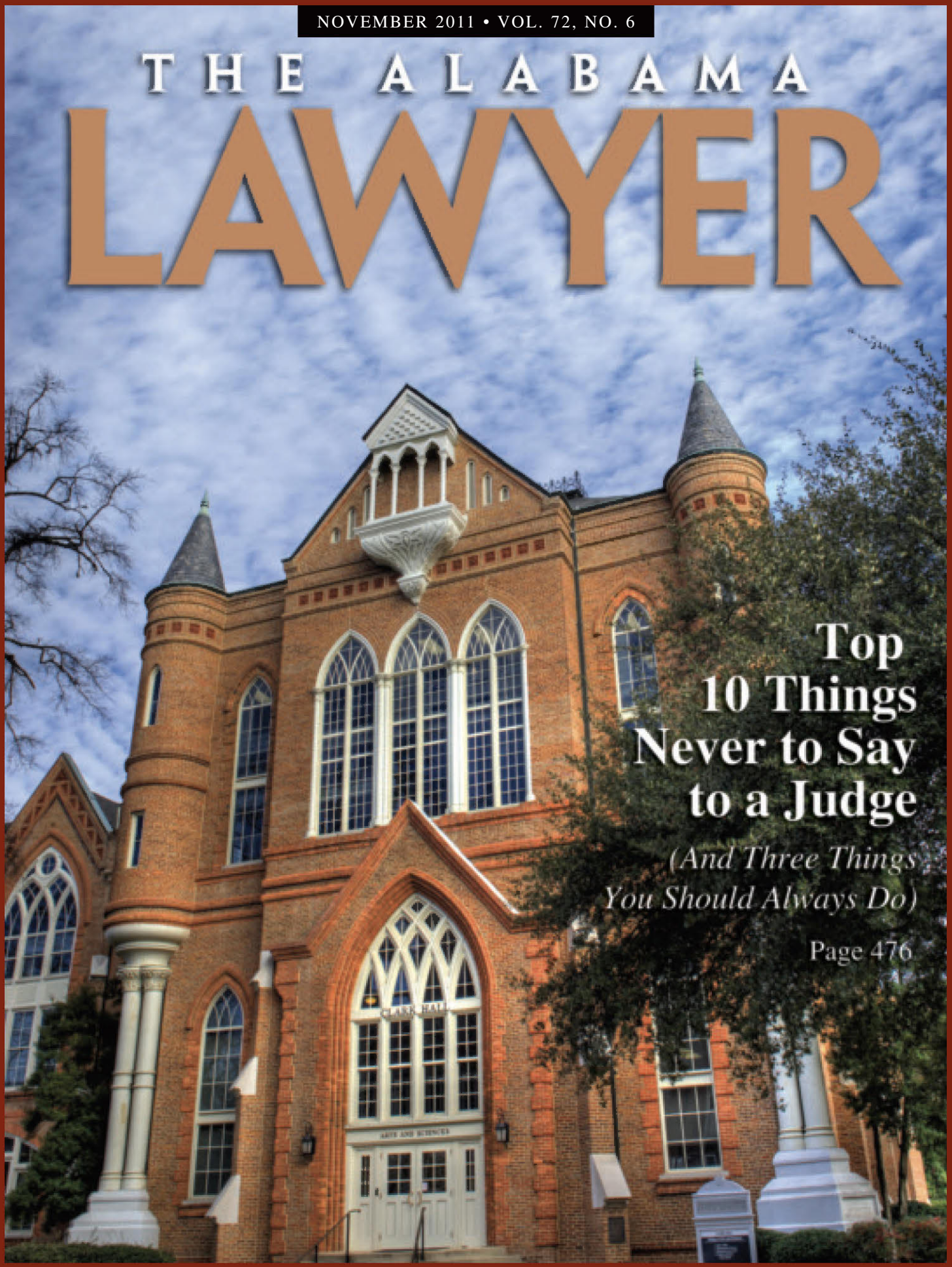
NOVEMBER 2011 • VOL. 72, NO. 6

THE ALABAMA LAWYER



Top 10 Things Never to Say to a Judge

(And Three Things You Should Always Do)

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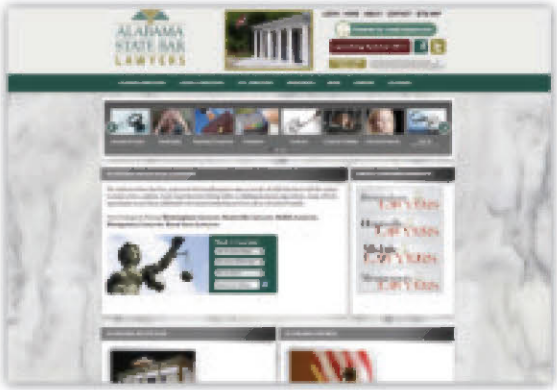

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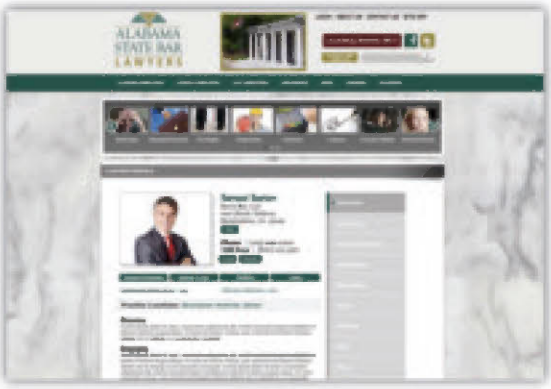

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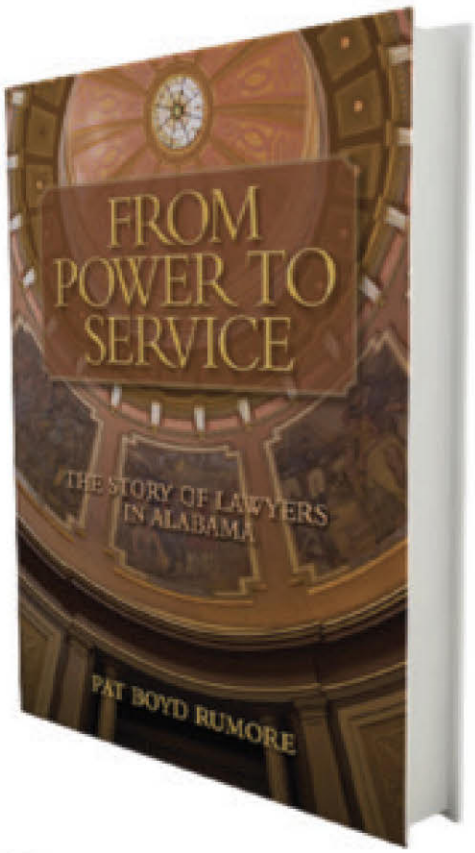

From Power to Service: The Story of Lawyers in Alabama

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

The story of lawyers in the developing history of Alabama opens in Mississippi Territory days with the appointment by President Thomas Jefferson of the first territorial judge in St. Stephens, the earliest settlement in what would become Alabama, and continues to present day Alabama, where the profession has grown to more than 16,000 members.

In these pages you will read about the people who pioneered Alabama's legal profession. The history of the profession in this state comes alive as Pat Rumore tells the bar's story in the words of those who shaped it. It's a story of lawyers who ended radical reconstruction and founded the state bar. It's a story of federal jurists who helped to end the segregated "southern way of life" by their decisions brought by some of this state's great civil liberties lawyers. It's also a story about women in the profession and how their achievements have paved the way for a new generation of lawyers.

Publication of this book is co-sponsored by the History and Archives Committee of the Alabama State Bar and the Alabama Bench and Bar Historical Society. Proceeds from the sale of this book go to the Alabama Law Foundation and the Bench and Bar Historical Society.

The cost is $40 per copy.

Order your copy today using a credit card. Go online to: *www.alabar.org/historybook.*

THE ALABAMA LAWYER

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IN THIS ISSUE

ON THE COVER

The University of Alabama's Clark Hall was built in 1884 and named for the 1800s University Trustee Willis G. Clark. It was constructed on the site of the old Lyceum dorm that was destroyed during the Civil War and originally contained a library, reading rooms, chapel and large public meeting room with a balcony. Sixteen items were placed in the cornerstone of the new building, including a silver 1821 dime from the cornerstone of the Lyceum dorm.

–Photo courtesy of Jeff Hanson, University Relations Photography, the University of Alabama

DEPARTMENTS

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JAMES R. PRATT, III
jim@hwnn.com

Are We Being Fair to Our Judges and the Perception of Justice in Alabama by Having Partisan Elections for Judicial Office?

The purpose of this article is not to campaign for a particular form of judicial selection or even to propose one type of judicial selection, but, rather, to raise awareness about the effect our current method of judicial selection has on our judges and our system of justice.

Judicial selection from various viewpoints

Recently, Keith Norman and I attended a conference in St. Louis sponsored by the Missouri State Bar concerning judicial selection. Justice Sandra Day O'Connor (ret.) was the keynote speaker and an active participant in the two-day conference. Justice O'Connor has an interesting background. She served in the Arizona legislature, was an elected judge in the Arizona state court system and later was nominated by the President and confirmed to the U.S. Supreme Court. Thus, she has seen the issue from various viewpoints and is one of the best informed and most experienced individuals active in the discussion concerning judicial selection. In Justice O'Connor's speech to bar presidents and executives from all over the country, she reiterated the point she made in *New Politics of Judicial Elections 2000-2009* published by the Brennan Center for Justice in 2010. In her forward she said:

"We all have a stake ensuring that courts remain fair, impartial and independent. If we fail to remember this, partisan in-fighting and hardball politics will erode the essential function of our judicial system as a safe place where every citizen stands equal before the law."

–Justice Sandra Day O'Connor (ret.)

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"We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not these contributions actually tilt the scales of justice, three out of every four Americans believe that campaign contributions affect courtroom decisions.

"This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception justice is for sale will undermine the rule of law that the courts are supposed to uphold.

"To avoid this outcome, states should look to reforms that take political pressure out of the judicial selection process. . ."

Not proud to be number one

It is worthwhile to examine Justice O'Connor's concerns in light of Alabama's method of selecting judges. As I travel around the country to meet with other state bars or different legal groups, I am always proud to point out the success of Alabama and Auburn on the football field. The last two years, those two universities have been national champions, *and* players from those two teams have enjoyed the notoriety of being awarded the Heisman trophy. No other state can claim that kind of success.

I am not proud, however, that Alabama ranks as the number one most expensive state in the country for judicial elections. Alabama is one of only eight states utilizing partisan election for the selection of appellate and general courts. According to the Brennan Center for Justice, Alabama is home to the nation's most expensive state supreme court elections, although it is only the nation's 23rd most populous state. Candidates here raised $40.9 million in 2000-2009, nearly double the next most costly state. In 2006, we had the most expensive race for chief justice in the history of this country.

Justice O'Connor pointed out that in a recent Harris poll, 71 percent of those polled indicated they felt justice was affected by contributions that are made to judges. We have read articles and editorials in our hometown newspapers criticizing or questioning decisions of members of the Alabama Supreme Court based upon inordinate contributions given by various special interest groups who have a stake in the outcome of a particular case. Over the years, I have heard lawyers on both sides opine that no matter what a jury does in a case, the appellate courts will be predisposed to change that result.

Perception is reality?

My point is not to suggest in any way that political contributions affect the decisions of any individual jurist or group of jurists serving in our state, but rather to ask whether it is fair to dedicated, well-meaning jurists to be labeled with the perception that politics affect the outcome of their decisions. Is it good for our judicial system that certain litigants and certain lawyers believe, whether right or wrong, that they have an advantage in Montgomery? As lawyers, we are taught to avoid even the perception of unethical conduct, so shouldn't we try to design a system of judicial selection that avoids, to the degree possible, the perception that money is affecting the quality of justice in our court system?

Like Justice O'Connor, I believe the Alabama State Bar and all lawyers, regardless of their political affiliation or philosophical position, have a stake in ensuring that the courts remain fair, impartial and independent and that the public believes that the court system is a place in which every citizen stands as an equal before the law.

I don't have all of the answers, but I do know that we will not improve our system of judicial selections until or unless all of the major stakeholders commit to a fair and objective discussion about the alternatives and agree to put what is best for our state, its judicial system and its citizens ahead of partisan politics. I am optimistic that we will have such a discussion and that we will find a way to select judges that is fairer to them and that restores the confidence of litigants, lawyers and the public in our judicial system.

KEITH B. NORMAN
keith.norman@alabar.org

Bill, Sue Bell and Caitlin Cobb

Thank You, Sue Bell Cobb

August 1, 2011 marked the conclusion of one of our state's most remarkable judicial careers–that of Chief Justice Sue Bell Cobb. Upon her graduation from the University of Alabama School of Law and passing the bar exam, Sue Bell (in law school most people called her by her first and last name as a double name) began her judicial odyssey. Less than a month after her notification in September 1981 that she had passed the bar exam, Sue Bell was appointed by Governor Fob James as district court judge for Conecuh County. From the first time she donned her judicial robe, she never looked back.

