refuse the power if they have the belief that “the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or person acting for or with the agent, and make a report to the appropriate adult protective service agency”; and
- Providing a statutory form for designation of an agent and grant of authority through this optional statutory form.

The act is effective for powers of attorney made after January 1, 2011.

Model State Trademark Act

In the spring of 2009, the Alabama Law Institute constituted a committee to review the status of Alabama’s Trademark Act and determine what, if any, revisions



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and updating were necessary. This review was prompted by the promulgation of a Model State Trademark bill by the International Trademark Association. The current Alabama act had been unchanged since 1988 and since that time there have been a number of changes to federal law in this area.

The committee is composed of the following members:

Lee Armstrong, chair, Auburn
Donna Bailer, Birmingham
Jean Brown, Montgomery
Brian Clark, Birmingham
Diane Crawley, Birmingham
Stephen Hall, Huntsville
Lee Huffaker, Birmingham*
Thad Long, Birmingham
Sheree Martin, Tuscaloosa
Kimberly Powell, Birmingham
David Quittmeyer, Mobile
Richard Rouco, Birmingham
Justice Harold See, Montgomery
James Dale Smith, Mobile
Will Hill Tankersley, Jr., Birmingham
Chad Tindol, Tuscaloosa
India Vincent, Birmingham
Lance Wilkerson, Birmingham

* **Lee Huffaker** served as reporter for the committee until his untimely death in August.

The committee, which is chaired by **Lee Armstrong**, determined that while the current Alabama law should not be replaced in whole, there were concepts in the model act which would be improvements to Alabama law and, therefore, the review would address those areas and determine what if any amendments to the Alabama act would be appropriate. The general areas at issue were dilution, the term for the registration period, the classification system and what remedies are available for infringement.

On the concept of dilution, the committee recommends that §8-12-6 of the Alabama *Code* be amended to include definitions of the terms "dilution," "dilution by blurring" and "dilution by tarnishment." The committee also recommends amendments to §8-12-17 to clarify how a claim for dilution can be made by a trademark holder. Such a person would continue to be able to seek injunctive relief, but would now also have available the full set of remedies contemplated in the act if they could prove that a violator willfully caused dilution of the mark.

Another issue addressed in the model act is a reduction in the applicable term of a trademark registration. The model act adopted a term of five years as opposed to the current period of 10 years in Alabama. The committee recommends amending §8-12-10 of the Alabama *Code* and adopting the five-year period to promote uniformity as well as to more regularly purge the filings of registrations that are no longer active.

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LEGISLATIVE WRAP-UP

Continued from page 471

When the Alabama act was last amended in 1988 the classification system contained in §8-12-14 was consistent with the system used by the U.S. Patent and Trademark System, which uses the international classification system. Since that time the international classification system has undergone a number of changes. The committee recommends amending §8-12-14 to incorporate by reference the federal system so that it will continually be current with the federal classification system.

Another area where the Alabama act differed substantially from both the model act and the federal system was in the remedies available to a person upon whose trademark has been infringed. In order to bring Alabama's act more into line, the committee recommends amending §8-12-18 to include giving a

judge the discretion to award up to treble damages for a violation. In addition, the court could award the recovery of attorney fees if there was a finding that a party acted in bad faith.

It is worth noting that a number of unique characteristics of the Alabama act will remain unchanged. These include Alabama's recognition of niche fame and the ability to register a trade name in addition to a trademark.