I say Sue Bell's was a remarkable judicial career because from her appointment as district judge, she was later elected to that position, then elected circuit judge for the 35th Judicial Circuit, then elected to the court of criminal appeals and finally chief justice–our state's first female chief justice. Over the course of her 30 years of judicial service, she was elected to the district and circuit courts, an intermediate appellate court and finally to the supreme court. I am not aware of any other judge in the history of our state who has accomplished this feat.

Just her judicial career alone is sufficient to secure Sue Bell's place in history, but because she is a human dynamo with a tremendous reservoir of energy, Sue Bell has been busy on multiple fronts. Her passion over the years has been children. She has been one of this state's leading advocates for them, helping lead the movement which resulted in the creation of Alabama's **Children First Foundation** and **Children's Alliance**, organizations which serve to advance and protect the interests of Alabama's children. During her shortened term as chief justice, Sue Bell was successful in convincing the legislature to adopt a new, much-needed juvenile code.

EXECUTIVE DIRECTOR'S REPORT

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Over the years, Sue Bell has supported specialized courts such as drug and mental health courts as a better and more effective way to deal with those charged with crimes stemming from drug abuse or mental health problems. As chief justice, she made a concerted effort to expand specialized courts to nearly all the judicial circuits throughout the state. She was also a strong proponent before the legislature for sentencing reforms. Although she was unsuccessful, Sue Bell worked tirelessly for these reforms.

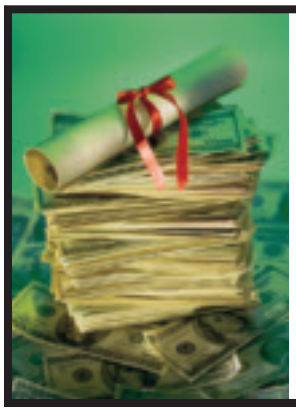
At this year's annual meeting in July, the chief justice visited with Rep. Cam Ward, President-elect Jim Pratt and President Alyce Spruell.

Sue Bell served courageously as chief justice, unafraid to tackle the tough issues that she felt affected the court or judiciary. With the legislature continuing to make funding cuts to the courts, she offered a proposal to address caseload disparity among all the trial courts. Her proposal was not universally popular among many of the circuits, as I am sure she knew would be the case when she offered it. Nevertheless, she offered it as a possible solution to the lack of funds preventing the creation of more judgeships in the busier circuits. Likewise, when many of her judicial colleagues were not in favor of a **Judicial Study Commission** report that recommended a number of reforms to the judicial disciplinary process, Sue Bell was undeterred in pursuing these in spite of the opposition and their eventual defeat.

Throughout her entire judicial career, Sue Bell has been a proponent of the organized bar. As chief justice, she was always solicitous of the legal profession's opinions on matters and frequently collaborated with bar leaders on issues affecting the profession or having an impact on the administration of justice. Upon assuming the office of chief justice, she readily embraced the **Chief Justice's Commission on Professionalism** created by her predecessor **Drayton Nabors** and strongly supported by the state bar, because she supported the commission's mission and realized the need for it. Similarly, she helped convince her supreme court colleagues to create the **Access to Justice Commission** to coordinate and support the delivery of civil pro bono legal services statewide. In every way, Sue Bell was helpful and supportive of the bar.

What I have mentioned here merely scratches the surface of Sue Bell's many endeavors. Not discussed are any of the numerous awards and recognitions she has received, as evidence of her commitment to so many worthy causes that are considerable in their number and scope. When I consider what Sue Bell has accomplished since her law school days, I am immediately reminded of **Julia Tutwiler**, the early educator, reformer and charter member of the Alabama Women's Hall of Fame. In my mind, she has achieved the stature of a Julia Tutwiler because she has worked tirelessly and selflessly to improve our Alabama's laws and institutions for the betterment of our state.

I completely understand her decision to retire. I know that she looks forward to having more time for family, especially husband **Bill**, daughter **Caitlin** and her mother, **Miss Thera Bell**. Despite her decision to conclude her judicial career early, I know Sue Bell well enough to know that she will not be letting any grass grow under her feet. In fact, with the musical talent she displayed during her campaign for chief justice, Julia Tutwiler, who penned the words to our state song *Alabama*, had better move over because Sue Bell might just be contemplating writing a new state song! Thank you, Sue Bell Cobb, for all that you have done.



Education Debt Update

For the July 2011 bar exam, 58 percent of those taking the exam had educational loans. The amount of those loans averaged $101,400.

United States District Court, Middle District of Alabama Vacancy Announcement: Death Penalty Law Clerk

Opening Date: 08/31/2011–Closing Date: until filled

The U.S. District Court of Alabama, Middle District, is accepting applications for the position of part-time Death Penalty Law Clerk. This position is located in Montgomery. The work schedule for this position is 40 hours every two weeks. The starting part-time salary is $28,704, dependent upon experience and qualifications.

Duties

- Perform case management activities as well as conduct substantive reviews of all state death penalty habeas corpus petitions or motions to vacate federal death sentences;
- Perform legal research and prepare recommendations to the Court regarding stays of execution, jurisdiction, scheduling, exhaustion of remedies, discovery, motions for evidentiary hearing, disposition on the merits, and certificates of appealability;
- Draft appropriate recommendations, opinions, orders and correspondence for the Court;
- Evaluate and determine that petitions and pleadings meet the requirements of federal and local procedural rules, form, payment of fees and service. Return those documents that do not conform to the statutes or rules, with instructions for necessary correction or compliance;
- Communicate with counsel for petitioners regarding procedural requirements, supplying them with appropriate forms, documents and instructions as required, and perform similar work as assigned by the Court;
- Inform the Court as to filing of death penalty cases and execution dates; and
- Perform other duties as assigned.

Qualifications

All candidates must be law school graduates, and have a thorough knowledge of the law and legal procedures. Skill in writing legal memoranda, opinions, orders and other documents is required. Skill in the oral presentation of complicated legal matters to judges is required.

For more information about this position, its requirements and benefits and how to apply, go to *http://www.uscourts.gov/careers/.*

This Court is an Equal Opportunity/EDR Employer.

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, 2012. 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

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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.

Changes to Client Security Fund Annual Assessment

The Client Security Fund was established by the Alabama Supreme Court to provide a remedy for clients who have lost money or other property as a result of the dishonest conduct of Alabama lawyers. The Alabama State Bar recognizes that the legal profession depends on the trust of clients and although few attorneys breach that trust, it is important that the profession's reputation for honesty and integrity be maintained and protected. The Client Security Fund serves this function by providing grants to clients whose money or property was wrongfully taken by an Alabama lawyer. On January 14, 2011, the Supreme Court of Alabama adopted the following rule changes:

- The Alabama State Bar is authorized to **assess each lawyer who on January 1 of each year holds a current business license to practice law**, as required by *Ala. Code* 1975, §40-12-49, an annual fee of **$25**.
- Any person admitted to practice in the State of Alabama who upon attaining the **age of 65 years, has elected to retire from the practice of law, shall be exempt from any assessment** under these rules.
- The Alabama State Bar is authorized to **assess each lawyer who on January 1 of each year holds a special membership to the Alabama State Bar**, as provided by *Ala. Code* 1975, § 34-3-17, an annual fee of **$25**.
- The Alabama State Bar is authorized to **assess each lawyer who on January 1 of each year is registered as authorized house counsel**, pursuant to Rule IX of the Rules Governing Admission to the Alabama State Bar, an annual fee of **$25**.
- The Alabama State Bar is authorized to **assess each lawyer admitted pro hac vice** pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar, a fee of **$25 per application**.
- The Alabama State Bar is authorized to **assess each lawyer who on January 1 of each year is disbarred, suspended, placed on disability inactive status or otherwise inactive, an annual fee of $25, which shall be paid as a condition of reinstatement of the lawyer's license to practice law**.
- A lawyer who **fails to pay by March 31** of a particular year the assessed annual fee pursuant to Rule VIII shall be deemed to be not in compliance with these rules. Such a lawyer **is subject to suspension** pursuant to Rule 9 of the *Alabama Rules of Disciplinary Procedure*.
- **Applications for pro hac vice admission pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar shall not be approved unless accompanied by the assessed fee as provided in Rule VIII of these rules.**

In December 2011, a notice will be sent to all bar members advising of the rule changes. In January 2012, members will receive an invoice notice by e-mail with payment instructions. Members who do not have an e-mail address will receive an invoice by regular mail. The full text of the Alabama State Bar Client Security Fund Rules is available at *www.alabar.org*.

Position Announcement

Clerk of the Court, Alabama Court of Criminal Appeals

*This job description is **illustrative only** and is not a comprehensive listing of all functions performed.*

Position Summary

This unique position is available at the Alabama Court of Criminal Appeals. The Clerk of the Alabama Court of Criminal Appeals is a statutory office pursuant to § 12-3-20, *Code* 1975. The clerk of the court manages and oversees the operation of the court of criminal appeals clerk's office and performs the duties set out in the *Code of Alabama* and the *Alabama Rules of Appellate Procedure*, as well as other procedural rules adopted by the Alabama Supreme Court. The clerk of court also performs such other duties as may be assigned thereto by the court of criminal appeals, and serves at the pleasure of the court.

Positions Supervised

Assistant Clerk
Financial Officer
Three case managers

- Interviews position applicants and makes hiring recommendations to the court.
- Assigns duties to employees, provides direction, guidance, and maintains the flow of work.
- Evaluates the work of the employees and administers discipline as needed.
- Directs and instructs personnel to accomplish the day-to-day work.

Essential Functions

The clerk of the court oversees or performs the following essentials functions:

- Prepares and oversees the court's annual budget requests, the financial operations plan and the financial operations of the court.
- Manages the procurement of all supplies and equipment for the court.
- Oversees the administration of the court's internal operating procedures as they relate to the clerk's office.
- Oversees the management and assignment of court property.
- Oversees the docketing into the case management system of incoming appeals, extraordinary petitions and other related documents, such as motions and briefs.
- Collects and deposits all filing fees and monies received.
- Manages all appeal processes through briefing, oral argument and assignment, and tracks all cases through final disposition.
- Distributes briefs, motions, petitions and other pleadings, as appropriate.
- Distributes opinions, decisions and orders by the court to the trial courts, the parties, and the reporter of decisions.
- Schedules oral arguments.
- Issues certificates of judgments upon final disposition of appeals.
- Archives court records and case files.
- Prepares conference notes from each court conference.
- Works with the appellate court technology staff as needed to ensure the integrity and functionality of the court's case-management and electronic filing system.
- Prepares the court's annual report at the end of each term of court.

Miscellaneous Duties and Responsibilities

- Communicates and interacts daily with appellate judges, administrative assistants, court employees, trial court judges, circuit clerks, court reporters, press, and the public.
- Responds to calls and questions from trial court judges, court reporters, clerks, attorneys, and the public regarding open and closed cases, rules of procedure and the court process, and directs calls to other courts and state agencies as needed.
- Prepares annual conference schedules for the court.
- Give status reports to the court from time to time on such matters as may be requested or needed.
- Makes all arrangements for the court to hear oral arguments at other locations outside Montgomery, Alabama, including working with local school officials and local bar associations. Coordinates travel arrangements with the court marshals to ensure security at all off-site locations.
- Makes educational presentations to attorneys, circuit clerks, and court reporters when requested.
- Develops and revises administrative policies and procedure relative to case processing and operations of the Office of the Clerk.
- Coordinates, implements and administers the court's case management system including improvements and enhancements.
- Prepares, maintains, analyzes court statistics and trends and creates both periodic and special reports as needed.

Desirable Knowledge and Ability

- Knowledge of court procedures, the court's document and case management systems, and the case management processes in the clerk's office.
- Knowledge of the procedural rules adopted by the Alabama Supreme Court.
- Knowledge of statutes pertaining to the judicial system.
- The ability to grasp and understand issues pertaining to the judiciary as they arise.
- Knowledge of the confidentiality requirements of the courts.
- Ability to handle unhappy and difficult customers.
- Ability to form good working relationships with judges, staff, attorneys and their employees.
- Ability and willingness to take on and complete projects.
- Ability to communicate well, both orally and in writing.
- Ability and desire to serve the public.
- Ability and desire to promote and protect the dignity of the courts.
- Ability to perform diverse functions on a regular basis, to work under time constraints, to get along well with others and to behave in a polite and professional manner.

Minimum Qualifications

Education and Experience

- Juris Doctor (JD), with a minimum of seven years practicing law, some of which should include appellate practice. At least three years of managerial experience is desired.

Certificates, Licenses, Registrations

- Member of the Alabama State Bar
- Possession of valid Alabama driver's license

Physical and Mental Demands

The physical and mental ability to perform the functions set out in this notice, including but not limited to the following requirements:

- The ability to concentrate and apply other cognitive, intellectual and mental functions.
- The ability to enter and retrieve information from computers for prolonged periods of time.
- The ability to access both paper and electronic files.
- The ability to travel as needed to various locations outside Montgomery, Alabama.
- The ability to stand and sit for prolonged periods.
- Accurate close and distant vision.

IMPORTANT NOTICES

Continued from page 449

- The ability to frequently lift and carry items weighing as much as 20 pounds.

Within the framework of the law, reasonable accommodations will be made to enable an otherwise qualified individual to perform the essential functions of the job.

Application Process

All applicants should apply by sending a cover letter and resume to the following address:

Court of Criminal Appeals
Attn: Employment Applications
P. O. Box 301555
Montgomery, AL 36130-1555

All applications should be post-marked no later than December 31, 2011.

Note: No references or letters of recommendation should be sent, unless specifically requested by the Court of Criminal Appeals.

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Robert Blake Lazenby

ROBERT BLAKE LAZENBY

BRANT A. YOUNG

One of the saddest days of my life was July 27, 2011. This is the day that Blake Lazenby, my wonderful friend and law partner died tragically. Blake was 54 years old. He was taken from us long before he should have been but he left behind a legacy that will be with all of us who loved him and whose lives he touched while he was with us. It is indeed an honor to have been asked to write a memorial for Blake since there are dozens of other people whose lives he touched and who would be far more eloquent than I to reflect on Blake's life and legacy.

Blake received his undergraduate degree from the University of Alabama where he was a member of Delta Tau Delta social fraternity. Blake graduated from the University of Alabama School of Law and came to work for our firm immediately following law school. He served on the Board of Bar Commissioners from Talladega County for many years and was a Fellow of the Alabama Law Foundation. Blake also served on the Disciplinary Commission and the Character and Fitness section of the state bar, contributing countless hours of volunteer work. He was a member of the Alabama Law Institute and the Alabama Defense Lawyers Association.

Blake will forever be remembered among those whose paths he crossed as a person who had a terrific legal mind, an extraordinary sense of humor and the highest degree of integrity; but perhaps the things for which he will be most remembered were his kindness and compassion. In the weeks following Blake's death, I spoke with dozens of lawyers and colleagues about him, and the one comment that was made in every single conversation was "what a nice guy he was." No one ever had an unkind word to say about Blake and he never had an unkind word to say about anyone else. I have never known anybody with as many friends, both in and out of the legal profession, a fact made abundantly clear by the number of people who attended his funeral.

Known only to those he touched is how much he mentored young lawyers as they crossed his path. He always found the time to provide advice and assistance to young lawyers when they had a problem or some issue with which they did not know how to deal. Not a week went by when Blake did not counsel with some young lawyer about how to handle an issue he was facing for a client. No question from a lawyer or client was too foolish or naive. Each was discussed in a manner exhibiting great respect for the person seeking his advice.

MEMORIALS Continued from page 451

Blake Lazenby was a gentleman in every sense of the word. He was a good man–as good as they come. Blake's death has left a void in my life and in the lives of all of those who knew him. How I approach the practice of law and how I relate to my fellow lawyers were forever changed by my association with Blake Lazenby and for that I will be forever grateful.

—William W. Lawrence, Thornton, Carpenter, O'Brien, Lazenby & Lawrence

Brant A. Young

Brant A. Young, 59, a Florence attorney, died at his home Friday morning, August 26, 2011. He was a life-long resident of Florence and partner in the firm of Cox, Young & Griffin.

Brant graduated from Coffee High School in 1970 and the University of Alabama Law School in 1978. That same year he joined Poellnitz, Cox, Robison, McBurney & Jones. He was a deacon at Mars Hill Church of Christ and a longtime soccer coach and enthusiast.

Brant is survived by his wife of 33 years, Judy Young; his daughter, Ann Lauren Young; his son, Judson Brant Young; his grandson, Luke Young; his mother, Melanie Young; his brother, Vance Young; and a number of nieces and nephews. He was preceded in death by his father, Marvin E. Young.

Please consider memorials to Mars Hill Bible School, Florence-Lauderdale Public Library or the Pancreatic Cancer Action Network, 2141 Rosecross Avenue, Suite 7000, El Segundo, CA 90245.

The Alabama Center for Dispute Resolution and the mediation community will miss **R. Blake Lazenby,** Talladega.

Bates, Marvin James, Jr.
Lawrenceville, GA
Admitted: 1959
Died: August 10, 2011

Campbell, Woodley Clark
Montgomery
Admitted: 1947
Died: January 29, 2011

Cameron, James Wesley
Montgomery
Admitted: 1955
Died: July 13, 2011

Christ, Chris Steve
Vestavia
Admitted: 1968
Died: June 29, 2011

DeMent, Ira, Hon.
Montgomery
Admitted: 1958
Died: July 16, 2011

Drasutis, Harry Anthony
Birmingham
Admitted: 2004
Died: July 3, 2011

Gibson, John William
Troy
Admitted: 1950
Died: January 19, 2011

Harris, James Ronald
Pelham
Admitted: 1986
Died: June 7, 2011

Helmsing, Frederick George
Mobile
Admitted: 1965
Died: July 9, 2011

Howard, George Pierce
Wetumpka
Admitted: 1943
Died: August 13, 2011

Hubbard, Joseph Dale
Oxford
Admitted: 1978
Died: July 4, 2011

Jackson, Alto Loftin
Clio
Admitted: 1937
Died: July 16, 2011

Mitchell, James Almwick
Anniston
Admitted: 1977
Died: October 14, 2009

Radney, John Thomas
Alexander City
Admitted: 1955
Died: August 7, 2011

Ritchey, George Michael
Pelham
Admitted: 1978
Died: January 5, 2011

Sawtelle, Jeffrey Stewart
Burke, VA
Admitted: 1974
Died: July 18, 2011

Schaeffer, Herbert D.
St. Louis, MO
Admitted: 1961
Died: June 22, 2010

Skidmore, Paul Edwin
Northport
Admitted: 1962
Died: March 9, 2011

Stallings, Robert George
Louisville, KY
Admitted: 1968
Died: March 15, 2011

Turner, Johnny Mac, Jr.
Mountain Brook
Admitted: 1986
Died: July 18, 2011

Wood, John Fred, Jr.
Vestavia
Admitted: 1972
Died: August 25, 2011

Wright, Tom
Elmore
Admitted: 1979
Died: August 21, 2011

GREGORY H. HAWLEY
ghawley@whitearnolddowd.com

We received many positive comments on "Guidelines for Work Being Done under My Supervision" by the late Asa Rountree, which offered advice to young lawyers. On behalf of his former firm, Debevoise & Plimpton LLP, we are pleased to make two additional points: first, "Guidelines" is a copyrighted work of the Debevoise firm, and, second, Debevoise is working to arrange a broader publication of "Guidelines" and other works by Asa in the future, making his writings widely available.

"The September 2011 Alabama Lawyer *was the one of the best I have ever read. In fact, the material presented would make a nice hard-bound book."*

—Howard M. Miles, Whatley, Drake & Kallas, Birmingham

"Just a note to let you know how much I enjoyed the article by Asa Rountree, 'Guidelines for Work Being Done under My Supervision,' that recently appeared in The Alabama Lawyer. *This was an outstanding article and provides great advice for any young lawyer. It should be required reading for any new lawyer."*

—William H. Traeger, III, Manley, Traeger, Perry & Stapp, Demopolis

"This issue is the best ever or one of the best. In 24 years, it is the first time I told the lawyers in my office they need to review it almost cover-to-cover. Wilson Green's appeals updates are without parallel, the writing article is good, and the Asa Rountree guidelines are brilliant and a useful tool for any lawyer. I also liked seeing a group of the new officers. If this edition is any indication of what we should expect, I am excited."

—Thomas F. Campbell, Campbell Law PC, Birmingham

"I thoroughly enjoyed the Asa Rountree piece in the September issue of the Lawyer. *Asa's 'Memorandum' provides great advice for lawyers, both new and those who've been at it a while. Thanks for providing this great benefit to our bar."*

—Allan R. Chason, Chason & Chason PC, Bay Minette

WILSON F. GREEN
wgreen@fleenorgreen.com

Cases to Watch in the U.S. Supreme Court's October Term

The United States Supreme Court's October 2011 term began last month. As of press time, the Court had accepted 41 cases on certiorari for argument and decision in this term. Some of the more noteworthy cases, along with the issues accepted for review, are the following:

Criminal

Search and Seizure

Florence v. Board of Chosen Freeholders, No. 10-945; from the Third Circuit, 621 F.3d 296 (3rd Cir. 2010)

Whether the Fourth Amendment would allow a warrantless strip search, without reasonable suspicion, of a person being held in jail resulting from a bench warrant issued after a civil contempt finding for failure to pay a fine

Eyewitness Identification

Perry v. New Hampshire, No. 10-8974; from the Supreme Court of New Hampshire, unpublished

Does the exclusionary rule for eyewitness identification evidence apply only when the police are responsible for creating the circumstances surrounding the identification which fostered an indicia of unreliability, or can it apply whenever the identification was made under conditions which tended to suggest that the defendant was responsible for the crime, regardless of the source of those conditions?

Brady Material

Smith v. Cain, No. 10-8145; from the Orleans Parish Criminal District Court, on post-conviction proceedings, unpublished

Whether the prosecution's failure to disclose *Brady* material concerning potential inconsistencies in statements of murder eyewitnesses was material or harmless

Search and Seizure

U.S. v. Jones, No. 10-1259; from the D.C. Circuit, 615 F.3d 544 (D.C. Cir. 2010)

Whether the government's warrantless use of a GPS tracking device affixed to a car violated the Fourth Amendment, where the owner of the car did not consent to the monitor

Confrontation Clause

Williams v. Illinois, No. 10-8505; from the Illinois Supreme Court, 238 Ill.2d 125 (Ill. 2010)

Whether a state rule of evidence allowing an expert witness to testify about DNA testing performed by non-testifying analysts violates the Confrontation Clause, when the defendant has no opportunity to confront the analysts

THE APPELLATE CORNER Continued from page 455

Civil

Qualified Immunity

Messerschmidt v. Millender, No. 10-704; from the Ninth Circuit, 620 F.3d 1016 (9th Cir. 2010)

Whether police officers were entitled to qualified immunity when they obtained a facially-valid warrant to search for firearms, firearm-related materials and gang-related items in the residence of a gang member and felon who threatened to kill his girlfriend and fired a shotgun at her

TCPA; Federal Jurisdiction

Mims v. Arrow Financial Services, LLC, No. 10-1195; from the Eleventh Circuit, 2010 WL 4840430 (11th Cir. 2010)

Did Congress divest the federal district courts of their federal-question jurisdiction over all private actions brought under the Telephone Consumer Protection Act?

Copyright Law

Golan v. Holder, No. 10-545; from the Tenth Circuit, 609 F.3d 1076 (10th Cir. 2010) and 501 F.3d 1179 (10th Cir. 2010)

Whether Congress, consistent with the First Amendment, acted constitutionally when it restored copyright protection to a large body of foreign works which had been placed in the public domain; as a corollary, whether the Progress Clause prohibits Congress from taking works out of the public domain

Arbitration

CompuCredit Corp. v. Greenwood, No. 10-948; from the Ninth Circuit, 615 F.3d 1204 (9th Cir. 2010)

Whether, by conferring on consumers a right to "sue" a credit repair organization, Congress intended to preclude arbitration of claims under the Credit Repair Organizations Act, in light of the CROA's provision declaring void any waiver of consumer rights

FMLA

Coleman v. Maryland Ct. of App., No. 10-1016; from the Fourth Circuit, 626 F.3d 187 (4th Cir. 2010)

Whether Congress abrogated the states' Eleventh Amendment immunity when it passed the "self-care leave" provisions of the Family Medical Leave Act

RESPA

First American Fin. Corp. v. Edwards, No. 10-708; from the Ninth Circuit, 610 F.3d 514 (9th Cir. 2010)

Does a Section 8(a) RESPA plaintiff, who seeks recovery of statutory damages of three times the amount charged for a subject settlement service, have standing where there is no allegation that the violation of Section 8(a) caused any alteration in the price, quality or other characteristics of the settlement service?

Railroads; Implied Preemption

Kurns v. Railroad Friction Prods. Corp., No. 10-879; from the Third Circuit, 620 F.3d 392 (3rd Cir. 2010)

Whether the Railroad Safety acts, including the Locomotive Safety Act of 1911, preempt state-law tort claims pursuant to implied, occupation-of-field preemption

Preemption

National Meat Ass'n. v. Harris, No. 10-224; from the Ninth Circuit, 599 F.3d 1093 (9th Cir. 2010)

Whether the Federal Meat Inspection Act–which requires slaughterhouses to hold animals that become unable to walk for observation for evidence of disease–preempts a state law that requires such animals to be immediately killed

Decisions of the Alabama Supreme Court

Discovery

Ex parte Delta Int'l. Mach. Corp., No. 1091049 (Ala. July 29, 2011)

In AEMLD action against a saw manufacturer, the plaintiff sought an inspection of saws equipped with "flesh-sensing technology" developed by a joint venture involving the defendant. The supreme court disallowed the discovery because the technology in question did not exist at the time of manufacture and could not have been retrofitted to the subject saw.

Personal Jurisdiction

Ex parte No. 1 Steel Products, Inc., No. 1091781 (Ala. July 29, 2011)

In a commercial contract dispute, contacts solely by e-mail, fax and telephone were insufficient to establish specific jurisdiction in Alabama. The court acknowledged that the parties "hotly disputed" which party initiated contact, but determined that the initiation of communications was not dispositive.