Other Law Institute Bills for 2010 include the Uniform Adult Guardianship Protective Proceedings Act (*See Sept. 2009 AL Lawyer*), the Uniform Child Abduction Prevention Act (*See Sept. 2009 AL Lawyer*) and the Uniform Mortgage Satisfaction Act (*See January 2009 AL Lawyer*). ▲▼▲

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

REINSTATEMENTS

TRANSFER TO DISABILITY
INACTIVE STATUS

SURRENDER OF LICENSE

DISBARMENTS

SUSPENSIONS

Reinstatements

- The Supreme Court of Alabama entered an order reinstating **Albert C. Bulls, III** to the practice of law in Alabama, effective May 30, 2009. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar. Bulls had received a 91-day suspension, effective August 1, 2008. [Rule 28, Pet. No. 09-1242]
- The Supreme Court of Alabama entered an order reinstating **Kimberly Jean Snow** to the practice of law in Alabama, effective September 2, 2009. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Snow had received a 91-day suspension retroactive to the date of her interim suspension which was effective September 19, 2007. [Rule 28, Pet. No. 09-1548]

Transfer to Disability Inactive Status

- The supreme court entered an order accepting the order of the Disciplinary Board, Panel II, of the Alabama State Bar transferring Red Bay attorney **John Raymond Benn** to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Professional Conduct*, effective July 9, 2009. [Rule 27(b), Pet. No. 09-1490]

Surrender of License

- The Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Board, Panel I, accepting Tuscaloosa attorney **Charles Gregory Tyler's** surrender of his license to practice law in Alabama, effective July 14, 2009. On June 24, 2009, Tyler surrendered his license to practice law regarding his forgery of the signature of a circuit judge. [Rule 23(a), Pet. No. 09-1125; ASB nos. 06-190(A) and 06-203(A)]

Disbarments

- Huntsville attorney **Sherryl Snodgrass Caffey** was disbarred from the practice of law in Alabama, effective August 21, 2009 by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar.

The Disciplinary Board's finding of guilt was based upon Caffey's conduct, which resulted in a finding of contempt of court in the Circuit Court of Limestone County during a criminal trial in which Caffey appeared as defense counsel. [ASB No. 00-73(A)]

- The Supreme Court of Alabama entered an order disbaring Birmingham attorney **Jesse Derrell McBrayer** from the practice of law in Alabama, effective August 5, 2009. On January 9, 2009, the Alabama Supreme Court released an opinion reversing the order of the Board of Disciplinary Appeals and remanded the matters for proceedings consistent with the court's opinion. The court determined that the reports and orders previously entered by the Disciplinary Board on July 23, 2007 and July 25, 2007 were due to be affirmed in their entirety. Therefore, on June 22, 2009, the Board of Disciplinary Appeals entered an order disbaring McBrayer from the practice of law. These matters involved McBrayer's misappropriation and conversion of clients' funds. [ASB nos. 03-148(A) and 04-95(A); BDA 07-03; SC 1070661]

Suspensions

- Tuscaloosa attorney **John Alan Bivens** was interimly suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective July 21, 2009. The Disciplinary Commission's order was based on a petition filed by the office of general counsel evidencing that probable cause exists that Bivens has misappropriated and

mismanaged client trust funds. [Rule 20(a), Pet. No. 09-1899]

- Huntsville attorney **Sherryl Snodgrass Caffey** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective August 20, 2009. The order of the Disciplinary Commission was based on a petition filed by the office of general counsel evidencing that Caffey had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 09-2125]
- Anniston attorney **Howard Wayne East** was summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar dated July 30, 2009. The Disciplinary Commission found that East's continued practice of law is causing or is likely to cause immediate and serious injury to his clients or to the public. [Rule 20(a), Pet. No. 09-1972; ASB nos. 09-1539(A), 09-1664(A) and 09-1825(A)]
- Former Montgomery attorney **Stephen Roger Glassroth** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for 18 months, effective July 9, 2008, the date of Glassroth's previously-ordered summary suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Glassroth's conditional guilty plea wherein Glassroth admitted that he violated rules 1.3, 1.4(a), 1.16(d), 8.1(b), 8.4(a), and 8.4(d), *Alabama Rules of Professional Conduct*. Glassroth failed to keep clients properly informed of the status of their cases and failed to respond to repeated requests from the bar concerning pending disciplinary matters. [ASB nos. 08-203 and 09-1322]