Securities; "Holder" Claims; Derivative vs. Direct Claims

Altrust Fin. Servs., Inc. v. Adams, No. 1091610 (Ala. July 29, 2011)

In a shareholder action, the court held: (1) under *Ala. Code* § 8-6-19(a), only purchasers of securities can sue; claims cannot be brought by "holders" of shares who claim to have continued holding shares based on misrepresentations; and (2) claims brought against officers and directors, as well as an outside audit firm, were derivative and not direct, because only when a shareholder contends that damage was unique to the particular shareholder does the claim constitute a direct claim (overruling *Boykin v. Arthur Andersen & Co.,* 639 So. 2d 504 (Ala. 1994)).

Rule 54(B) Certification Improper

E.B. Investments, LLC v. Pavilion Development, LLC, No. 1091666 (Ala. Aug. 5, 2011)

Yet another recent case dismissing an appeal from a Rule 54(b) certification because they are "disfavored" and should not be granted routinely

Unlawful Detainer; Time for Appeal

MPQ, Inc. v. B'ham Realty Co., No. 1091582 (Ala. Aug. 12, 2011)

Failure to appeal the district court's adjudication of an unlawful detainer claim within seven days, as provided in *Ala. Code* § 6-6-350, deprived the circuit court of jurisdiction to hear any aspect of that claim.

Fictitious Parties; Relation Back

Ex parte Ismail, No. 1100726 (Ala. Aug. 12, 2011)

The plaintiff failed to exercise due diligence in adding the treating physician for a fictitious party, because the medical records in the plaintiff's possession before the filing of the complaint identified the treating physician.

Failure to Exhaust Administrative Remedies

Ex parte Alabama Power Co., No. 1091421 (Ala. Aug. 19, 2011)

Under *Ala. Code* §§ 37-1-31 and 37-4-1(9) the jurisdiction of the APSC is exclusive, and, as it relates to service regulations, that jurisdiction is to be exercised "notwithstanding any rights heretofore acquired by the public."

Venue; Doing Business by Agent Under Section 6-3-7

Ex parte Elliott, No. 1100479 (Ala. Aug. 19, 2011)

The defendant (a paper and pulp manufacturer) was doing business in Conecuh County under *Ala. Code* § 6-3-7 because it maintained timber acreage under lease, without proof of actual harvesting of timber.

Personal Jurisdiction; Securities

Ex parte KKR, No. 1091191 (Ala. Aug. 19, 2011)

Out-of-state individual defendants were subject to personal jurisdiction in Alabama regarding affairs of an Alabama corporation. The individual defendants (with one exception) were on the board of directors of the corporation for four years and had come to Alabama and were involved in acquiring the corporation and preparing a prospectus for notes to be used in financing the acquisition.

Suppression; Breach of Contract; Materiality

Crestview Mem. Funeral Home, Inc. v. Gilmer, No. 1100235 (Ala. Aug. 26, 2011)

The decedent's spouse sued the funeral home and individuals, contending that the defendants breached a contract to provide embalming services through a licensed provider, and asserting a related suppression claim. The court reversed judgment for the plaintiff, reasoning that, absent evidence of improper embalming, failure to perform embalming by a licensed embalmer was not "material." A retrial was necessary because the jury had to reassess the element of materiality as to suppression.

Trusts; Prerequisites to Suit by Beneficiary against Third Parties

Ex parte Callan Assocs., Inc., No. 1081683 (Ala. Sept. 9, 2011)

A 4-3 majority held that PACT participants were required to make demand on the PACT board before suing a third-party investment adviser to the board concerning the performance of the PACT assets. A mere allegation that the board had contracted with Callan did not imply that Callan was in a position of over-influence or collusion with the board so as to excuse demand.

Derivative Actions vs. Direct Actions

Ex parte Morgan Asset Mgmt., Inc., No. 1100714 (Ala. Sept. 9, 2011)

The trust beneficiaries sued the trustee entities, claiming that the defendants invested the beneficiaries' funds in unsuitable investments. The court found the claims were derivative in nature, and, thus, required a demand before bringing suit, because the damages sought represented diminution in value of the funds themselves. Under Maryland law (which applied), the claims were derivative because the plaintiffs' harm was not distinct from the harm suffered by the corporation.

Wrongful Death; Previable Fetus

Mack v. Carmack, No. 1091040 (Ala. Sept. 9, 2011)

The court unanimously held that a wrongful death action may be maintained on behalf of a nonviable fetus, overruling *Gentry v. Gilmore,* 613 So. 2d 1241 (Ala. 1993).

Unlawful Detainer; Time to Appeal

Ex parte Brown, No. 1091367 (Ala. Sept. 9, 2011)

The "seven days" for the time to appeal in a residential unlawful detainer from district court to circuit court,

 Continued from page 457

as provided in *Ala. Code* §§ 6-6-350 and 35-9A-461(d), is subject to the provisions of Rule 6(a), *Ala. R. Civ. P.*, which would exclude intermediate Saturdays and Sundays.

Arbitration; Costs

Don Drennen Motor Co. v. McClung, No. 1100734 (Ala. Sept. 9, 2011)

The trial court's order requiring the defendant to pay arbitration costs violated the parties' agreement and the controlling AAA rules concerning arbitral costs.

Arbitration; Merger by Deed

Thomas v. Sloan Homes LLC, No. 1100395 (Ala. Sept. 16, 2011)

The merger doctrine did not nullify the arbitration clause contained in the sales contract after the closing and delivery of deed.

Warranty

American Suzuki Motor Corp. v. Burns, No. 1081605 (Ala. Sept. 23, 2011)

Alabama does not recognize a cause of action for a "constructive" breach of warranty.

Premises Liability

Lafarge North America, Inc. v. Nord, No. 1090620 (Ala. Sept. 23, 2011)

The court held that the plaintiff was contributorily negligent as a matter of law because he had placed himself consciously in harm's way, having appreciated the danger associated with walking behind an operating forklift in a designated commercial loading zone.

Appellate Procedure; Animals in Roadway

Hayes v. Henley, No. 1100636 (Ala. Sept. 23, 2011)

Under *Ala. Code* 3-5-3, the alleged owner of livestock in the roadway was not liable for personal injuries to the driver of the vehicle absent a proof of willfulness.

Personal Jurisdiction

Ex parte American Timber & Steel Co., Inc., No. 1100884 (Ala. Sept. 23, 2011)

The ATSC should have reasonably foreseen that its goods would have to move through Alabama to traverse the roads from Texas to Florida, and, thus, would be subject to jurisdiction in Alabama in connection with a traffic accident involving the transport of those goods. The commercial website operator who booked the freight, however, was not subject to personal jurisdiction.

Decisions of the Alabama Court of Civil Appeals

Workers' Compensation

G.UB.MK Constructors, Inc. v. Davis, No. 2100282 (Ala. Civ. App. Aug. 19, 2011)

An injury to the plaintiff's left hand did not render the plaintiff permanently and totally disabled because the evidence was insufficient to show that the pain prevented the worker from engaging in physical activities with the uninjured parts of his or her body.

Collateral Source Rule

Crocker v. Grammer, No. 2090957 (Ala. Civ. App. Sept. 9, 2011)

Ala. Code § 12-21-45 remains viable after the adoption of the *Alabama Rules of Evidence.* Thus, while under the common-law collateral-source rule, a jury could not in any case decrease the amount of damages awarded on account of a plaintiff's receipt of third-party payments of medical and hospital expenses, under § 12-21-45 a jury can now decide whether such a reduction would be appropriate.

Decisions of the Eleventh Circuit Court Of Appeals

Arbitration; Review of Arbitral Award

Cat Charter LLC v. Schurtenberger, No. 10-11674 (11th Cir. July 13, 2011)

An arbitrators' award was not subject to vacatur under the FAA, because a "reasoned" award as required by the agreement means more than a simple result, but does not require findings of fact and conclusions of law.

FLSA

Dionne v. Floormasters Enterprises, Inc., No. 09-15405 (11th Cir. July 28, 2011)

An employer is not liable for attorney's fees and costs under the FLSA if he tenders the full amount claimed by an employee, where the trial court grants the employer's motion to dismiss the employee's complaint on mootness grounds.

Commerce Clause; Health Care

State of Florida v. U.S. Dept. of HHS, No. 11-11021-HH (11th Cir. Aug. 12, 2011)

The Court affirmed the district court's holding as unconstitutional the "individual mandate" provision of the 2010 Healthcare Law, but reversed the district court's holding that found the individual mandate non-severable.

Arbitration; Class Actions

Cruz v. Cingular Wireless, No. 08-16080 (11th Cir. Aug. 11, 2011)

In its first post-*Concepcion* decision, the Eleventh Circuit affirmed the district court's finding enforceable an arbitration clause containing a class-action waiver. The Court held any state-law policy concerning the prosecution of small-dollar claims, and the viability of the same outside of the class-action context, is pre-empted by the FAA.

Arbitration; Non-Signatory Enforcement

Lawson v. Life of the South Ins. Co., No. 10-11651 (11th Cir. Aug. 10, 2011)

The Court affirmed the denial of a credit insurer's motion to compel arbitration, in a class action by credit life purchasers seeking a return of unearned premiums upon refinance or payoff. The Court reasoned that neither the equitable estoppel nor the third-party beneficiary doctrines allowed the credit insurer, a non-party to the arbitration agreement, to enforce the arbitration agreement.

Labor and Employment

Cummings v. Washington Mutual, No. 10-10706 (11th Cir. Aug. 22, 2011)

A claim under the Employee Polygraph Protection Act fails because the employer was investigating a specific instance of theft, and had a reasonable suspicion of the plaintiff's involvement. The one-year limitations period for asserting a COBRA claim is subject to the general federal "discovery" rule.

Arbitration; Waiver; Amendment to Complaint

Krinsk v. Suntrust Banks, Inc., No. 10-11912 (11th Cir. Sept. 7, 2011)

After the defendant affirmatively disavowed the arbitration clause and the parties litigated a putative class action, the plaintiff filed an amended complaint which substantially expanded the putative class definition, and the defendant then invoked arbitration. The district court rejected arbitration, but the Eleventh Circuit reversed, holding that when an amendment substantially changes

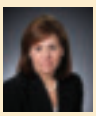
Setting a Record for Volunteerism

Alabama State Bar members have proven over and over and in numerous ways that "Lawyers Render Service" is not simply a catchy slogan but is a goal to which many aspire. This devotion to helping others, especially those less fortunate, was recognized once again by the American Bar Association at its annual meeting this past summer.

For the *third* time, a member of the state bar has been honored with the ABA Pro Bono Publico Award. This award is presented each year to individual lawyers and institutions in the legal profession who have demonstrated outstanding commitment to volunteer legal services for the poor and disadvantaged.


Schoen

In 1995, Montgomery attorney **David I. Schoen** was the first ASB honoree, followed by **Barry Johnson Parker** of Birmingham (now of Mobile) in 2001 and, this year, by **Henry A. Callaway, III** of Mobile. Schoen practices with The Law Office of David Schoen, Parker is a shareholder with Maynard Cooper & Gale PC and Callaway is a partner with Hand Arendall LLC, also of Mobile.


Parker


Callaway

THE APPELLATE CORNER Continued from page 459

the scope of the case, "fairness" dictates that the defendant be allowed to plead anew, even to revive defenses which were not pleaded or waived.

Expert Testimony; *Daubert*

Rosenfeld v. Oceania Cruises, No. 10-12651 (11th Cir. Sept. 7, 2011)

A plaintiff in a slip-and-fall premises liability case should have been allowed to offer expert testimony concerning the defendant's choice of flooring on a cruise ship and its susceptibility to slippage.

Interstate Land Sales

Gentry v. Harborage Cottages-Stuart LLLP, No. 09-13253 (11th Cir. Sept. 7, 2011)

A condo developer violated the Interstate Land Sales Full Disclosure Act by failing to provide a property report prior to the purchase agreements, and the developer was not exempt from the Act because the transactions were designed to evade the Act.

Removal and Remand

Bender v. Mazda Motor Corp., No. 10-14699 (11th Cir. Sept. 23, 2011)

Once a case is remanded, the district court loses jurisdiction under *Harris v. BlueCross/BlueShield of Alabama, Inc.,* 951 F.2d 325 (11th Cir. 1992), and, thus, lacks jurisdiction to consider a Rule 60 motion.

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

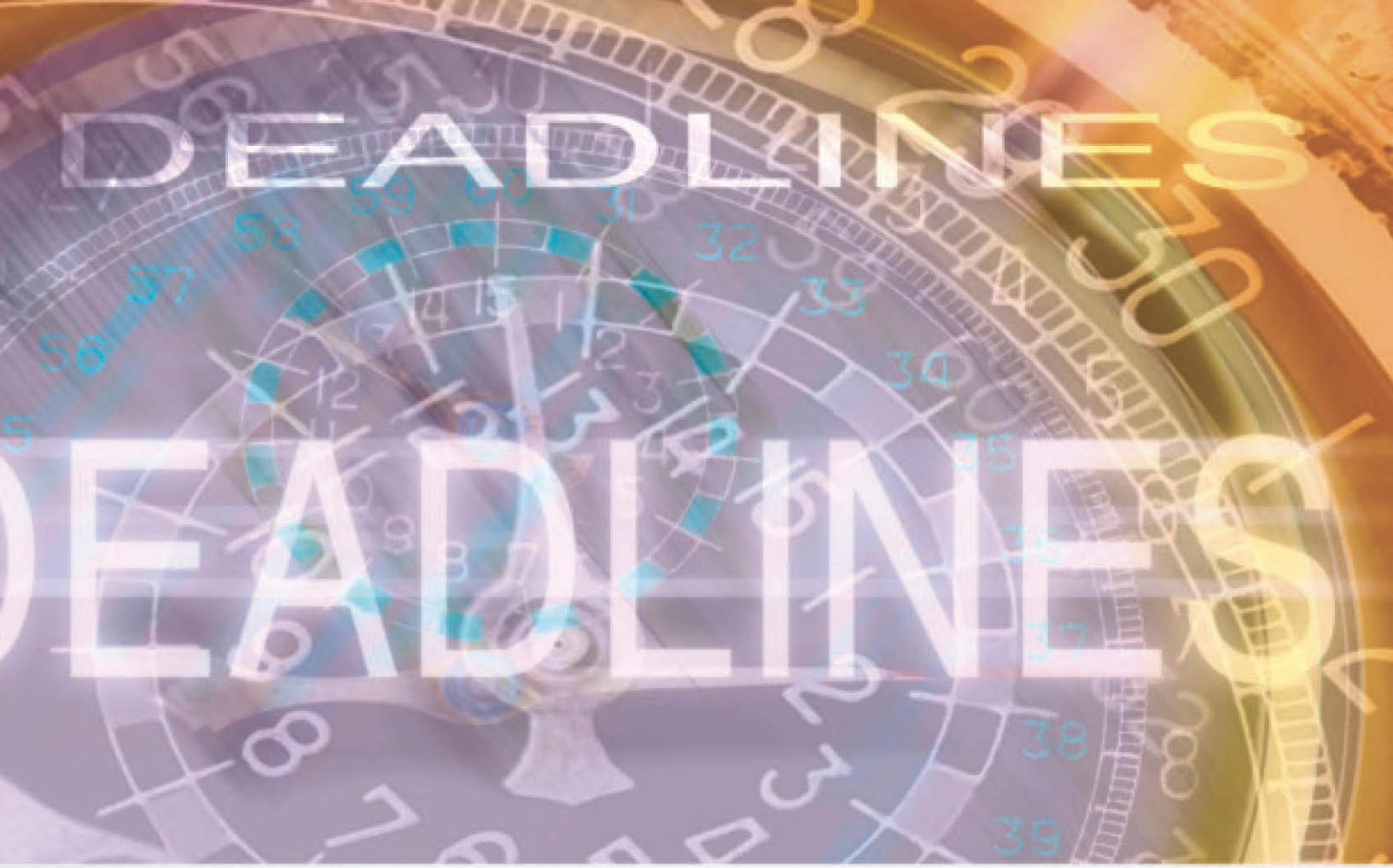
NAVAN WARD
navan.ward@beasleyallen.com

Section Starts This Year Strong

In October, the Young Lawyers' Section (YLS) hosted another admissions ceremony for at the Montgomery Performing Arts Center. Newly-appointed Alabama Supreme Court **Chief Justice Charles Malone** presided over his first admissions ceremony as Alabama's head judge. Special thanks go to the members of our Admission Ceremony Committee which include **Bill Robertson** (chair), **Nathan Dickson** (co-chair), **Louis Calligas** (co-chair) and **Walton Hickman**. The YLS also thanks the **U.S. District courts** for the Northern, Middle and Southern districts of Alabama for the support provided with the ceremonies, and to all of the participating sponsors, including **Attorneys Insurance Mutual of the South, Fouts Commercial Photography, Freedom Court Reporting** and **Village Photography**. Without the hard work of committee members, and the support of Alabama's federal courts and all of the sponsors, the fall ceremony would not have been such a success.

During Pro Bono Week, the YLS held a simultaneous phone-a-thon in Huntsville, Birmingham, Montgomery and Mobile to sign up new admittees for the Volunteer Lawyers Program (VLP). The YLS also plans to launch another pro bono project, "Project Salute," which will serve our veterans by helping them obtain federal benefits and other basic pro bono legal services.

The 11th Annual Iron Bowl CLE was held earlier this month in Birmingham at **Bradley Arant Boult Cummings**. The Iron Bowl CLE is held each year the week prior to the Iron Bowl and is a convenient way to obtain 3.0 hours of CLE credit (including the required 1.0 hours of ethics) before the end of the year. Thanks to Bradley Arant for allowing the YLS to use its facilities and to the speakers for taking time out of their busy schedules to make presentations. I also thank the members of the Iron Bowl CLE Committee, **Jon Patterson** (chair), **Brett Ialacci** (co-chair) and **Clifton Mosteller** (co-chair), for their hard work in setting up another successful event. As always, we had a pair of Iron Bowl tickets to give away—Roll Tide and War Eagle!


DEADLINES
DEADLINES


DEADLINE

Wage and Hour Myths:
Illuminating the Truth behind Misconceptions Of the Fair Labor Standards Act

By J. Bradley Medaris

An Overview of the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) requires all employers to pay all protected employees no less than the minimum hourly rate (currently $7.25 per hour) and overtime at a rate of one and one-half times the employer's regular rate of pay.[1] These laws apply to all workers who are engaged in commerce or the production of goods for commerce and to employees of all business enterprises which have annual gross sales of $500,000 or more.[2] Certain employees are exempt from the protections of the FLSA.[3] If an employee is improperly compensated, the employee is entitled to all unpaid wages, liquidated damages in an amount equal to the unpaid wages and attorney's fees and costs.[4]

Companies have been hit hard by FLSA lawsuits recently, facing multi-million dollar judgments. Just this year, Walmart lost a case where the allegations involved forcing employees to work off the clock. The jury awarded more than $187,000,000 in damages.[5] An Iowa farm was forced to pay more than $1.7 million to workers after an investigation by the Iowa Labor Commissioner determined that workers were receiving sub-minimum wages.[6] The U.S. Department of Labor has been active recently as well, recovering more than $176,000,000 for workers throughout America in 2010.[7]

All members of the bar should become familiar with this law. Obviously, attorneys who typically represent companies must address FLSA compliance with their clients. Attorneys who typically represent individuals likely have several clients who have suffered violations of this law and are entitled to back wages and other damages. Unfortunately, there seem to be many misunderstandings about this law. Some of these myths are so pervasive that many attorneys accept them as true without challenge. The FLSA is a very complex law that can be extremely difficult for the average attorney to grasp. Fortunately, many concepts can be presented easily, and this article seeks to illuminate some of the unfamiliar recesses of this important law.

Myth One–Violations of the Fair Labor Standards Act rarely occur

"Most workers are paid correctly. Everyone knows that we have minimum wage laws. If employers don't want workers to get overtime, they don't let them work overtime. The rules are too simple for there to be too many violations. Maybe there are a few rogue small businesses or maybe a few undocumented workers get taken advantage of, but this is the exception rather than the rule."

Many people share this attitude, including a significant number of attorneys. However, all evidence suggests that FLSA violations are at epidemic levels. Alabama has seen more than a 400 percent increase in FLSA filings since 2005. The federal courts in general have seen an increase across the U.S. from 1,870 filings in 2000 to 6,771 filings in 2010–an increase of over 360 percent.[8]

In 2009, the UCLA Institute for Research on Labor and Employment, the National Employment Law Project and the Center for Urban Economic Development, along with other organizations, released a study researching the extent of violations of the Fair Labor Standards Act among low-wage industries in Los Angeles, Chicago and New York City. This study, entitled "Broken Laws, Unprotected Workers," found widespread violations of wage and hour laws. The highlights (or lowlights) of this study include:

- 76 percent of those employees who worked overtime were not paid the required overtime rate of pay;
- 26 percent of workers were paid less than minimum wage;
- 30 percent of tipped employees were paid less than minimum wage;
- African-American workers suffered pay violations three times more often than white workers;

- Of those workers sampled, 68 percent had suffered at least one pay-related violation in the previous work week; and
- The study concluded that more than 1.1 million workers in the three cities surveyed suffer at least one pay-related violation each work week and the total wage loss equals more than $56 million per week.

According to this report, these violations are widespread and can be found in every industry and business, from small restaurants to international corporations. Even law firms have been successfully sued for violations of this law.[9]

Workers throughout the country are suffering from illegal pay plans. Likewise, many companies are facing huge lawsuits over problems that would be easy to avoid with the assistance of good legal counsel. All attorneys need to be aware of the widespread nature of this problem to help those clients who need wage and hour advice.

Myth Two–All employees are covered by the Fair Labor Standards Act

"These laws cover all workers who are engaged in commerce. As we all know, commerce covers almost every activity that a worker could be engaged in. All workers are therefore engaged in commerce and protected by the FLSA."

The FLSA applies to all employers whose business grosses $500,000 or more annually. The FLSA also applies to businesses that gross $500,000 or less if "engaged in commerce." The term "engaged in commerce" causes a common misconception thanks to decisions such as *Heart of Atlanta Motel, Inc. v. U. S.*[10] and *Katzenbach v. McClung*.[11] Under the analysis of these cases, Congress seems to have almost limitless power to regulate commerce. In cases analyzing the FLSA, however, the Supreme Court has determined that Congress did not intend to use the full scope of that power in creating the FLSA.

In *McLeod v. Threlkeld*,[12] the Supreme Court reviewed the legislative history of the FLSA. The Court ultimately determined that the FLSA was not intended to apply to all workers because Congress had originally drafted the legislation to protect all workers "engaged in commerce in any industry affecting commerce" but this language was rejected and replaced with the current form.[13] There must be some gap between "engaged in commerce" and "engaged in commerce in any industry affecting commerce."

To be engaged in commerce under the FLSA, an employee must be working for an instrumentality of commerce (such as a transportation or communication company) or be regularly using such things as the mail, telephone, Internet or transportation in his job.[14] Using a credit card two or three times a week has been found to not satisfy this requirement.[15] A worker cannot rely upon the argument that because an item previously moved in commerce, he is covered by this Act.[16] However, because all employees of a business which grosses $500,000 are automatically covered by this law, this analysis is only relevant to smaller employers.

Additionally, there are some workers who are completely or partially exempt from the Act (provided the employer complies with certain requirements). Examples of exempt workers include:

- Truck drivers[17]
- Farm workers[18]
- Computer professionals[19]
- Seasonable amusement park workers[20]
- Outside salespeople[21]
- Teachers[22]
- Insurance adjusters[23] and
- Managers (but see Myth Four)[24]

Police and fire department employees are also partially exempt and are subject to a unique method of calculating overtime based upon the length of their tours of duty.[25] These rules tend to further complicate FLSA compliance and have led to several lawsuits recently in Alabama.[26]

Many states have attempted to fill in this jurisdictional gap by creating wage and hour laws to cover these exempt and otherwise unprotected employees. Alabama, however, has never done so. As it stands, if an Alabama employer is not covered by the Fair Labor Standards Act his employees have no right to minimum wage or overtime.

Myth Three–Workers who are paid a salary are not entitled to overtime

"If an employee is paid a salary, he is paid that amount no matter how many hours he works. This is a good system for the

employer because it makes payroll easier. The employee benefits too because he does not have to worry about how many hours he works–he knows what he will be paid each week. Overtime isn't part of a salary."

There is nothing per se illegal about paying a covered worker a salary.[27] However, paying a salary does not excuse an employer from paying overtime. Only those types of employees listed in 29 U.S.C. § 213 can work long hours without additional overtime pay. If a non-exempt employee works more than 40 hours in a week, he is entitled to one and one-half times his regular rate of pay.[28]

Even if the FLSA allows a certain type of worker to receive a salary, these workers must be paid on a true salary basis. Most exempt workers must receive no less than $455 per week regardless of the number of hours worked.[29] Deductions from this minimum salary are only allowed in certain situations, such as when an employee misses work for a personal reason (not sickness/disability) or when the employee is suspended for violating a safety rule of major significance.[30]

Improper deductions from one salaried employee can destroy the ability of an employer to pay any other similarly situated employees a salary. In *Avery v. City of Talladega, Ala.*,[31] one of the plaintiffs (a police lieutenant) was suspended for leaving the scene of a suicide without permission. A second lieutenant was suspended for using excessive force against an inmate. The court determined that the deductions in pay that accompanied these suspensions were not lawful because the lieutenants did not violate any safety rules of major significance. Because these deductions were unlawful, the court ruled that all police lieutenants were not treated as exempt employees by the defendant and, therefore, all were entitled to overtime pay.

An employee who is being paid a salary should always be closely examined. If the employee's duties do not exempt him from the protections of the FLSA, he is entitled to overtime pay. Even if the employee is exempt, he must receive his salary regularly and without deductions to stay an exempt employee.

Myth Four–All managers are exempt under the Fair Labor Standards Act

"Managers are exempt under the Act, which means all managers can be paid a salary. If an employee holds the title of manager, his employer can't violate the FLSA as to him."