- Mobile attorney **Lawrence Johnson Hallett, Jr.** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 90 days, effective July 24, 2009. In addition, Hallett was conditionally suspended for 18 months following the 90-day suspension. The 18-month suspension was deferred pending probation, during which time Hallett must make restitution to his former client in the amount of \$40,000. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar finding Hallett guilty of charging a clearly excessive fee in violation of Rule 1.5(a) of the *Alabama Rules of Professional Conduct*; of improperly dividing a fee with a lawyer not a member of his firm in violation of Rule 1.5(e) of the *Alabama Rules of Professional Conduct*; knowingly acquiring a security or other pecuniary interest adverse to the client in violation of Rule 1.8(a) of the *Alabama Rules of Professional Conduct*; and of misconduct that reflects adversely on his fitness to practice law, in violation of Rule 8.4(g) of the *Alabama Rules of Professional Conduct*.

Hallett undertook to represent a client in a divorce action upon a referral from another attorney who was unable to prepare the case for trial. The client had limited funds to pay a retainer, but the marital estate was valued in excess of \$5,000,000, including real property and business assets. Hallett had his client execute a fee agreement for \$100,000 plus interest. The fee agreement also provided the client would be responsible for additional costs and paralegal fees. Hallett also had his client execute a promissory note for \$100,000, which was to be secured by any real property in which the client had an interest or was awarded from the divorce. Hallett allowed his paralegal to draft the fee agreement, promissory note and security agreement and present them to the client for execution. Hallett did not explain the fee agreement, promissory note and security agreement to the client and was not present when the documents were executed. The Disciplinary Board found that Hallett engaged in minimal preparation for trial and that an itemized statement of paralegal fees and other costs was fraudulent,

clearly excessive and manufactured after the fact. Although the client was awarded a modest portion of the marital estate, which included real and personal property, the client was forced to sell the real property because she did not have the ability to make monthly payments toward the debt for which the trial court made her responsible. When the client complained to Hallett about her situation, Hallett told her that he had made her a “millionaire” and if she could not afford to keep the property, then she should sell it. Thereafter, the client found a buyer for one of her properties. On the date of the closing, Hallett held the deed to the property until the closing agent agreed to protect his interest, which he claimed was in excess of \$100,000. Hallett collected the \$100,000, including interest, plus other fees and charges, over the objection of his client. Thereafter, Hallett forwarded \$25,000 of his fee to the referring lawyer, without the consent of his client, even though the referring lawyer had done no other work in the case. After collecting more than \$100,000 from his client, Hallett continued efforts to collect even more money from this client for additional fees and expenses, many of which were not supported or properly documented. A more detailed statement of the facts may be found in *Alabama State Bar v. Lawrence Johnson Hallett, Jr.*, No. 1071419, (Alabama Supreme Court, April 10, 2009). [ASB No. 03-21(A)]

- Former Birmingham attorney **Leigh Hazlett** was suspended from the practice of law in Alabama for 91 days, effective August 14, 2009 by order of the Supreme Court of Alabama. In or around July 2007, Hazlett filed a bankruptcy petition on behalf of her client for a fee of \$1,000. Hazlett failed to file certain required forms and, as a result, a deficiency notice was sent to Hazlett. Hazlett failed to respond to the deficiency notice and the court issued a show cause order as to why the petition should not be dismissed. Hazlett failed to appear at the show cause hearing and the petition was dismissed. Thereafter, the client and her new attorney filed a motion to reinstate the bankruptcy petition based upon Hazlett’s abandonment of

DISCIPLINARY NOTICES

Continued from page 475

the client. The court granted the motion and in October 2007 issued a notice to Hazlett ordering her to appear and show cause why she should not be required to refund the attorney fee to the client. The court ordered that Hazlett refund the \$1,000 attorney's fee to the client. However, Hazlett failed to refund the fee. The court issued another notice for Hazlett to appear and show cause why additional sanctions should not be imposed. Hazlett subsequently failed to appear at the rescheduled hearing and the court issued an order imposing additional sanctions on Hazlett, including a \$1,000 fine, plus interest. [ASB No. 08-114(A)]