Titles mean nothing under the FLSA. To determine whether an employee is truly a manager, the employee's actual duties must be examined and the employee's primary duty must be determined.[32] Typical managerial duties include such tasks as hiring and firing workers; setting workers' pay; training employees; maintaining certain records; managing inventory; ordering tools and supplies; planning and controlling budgets; ensuring the safety of workers; and apportioning work among employees.[33] Management is the employee's primary duty if it is the "principal, main, major or most important duty that the employee performs."[34] Other factors, such as how much the potential managerial employee earns versus non-exempt workers and how much time the potential managerial employee spends performing managerial tasks, can weigh heavily on the issue.[35]

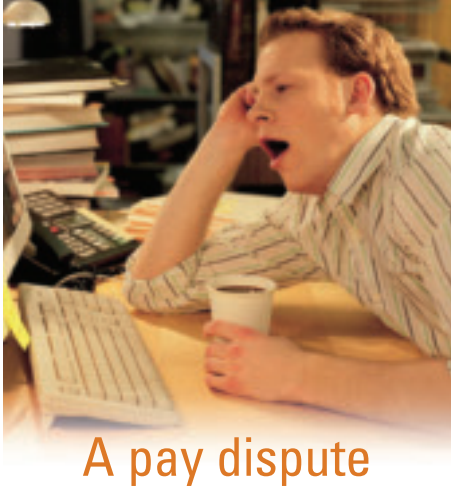
Each employee's situation requires a unique factual inquiry; the law will not tolerate a categorical approach to granting exemptions.[36] Thus, employers must be extremely careful with managerial (and all exempt) employees. This is especially true because the burden is on the employer to demonstrate that the employee is exempt.[37]

In *Morgan v. Family Dollar Stores, Inc.*,[38] the evidence demonstrated that the defendant's store managers were not treated as true managers by the company. The court found that 80-90 percent of the store managers' time was spent performing tasks such as stocking shelves, operating cash registers, unloading trucks or cleaning bathrooms. The company's job description for store managers was very similar to that of sales associates. Company documents also demonstrated that the store managers had almost no discretion, and policies existed for even the tiniest of details–such as what items should go in what drawers of a file cabinet and how to arrange clipboards. Because of the overwhelming evidence that store managers had very little discretion and spent the bulk of their time performing non-exempt tasks, they were entitled to overtime.

An employer cannot simply designate every employee as an assistant manager and, thus, avoid overtime. Only true managers–those who genuinely manage a store, department or other subdivision of a company–are not required to be paid overtime. Misclassification lawsuits are quite common under the FLSA and special attention must be paid to those workers who are called managers.

Myth Five–Overtime pay can be waived

"Employees and employers are free to negotiate the terms of an employee's employment. If an employee agrees to waive his rights to overtime, it can just be part of his employment agreement."



A pay dispute resolution policy for a company is a good idea overall, as it will help reduce the number of potential lawsuits the company will face and will give employees the chance to be heard on any pay problems.

The FLSA was created to help protect workers from longer hours and little pay–a problem which affects the health of the workforce and the free flow of goods in commerce.[39] To allow a waiver of the rights conferred to workers under the Act would negate the entire purpose of the legislation.[40] Indeed, the protections offered by the FLSA are so well respected that they can even trump the provisions of collective bargaining agreements.[41]

These protections are so strong that there exist only two ways to reach an enforceable settlement agreement when an employee's rights have been violated. First, the Department of Labor can review and supervise any agreements to compensate damaged employees.[42] Second, a District Court may review and approve such agreements.[43] An agreement which is reached that is not approved by either the Department of Labor or the courts is unenforceable.[44]

However, a recent decision by the 11th Circuit creates a possible exception to this rule. *Dionne v. Floormasters Enterprises, Inc.*[45] states that a District Court does not have jurisdiction to hear a claim when the defendant has tendered to the plaintiff the entire amount of the plaintiff's claim. This decision appears to create a split among Circuit courts, so the issue may not be completely resolved at this time.[46]

Even the potential exception offered by *Dionne* is very limited. It is important to remember that once an FLSA violation has been committed, any resolution must be taken to court.[47] Reaching a settlement agreement without court approval will not be unenforceable.

Myth Six–Corporate policies forbidding overtime can shield an employer

"If an employer has a policy against paying workers for unapproved overtime, the employees have to respect and abide by the policy. The employer can fall back on this policy and avoid liability if employees are working overtime without approval."

The "ostrich" approach to overtime does not protect an employer from liability for failure to pay overtime. Work not requested but permitted is compensable.[48] So long as the work is permitted to continue–the reason for it is immaterial–the employee must be paid for this time.[49]

Having a rule forbidding overtime or a policy for having overtime approved beforehand is fine, but management must actively work to enforce such policies.[50] Management is expected to know what is happening in the business and will be held accountable for violations that could have been discovered through reasonable diligence.[51]

However, if an employee hides overtime from an employer (for example, by falsifying time sheets) and the employer had to rely upon the employee's representation of the hours he worked (say, because the employee worked from home), the employee can be found to be estopped from claiming unpaid wages.[52] Thus, it appears that a policy against overtime can protect an employer only in unusual situations.

A pay dispute resolution policy for a company is a good idea overall, as it will help reduce the number of potential lawsuits the company will face and will give employees the chance to be heard on any pay problems. It is not an impenetrable shield to protect a company, though. Management has a duty to make sure that employees are complying with company policy regarding overtime.

Myth Seven–Companies can give time off rather than pay overtime

"A company can comply with the law by allowing its employees to take time off in lieu of overtime. If an employee works 50 hours one week, let him only work 30 the next week and there will be no violation of the law."

The FLSA forbids the employment of an employee for more than 40 hours per work week without paying the premium overtime rate.[53] Each work week must stand alone when determining whether overtime should be paid.[54]

Employees of the state, of a state agency or of an interstate agency may receive compensatory time rather than overtime.[55] Even in this situation, the employee and employer must specifically agree to this arrangement.[56] This compensatory time off must be paid out at the same premium overtime rate–in other words, 10 hours of overtime equals 15 hours of compensatory time.[57] The employee is limited to 240 hours of accrued compensatory time (480 for public safety employees).[58] Overtime must be paid out once the employee hits this ceiling.

Further, if an employee requests to use this compensatory time, the employer must not unreasonably stand in his way.[59] The employee must also receive all of his unused compensatory time as overtime pay at the end of his employment with the employer.[60]

Amending this provision of the FLSA to allow private employers with an opportunity to provide compensatory time rather than overtime is often mentioned as a way to improve the

law. As of this writing, however, private companies cannot use compensatory time and must pay overtime to their workers.

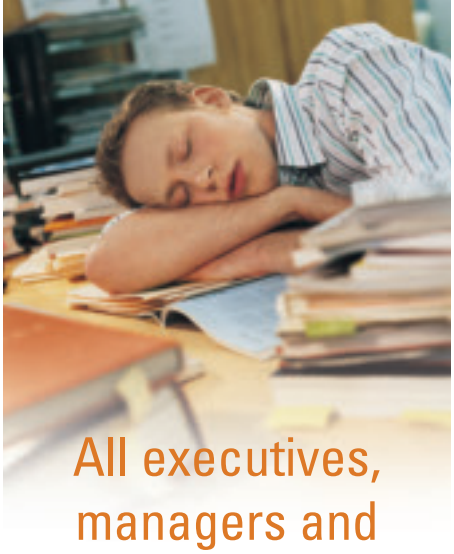
Myth Eight–Individuals cannot be sued under the FLSA

"Even if a violation does occur, only the business entity can be sued. That's why people incorporate. The owners and officers are safe from personal liability."

The FLSA defines employers in an interesting way–an employer is anyone acting in the direct or indirect interests of an employer.[61] Courts are expected to construe this term liberally due to the remedial nature of the FLSA.[62] Obviously, this swallows a large group of individuals.

A corporate officer can be included within this definition provided that he has operational control of the company or direct control over the employee in question.[63] In other words, the corporate form will not protect any individual actor from liability under this law.[64] Even ordinary supervisors have been found to be employers.[65] It would seem that anyone who directs an employee, pays an employee or is in any way responsible for an employee risks being liable for FLSA violations.

This can be a major problem for management level individuals who are ignorant of the requirements of the law. All executives, managers and supervisors must be regularly briefed on the requirements of the FLSA for the benefit of their company but also for their own personal benefit. Workers can always target individual owners, officers, managers and supervisors to reimburse them for unpaid wages and other damages.



All executives, managers and supervisors must be regularly briefed on the requirements of the FLSA for the benefit of their company but also for their own personal benefit.

Conclusion

The FLSA is a very far-reaching, nuanced and complicated act. Many attorneys and even judges struggle with its requirements. However, businesses of all types must have a strong understanding of these laws. Ignoring the FLSA opens a company to potentially severe legal problems. Those employers who are found guilty of violating this law face significant damages: unpaid wages, liquidated (double) damages, attorney's fees and costs. The Department of Labor has recently sought criminal sanctions against some employers.[66] Thus, it is very important that those who advise businesses on payroll matters be extremely familiar with the FLSA.

Employees too have an incentive to understand this law. At its core, the FLSA doesn't require much from employers–pay at least $7.25 per hour and one and one-half times the regular rate for hours worked above 40 in a week. Still, many companies are willing to pay workers (and even make a business decision to) illegally, in the hopes of making a greater profit. This most often occurs with low-wage workers. Those attorneys who do a significant amount of criminal, workers' compensation, domestic, juvenile, and other similar work are likely in contact with workers who are improperly compensated. Because of the requirement that the defendant pay a prevailing plaintiff's attorney's fees, there exists an incentive for attorneys to discuss this act with their clients.

Ultimately, both workers and employers benefit from a greater understanding of this law. The benefit to workers is obvious–receiving the correct amount of pay they are due under the law each week. Benefits to the company include increased worker satisfaction, less exposure to litigation and a more competitive and balanced marketplace. Attorneys who regularly represent either businesses or workers (especially workers in low-income industries) owe it to their clients to advise them on their rights and responsibilities under the FLSA. Helping clients move past these common myths will significantly aid in a better understanding of this complicated law.

Endnotes

1. 29 U.S.C. §§ 206, 207.
2. 29 U.S.C. §§ 206, 207 and 203(s).
3. 29 U.S.C. § 213.
4. 29 U.S.C. § 216(b).
5. *Braun v. Wal-Mart*, 2011 WL 2295224 (Pa. Super. 2011).
6. *http://www.iowaworkforce.org/wc/henrysturkeyservicedecision.pdf.*
7. *http://www.dol.gov/dol/budget/2012/PDF/FY2012BIB.pdf.*
8. These figures come from the filing records contained at Public Access to Court Electronic Records (PACER), located at *http://www.pacer.gov.*
9. *See Magnoni v. Smith & Laquercia, LLP*, 661 F. Supp. 2d 412 (S.D.N.Y. 2009).
10. 379 U.S. 241 (1964).
11. 379 U.S. 294 (1964).
12. 319 U.S. 491 (1943).
13. *Id.* at 493.
14. *Thorne v. All Restoration Services, Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006).
15. *Id.* at 1267.
16. *Id.*
17. 29 U.S.C. § 213(b)(1).
18. 29 U.S.C. § 213(a)(6).
19. 29 U.S.C. § 213(a)(17).
20. 29 U.S.C. § 213(a)(3).
21. 29 U.S.C. § 213(a)(1).
22. 29 U.S.C. § 213(a)(1).
23. 29 U.S.C. § 213(a)(1).
24. 29 U.S.C. § 213(a)(1).
25. 29 U.S.C. § 207(k); 29 C.F.R. § 553.230.
26. *Cremeens v. City of Montgomery*, 2:08-cv-546-MEF-WC (M.D. Ala. 2008); *Camp v. City of Pelham*, 2:10-cv-1270-PWG (N.D. Ala. 2010); *Pitts v. Lauderdale Co. Sheriff's Dept.*, 3:10-cv-3075-CLS (N.D. Ala. 2010).
27. 29 C.F.R. § 778.113.
28. *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1268-9 (11th Cir. 2008).
29. 29 C.F.R. § 541.600(a).
30. 29 C.F.R. § 541.602(b).
31. 24 F.3d 1337 (11th Cir. 1994).
32. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1266-7 (11th Cir. 2008).
33. 29 C.F.R. § 541.102.
34. 29 C.F.R. § 541.700.
35. *Id.*
36. *Morgan* at 1269.
37. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir. 2008).
38. *Supra.*
39. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945).
40. *Id.* at 707.
41. *See Herman v. City of St. Petersburg, FL, Police Dept.*, 131 F.Supp.2d 1329, 1332 (M.D. Fla. 2001); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981).
42. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 (11th Cir. 1982).
43. *Id.*
44. *Dees v. Hydradry, Inc.*, 706 F.Supp.2d 1227, 1237 (M.D. Fla. 2010).
45. 2011 WL 318977 (11th Cir. 2011).
46. *See Pitts v. Terrible Herbst, Inc.*, 2011 WL 3449473 (9th Cir. 2011); *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913 (5th Cir. 2008).
47. Based upon the author's experiences, the Alabama offices of the United States Department of Labor have a policy to not become involved in private resolutions of FLSA claims.
48. 29 C.F.R. § 785.11.
49. *Id.*
50. *Reich v. Dept. of Conservation and Natural Resources, State of Ala.*, 28 F.3d 1076, 1082 (11th Cir. 1994).
51. *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 827-8 (5th Cir. 1973).
52. *See Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324 (5th Cir. 1972).
53. 29 U.S.C. § 207(a); 29 C.F.R. § 778.104.
54. 29 C.F.R. § 778.104.
55. 29 U.S.C. § 207(o).
56. *Chesser v. Sparks*, 248 F.3d 1117, 1120 fn 1 (11th Cir. 2001).
57. 29 C.F.R. § 553.20.
58. 29 C.F.R. § 207(o)(3).
59. 29 U.S.C. § 207(o)(5).
60. 29 U.S.C. § 207(o)(4).
61. 29 U.S.C. § 203(d).
62. *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989).
63. *Patel v. Wargo*, 803 F.2d 632 (11th Cir. 1986).
64. *Harper v. Coates-Clark Orthopedic Surgery & Sports Medicine Center, LLC*, 2006 WL 2523135 (M.D. Fla. 2006).
65. *Waters v. Baldwin County*, 936 F.Supp. 860, 863 (S.D. Ala. 1996).
66. *http://azdailysun.com/news/local/crime-and-courts/arrests-in-forced-labor-case-at-flagstaff-wedding-boutique/article_90ce7e0a-3d56-5021-b81b-14723137b338.html.*

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Can I Get a Witness:
Obtaining Out-of-State Deposition Subpoenas

By Robin H. Jones

At some point, most lawyers will have to track down a witness residing in another state for purposes of obtaining discovery for use in a case pending before an Alabama state court. For instance, to defend your case pending in the Circuit Court of Escambia County, Alabama, you need critical testimony from an uncooperative former employee of your client who has moved to Los Angeles, California to pursue her show business dreams. This situation calls for the issuance of an out-of-state subpoena. Generally, upon learning of the need to issue such an out-of-state subpoena, my head is instantly filled with procedural questions (and the refrain from Marvin Gaye's 1963 classic): Does California require letters rogatory or commission? Will I have to obtain local counsel to file a miscellaneous action in a California court to prompt a judge to issue my subpoena? Can I include a document request with my deposition subpoena? Proper issuance and service of your subpoena is crucial if you want your witness to appear for the deposition. Indeed, unless the former employee agrees to miss an acting lesson to appear for deposition, you will require a valid subpoena to command her appearance.

Federal Courts Have Uniform Deposition Subpoena Procedures

In federal court, issuing an out-of-state subpoena is a relatively painless and uniform process. Indeed, if you are an attorney authorized to practice in the federal court where your action is pending, you can issue a subpoena in another jurisdiction without the court's involvement or the assistance of local counsel. As set forth in *Fed. R. Civ. P.* 45, the subpoena must simply be issued from the United States District Court where the deposition is to be taken or the production or inspection is to occur.[1]

Alas, such uniform simplicity for issuing out-of-state subpoenas does not currently exist at the state court level. The specific requirements for obtaining an out-of-state subpoena generally vary from state to state and, sometimes, from county to county. The Uniform Law Commission, however, has taken steps to streamline the out-of-state subpoena process among the state courts.

The Uniform Law Commission

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, was established in 1892 and is comprised of practicing lawyers, judges, legislators, law professors, and others individuals qualified to practice law.[2] These commissioners represent each state as well as the District of Columbia, Puerto Rico and the United States Virgin Islands. Their respective state governments appoint them to "research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical."[3] With advice from the American Bar Association, uniform laws are initially prepared in committees comprised of ULC commissioners.[4] Once drafted, the proposed laws endure an extensive editing and approval process before being offered to states for adoption.[5]

For more information about the work of the Uniform Law Commission, be sure to read "Alabama Attorneys Complete Work at Uniform Law Conference" by Rep. Cam Ward, in the March 2011 Alabama Lawyer. *Please note in Bob McCurley's "Legislative Wrap-Up" that he expects the Interstate Depositions and Discovery Act to be introduced in the 2012 legislative session.* *See page 496 for more on this topic.*

Several prominent American lawyers have served as commissioners, including President Woodrow Wilson and Chief Justice William Rehnquist.[6] Since its inception, the ULC has issued over 300 uniform laws that have been submitted to the states for adoption.[7] Perhaps the most well-known of these is the Uniform Commercial Code or UCC.[8]

In furtherance of its goal to unify specific areas of state law, the ULC has made several efforts to streamline the out-of-state deposition subpoena requirements across all states. Its first attempt was the 1920 Uniform Foreign Deposition Act (UFDA), which provides in relevant part as follows:

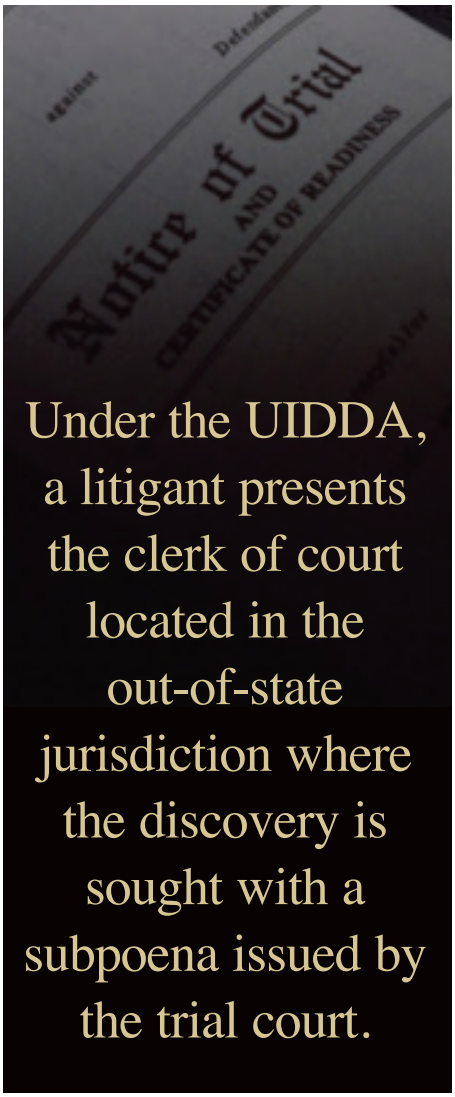
> Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.[9]

In 1962, the ULC drafted the Uniform Interstate and International Procedures Act (UIIPA).[10] While the UIIPA expounded on and was meant to supersede the UFDA, its acceptance was not widespread.[11] Ultimately, the ULC withdrew the UIIPA from recommendation in 1977.[12] Thirty years passed before the ULC offered a new alternative for unifying out-of-state discovery procedures.

In 2007, the ULC issued the Uniform Interstate Depositions and Discovery Act (UIDDA) with the goal of creating an interstate discovery procedure that "can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for litigants, and is fair to deponents."[13] The ULC used *Fed. R. Civ. P.* 45 as a template for the UIDDA because it is "universally admired by civil litigators for its simplicity and efficiency."[14]

Under the UIDDA, a litigant presents the clerk of court located in the out-of-state jurisdiction where the discovery is sought with a subpoena issued by the trial court.[15] Upon receipt of the trial court subpoena, the clerk will issue a discovery state subpoena for service upon the person or entity that is the subject of the original subpoena.[16] The UIDDA reduces the need for judicial oversight in issuing an out-of-state subpoena and altogether removes the necessity for obtaining a commission or letters rogatory. Further, it eliminates the need for local counsel and the requirement of filing a miscellaneous action in the discovery state to have the subpoena issued.

Since its creation in 2007, numerous states have adopted or are in the process



Under the UIDDA, a litigant presents the clerk of court located in the out-of-state jurisdiction where the discovery is sought with a subpoena issued by the trial court.

of adopting the UIDDA in some fashion.[17] While the wholesale enactment of the UIDDA by all 50 states and recognized territories would ease the burden on lawyers and clients nationwide, it will likely be several years before that occurs, assuming that all states will move toward adopting it. In the interim, the non-UIDDA states typically fall into a handful of general categories relating to how they address out-of-state deposition subpoenas.

Alabama and Other Letters Rogatory/ Commission States

This category of states, including Alabama, requires an out-of-state attorney to obtain a document–sometimes referred to either as "letters rogatory" or "commission"–from the trial court directing the court in the discovery state to issue the subpoena. Generally, local counsel is not required in the discovery state to issue the subpoena under the letters rogatory/commission approach. Instead, the trial court will issue the letters rogatory/commission, which can then be forwarded, along with a proposed subpoena, to the appropriate discovery state clerk, who will work with counsel to have the subpoena issued. Local counsel will only become necessary if compliance with the subpoena becomes an issue.

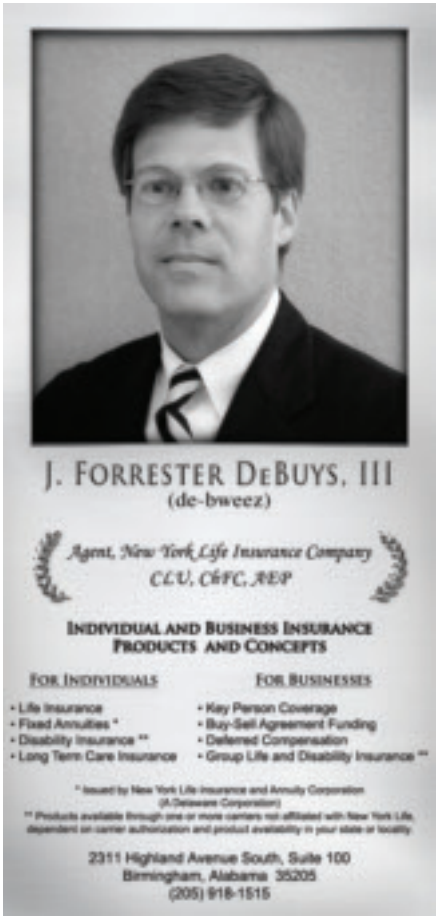
Specifically, Alabama is a commission state.[18] *Ala. R. Civ. P.* 28(c) requires any person desiring to take the deposition of an Alabama resident for use in a foreign action to provide a commission from the foreign, trial court to the Alabama court in the circuit where the witness resides. At that point, the Alabama court will issue the necessary deposition subpoena pursuant to *Ala. R. Civ. P.* 45. Should any issues relating to compliance with or the scope of the subpoena arise, those may be addressed with the subpoena-issuing Alabama court in a manner consistent with *Ala. R. Civ. P.* 30(d), 37(a)(1), 37(b)(1) and/or 45(c).

Miscellaneous Action States

These states require a party to hire local counsel in the discovery state to initiate a miscellaneous action in the discovery state court with jurisdiction over the deponent. This typically includes submitting a motion to the discovery court for an order allowing the subpoena to issue.

Uniform Foreign Depositions Act States

The states that are still clinging to some form of the UFDA require a party seeking a deponent to employ the same measures used in the trial court state. Generally, this involves submitting to the discovery state court a notice of deposition and subpoena. Similar to the letters rogatory/commission states, local counsel is normally not required to issue subpoenas in UFDA states, but may be necessary in any enforcement proceeding.



Best Practices for Obtaining Out-of-State Deposition Subpoenas

With the wide variety of procedures employed across the country for issuing an out-of-state deposition subpoena in state court, your best friend in the process is usually going to be the local clerk of court in the discovery state. Thus, when you realize an out-of-state subpoena will be necessary, you should locate your witness, determine the state court having jurisdiction over him or her, review the state rules and/or statutes regarding out-of-state deposition subpoenas, check the discovery state court's website for relevant local rules or preferred forms, and make a list of any questions you may have about the process. At that juncture, contact the local clerk. Typically, the clerk is very helpful in shepherding you through the process, which includes providing confirmation or clarification of proper procedures, forms and fees.