- Birmingham attorney **Jacob Calvin Swygert, Jr.** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective August 5, 2009. The order of the Disciplinary Commission was based on a petition filed by the office of general counsel evidencing that Swygert had failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 09-2029] ▲▼▲

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10	\$165	\$165	\$215	\$310	\$495	\$820	\$1,335
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ABOUT MEMBERS, AMONG FIRMS

Continued from page 477

Charley Tudisco announces the opening of **The Tudisco Law Firm LLC** at 1901 Cogswell Ave., Ste. 2, Pell City 35125. Phone (205) 814-1146.

Among Firms

Governor Bob Riley has appointed **Gilbert Porterfield Self** circuit judge for the **11th Judicial Circuit** (Lauderdale County).

Carol Armstrong and **Sheetal Desai** announce the opening of **Armstrong & Desai LLC** at 2809 8th St., Tuscaloosa 35401. Phone (205) 210-4713.

Azar, Azar & Moore LLC is now **Azar & Azar LLC** with offices at 4276 Lomac St., Montgomery 36106.

Clyde T. Bailey, III and **Brooke K. Poague** announce the opening of **Bailey & Poague LLC** at 100 Court St., Wetumpka 36092. Phone (334) 567-9569.

Bradley Arant Boulton Cummings LLP announces that **Robert M. Couch** has joined as *of counsel*.

Christ N. Coumanis and **David P. York** announce the opening of **Coumanis & York PC** with offices in Daphne and Mobile. Phone (251) 990-3083 and (251) 431-7272.

Debra Henderson Buchanan has joined

Stephen G. McGowan LLC as an associate.

H. Arthur Edge PC announces that **Joseph H. McClure, III** has joined as an associate.

Ely & Isenberg LLC announces that **Candace L. Hudson** has become a member and **Grahame M. Read** has joined as an associate.

Estes, Sanders & Williams LLC announces that **William H. Hassinger, IV** has become associated with the firm.

Michael A. Fritz, Sr. and **David Hughes** announce the formation of **Fritz & Hughes LLC**, 7020 Fain Park Drive, Ste. 1, Montgomery 36117. Phone (334) 215-4424.

Frohsin & Barger LLC announces that **Ronald R. Brunson** has joined as *of counsel*.

Jones Walker announces that **Christopher P. Couch** has joined as special counsel.

Lowe, Mobley & Lowe announces that **Matthew B. LeDuke** has become a partner and the new firm name is **Lowe, Mobley Lowe & LeDuke**. Offices are located in Haleyville and Hamilton.

Parnell & Crum PA announces that **Christy Olinger** has joined as an associate.

Porterfield, Harper, Mills & Motlow PA announces that

Robert W. Heath has become a partner and **Christie J. Strange** has joined as an associate.

Quarles Law Firm LLC announces that **Frances P. Quarles** has joined the firm.

Richardson Callahan & Frederick LLP announces that **Lisa M. McCormack** has been named a partner and **Jacob A. Maples** and **Ashley F. Ragsdale** have joined as associates.

Karen M. Salter and **Carmen S. Ferguson** announce the formation of **Salter Ferguson LLC** at 32 Manning Place, Birmingham 35242. Phone (205) 408-4357.

Southern Poverty Law Center announces that **Mary Bauer** has been named legal director.

Tanner & Guin LLC announces that **Bob Shields** has joined the firm in its Birmingham office.

Thomas Goode Jones School of Law announces that **Anita Kimbrell Hamlett** has been named director of career services.

Andre' M. Toffel PC announces that **Richard A. Cusick** has joined as an associate.

Don Heflin has been named **United States Consul General** in Nuevo Laredo, Mexico. 

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