In a legal world where life is easy, all states will adopt some form of the UIDDA. Until that world comes to be, however, we will have to consult each state's rules or statutes on out-of-state depositions and rely on helpful court clerks when seeking out-of-state deposition subpoenas. The chart below identifies the current state statutes and rules authorizing issuance of subpoenas to compel witnesses to attend a deposition for use in another state.[19] It is hoped that it will be of some assistance in starting the process the next time you need an out-of-state deposition subpoena. ▲▼▲

Current State Statutes and Rules Relating to Issuance of Out-of-State Deposition Subpoenas

STATE	AUTHORITY
Alabama	Ala. R. Civ. P. 28(c)
Alaska	Alaska R. Civ. P. 28(c)
Arizona	Ariz. R. Civ. P. 30(h)
Arkansas	Ark. R. Civ. P. 28(c)
California	Code Cal. Civ. Proc. §§ 2029.100 *et seq.*
Colorado	Colo. Rev. Stat. §§ 13-90.5-101 *et seq.*
Connecticut	Conn. Gen. Stat. §§ 52-148e *et seq.*
Delaware	Del. Code Ann. tit. 10, § 4311
District of Columbia	D.C. Code Ann. § 13-443
Florida	Fla. Stat. Ann. § 92.251
Georgia	Ga. Code §§ 24-10-110 *et seq.*
Hawaii	Haw. Rev. Stat. § 624-27
Idaho	Idaho R. Civ. P. 45(i)
Illinois	Ill. S. Ct. R. 204(b)
Indiana	Ind. Code §§ 34-44.5-1-1 *et seq.*
Iowa	Iowa Code Ann. § 622.84
Kansas	Kan. Stat. Ann. § 60-228a (as amended by 2011 Kan. Laws Ch. 48 (S.B. 9))
Kentucky	Ky. Rev. Stat. Ann. § 421.360
Louisiana	La. Rev. Stat. Ann. §§ 13:3821
Maine	Me. R. Civ. P. 30(h)
Maryland	Md. Cts. & Jud. Proc. Code Ann. §§ 9-401 *et seq.*
Massachusetts	Mass. Ann. Laws. ch. 223A, § 11
Michigan	Mich. Comp. Laws Ann. § 600.1852 MCR 2.305(e)
Minnesota	Minn. R. Civ. P. 45.01(d)
Mississippi	Miss. R. Civ. P. 45 (as amended by MS Order 09-21)
Missouri	Mo. Ann. Stat. § 492.100 Mo. S. Ct. R. 57.08
Montana	Mont. R. Civ. P. 28(d)
Nebraska	Neb. Ct. R. Disc. § 6-328
Nevada	UIDDA Enacted by 2001 Nev. Laws Ch. 10 (A.B. 87) – Statutory Section Not Yet Assigned
New Hampshire	N.H. Rev. Stat. Ann. § 517:18
New Jersey	N.J. R. 4:11-4
New Mexico	N.M. R. Civ. P. 1-045.1 N.M. Stat. Ann. § 38-8-1
New York	N.Y.C.P.L.R. § 3119
North Carolina	N.C. R. Civ. P. 28(d)
North Dakota	N.D. R. Civ. P. 45(a)(3)
Ohio	Ohio Rev. Code Ann. §§ 2319.08, 2319.09
Oklahoma	Okla. Stat. Ann. tit. 12, § 2004.1
Oregon	Or. R. Civ. P. 38(c)
Pennsylvania	42 Pa. C.S.A. § 5326
Rhode Island	R.I. Gen. Laws § 9-18-11
South Carolina	S.C. Code §§ 15-47-100 *et seq.* S.C. R. Civ. P. 28(d)
South Dakota	S.D. Codified Laws § 19-5-4
Tennessee	Tenn. Code Ann. §§ 24-9-201 *et seq.*
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 20.002
Utah	Utah Code Ann. §§ 78B-17-101 *et seq.*
Vermont	Vt. R. Civ. P. 28(d)
Virginia	Va. Code Ann. §§ 8.01-412.8 *et seq.*
Washington	Wash. Super. Ct. Civ. R. 45(d)(4)
West Virginia	W. Va. R. Civ. P. 28(d)
Wisconsin	Wis. Stat. § 887.24
Wyoming	Wyo. Stat. § 1-12-115

Endnotes

1. Look to *Fed. R. Civ. P.* 45 for details regarding the issuance and service of a federal subpoena. In addition, it is a good practice to consult the local rules of the federal court issuing the subpoena as they might contain necessary and relevant information.
2. *Walter P. Armstrong, Jr., A Century of Service–A Centennial History of the National Conference of Commissioners on Uniform State Laws* (West Publishing Co. 1991); *see also http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC*. In 1881, the Alabama State Bar created a committee to examine the law for the purpose of making recommendations about uniformity of law between states and to bring the subject to the attention of bar associations in other states. *Id.* at 16. Alabama was one of the first states to recognize the wide variations between the law in separate states and take steps toward unification. *Id.* Alabama ultimately joined the ULC in 1906. *Id.* at 161.
3. *http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC.*
4. *http://www.nccusl.org/Narrative.aspx?title=Constitution* (Article 30).
5. *Id.*
6. *Walter P. Armstrong, Jr., A Century of Service–A Centennial History of the National Conference of Commissioners on Uniform State Laws* 181, 209 (West Publishing Co. 1991).
7. *http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC*. Alabama has adopted into law in excess of 50 uniform acts that the ULC has drafted. *Walter P. Armstrong, Jr., A Century of Service–A Centennial History of the National Conference of Commissioners on Uniform State Laws* 161 (West Publishing Co. 1991).
8. *http://www.nccusl.org/Narrative.aspx?title=Frequently%20Asked%20Questions.*
9. *http://www.law.upenn.edu/bll/archives/ulc/iddda/2007act_final.htm*. The UFDA was originally adopted in 13 states. *Id.*
10. *Id.*
11. *Id.* The UIIPA was adopted in only six states. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Those states that have enacted or are in the process of adopting some form of the UIDDA include California, Colorado, Delaware, District of Columbia, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, and Virginia. *See, e.g., http://www.nccusl.org/LegislativeFactSheet.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act.*
18. While Alabama has previously adopted other proposed uniform laws, there are no apparent indications that Alabama is presently considering the adoption of the UIDDA.
19. These are the statutes and rules currently in force. As mentioned, some states are considering or are in the process of adopting the UIDDA, which means certain of the identified statutes and rules are in the midst of being or will soon be repealed or amended (*e.g.* Georgia, Montana, Nevada, North Carolina, North Dakota, Oregon, Pennsylvania, and Vermont).

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Top 10 Things Never to Say to a Judge

(And Three Things You Should Always Do)

By Judge William R. Sawyer

Frequently, a lawyer will stand up in court and make an otherwise excellent presentation of his case, only to shoot himself in the foot by saying something that detracts from his argument. I have identified the top 10 things that a lawyer should never say to a judge while making an oral presentation. To end on a positive note, I have also suggested three things that lawyers should always do. While I approach this from the viewpoint of a bankruptcy judge who sits through interminable motion dockets, these principles apply to almost all oral presentations. With a nod to David Letterman, here are the top 10 things never to say to a judge.

10. "I'll be brief."

A lawyer should never say, "I'll be brief," even if he is. Lawyers frequently preface their remarks with this unnecessary bon mot. Lawyers who say this usually mean that their case is so bad or that they are so poorly prepared that they just do not have much to say. Some of the more Machiavellian types will say this in an effort to generate an expectation that they will be brief, and then they take an inordinately long time hoping that they have sucked the oxygen out of the courtroom so that their opponent will feel he cannot take much time. In any event, this should never be said. Always start with the assumption that the court will expect a lawyer to use the time appropriate for the matter, but no more.

9. "It's in my motion (or brief)."

This is usually said by a lawyer who knew what he was talking about when he wrote his motion but has not looked at it since and has forgotten most of what he wrote. This makes it appear as if the lawyer is criticizing the judge for being inadequately prepared to hear the motion when, in fact, it is the lawyer who is inadequately prepared. Counsel should always answer a question from the court the best they can without suggesting that the judge is inadequately prepared.

8. "My secretary forgot to put this on my calendar."

This is often uttered by lawyers who are moving for reconsideration of a motion lost because they did not show up for the hearing. A lawyer should never blame his staff and should always take the blame.

7. "That's a good question."

This is another phrase used by lawyers who are unable to answer a question put to them. It is doubly irritating because an unprepared lawyer has compounded his error by patronizing the judge.

6. "This isn't my case."

Lawyers frequently use this when they "stand in" for other lawyers and cannot answer a question. Sometimes it is said preemptively to head off questions that will not be answered in any event. It is a bad practice to appear in a case if the lawyer is not adequately prepared. If you stand up in court on a matter, it is your case, at least for that day.

5. "I'm not a bankruptcy lawyer."

Lawyers say this because they hope to get a mulligan on any procedural gaffes they may commit. However, it has the effect of devaluing everything the lawyer says. The rules are the rules, so there is no point in saying this. There are no mulligans in the law; every stroke counts no matter how poorly played.

4. "I couldn't be here last week because I had to be in court."

This is usually said in an effort to brazen out a motion to reconsider following an adverse order entered because the lawyer did not appear. It carries the implication that the other court or the other matter is more important and that the lawyer did not appear because he was simply too busy. Remarks such as this are never well received.

3. "I'll get to that later."

This is commonly used by the lawyer who is so inflexible he simply cannot alter the order of his presentation. This should never be said. Rather, the lawyer should be able to answer the question and then return to what he was saying. If appropriate, the lawyer should use the question as a clue as to what the judge thinks is important and tailor his presentation to maximize his chances of winning his motion. Lawyers should always welcome questions from the bench because it gives the lawyer a window into the judge's thinking. Even if a question appears to be adverse to the lawyer's case, it should nonetheless be welcomed; the judge must have some doubt or he would not have asked the question. The worst possible scenario is to appear before a judge who is as cold and silent as a stone, leaving the lawyer little opportunity to have an impact on his thinking.

2. "It's complicated."

Often a lawyer who does not know the answer to a question and does not want to admit it will use this phrase. This implies that the lawyer does not think the judge is smart enough to understand the answer to the question he has just asked.

1. "With all due respect."

Judges universally hate this remark more than all others and frequently say so, yet lawyers continue to say it. The problem is that when lawyers say this they are usually not being respectful at all. "With all due respect" is usually said by a lawyer in response to something a judge has said that the lawyer believes is incorrect. The mark of a top-notch lawyer is one who can persuade a judge that he is wrong about something of which he is convinced is right. Do not tell a judge he is wrong, rather, tell him what you believe to be correct and let him draw the conclusion, on his own, that his first impression was wrong. At best, "with all due respect" is a phlegm-clearing device which adds nothing to a presentation; at worst, it antagonizes the judge, making it that much more difficult to win the motion. The remark "with all due respect" should be forever banned.

Three Suggestions for Better Oral Presentations

I will close with three suggestions as to how lawyers might better prepare for oral hearings on motions.

First, be able to describe the motion in 50 words or less. For example, "Your honor, this is a motion for relief from the automatic stay. First Bank has a mortgage on the debtor's residence. We believe that relief should be granted because the debtor has not provided adequate protection for the bank's interest." If a lawyer cannot describe his motion succinctly, the judge probably will not understand what he is trying to do; or if he does, not be persuaded and deny the motion.

Second, identify the salient facts: "The debtor has not made a monthly payment in six months and the mortgage balance now exceeds the value of the residence." Be prepared to list the facts upon which your motion hinges. Identifying the pertinent facts is as important as eliminating those that are not. Put enough "meat on the bones" so that the judge knows what you are talking about but not so much that you get lost in pointless detail. The skill of being able to separate the essential from nonessential facts is one of the most important a lawyer can develop.

Third, accurately identify the legal standard to be used by the court. Do not overstate the law. If the court has discretion, identify the boundaries of the court's discretion. Do not misstate or overstate the legal standard. For example, a lawyer should not say, "Because it is undisputed that the debtor failed to make his January mortgage payment, the court must grant relief from the automatic stay, notwithstanding the fact that there is more than $50,000 equity in the residence." It would be much better to say, "Section 362(d) requires that relief from the automatic stay be granted upon a showing of cause. We believe that, under the facts here, we have made such a showing."

I hope these suggestions prove helpful.

Judge William R. Sawyer *is a United States Bankruptcy Judge for the Middle District of Alabama. He thanks Marguerite De Voll, his law clerk, for her assistance with this article.*

Alabama Supreme Court Clarifies Statute of Limitations For Wantonness

By Christopher L. Yeilding and Conrad Anderson, IV

The Supreme Court of Alabama's recent decision in *Ex parte Capstone Building Corp*.[1] marks the latest development in what has arguably been a 150-year long evolution of the distinction between "trespass" and "action [or trespass] on the case," with a related consequence being the clarification of what actions are governed by the six-year statute of limitations found in *Ala. Code* § 6-2-34(1) and those that are governed by the two-year catch-all statute in *Ala Code* § 6-2-38(l). While some commentators have suggested that the court's decision in *Capstone* represents a fundamental change in the law, others are less surprised, and are of the opinion that the decision is only a clarification of what the law has always been. Regardless of whether the decision is novel or nothing new, it is now clear: wantonness is not an action for "trespass to person or liberty, such as false imprisonment or assault and battery" and, therefore, does not fall within the six-year statute. Accordingly, the statute of limitations for claims of wantonness is two years.

Trespass vs. Trespass on Case

Under the ancient formulation, "whenever the injury [was] *direct and immediate*, whether it proceed[ed] from design or negligence, trespass [would] lie. But where the injury [was] *merely consequential*, the remedy must be an action on the case."[2] Thus, the real difference between trespass and action on the case was the "*directness"* of causation, rather than the *intent* of causation. This rule was the applied distinction in one form or another for well over a century, though there were some attempts to subtly redefine its application.[3]

Beginning in 1980 with the dissenting opinion of Justice Richard L. Jones in *Strozier v. Marchich*, there has been a steady move away from the ancient distinction and the language (direct/indirect causation) that governed it. In that opinion, Justice Jones wrote:

> Whatever vestige of the outmoded direct/indirect distinction between trespass and trespass on the case still exists in Alabama, I would now abandon and adopt instead the more modern tort concept of measuring the cause of action in terms of the degree of culpability of the alleged wrongful conduct.[4]

This was, Jones argued, the way that Alabama courts had applied the rule for quite some time in the past, but the language of the rule had never clearly changed to reflect the rule's application in practice.

After *Strozier*, the Alabama Supreme Court did not revisit this issue until 2004 in *McKenzie v. Killian*.[5] At that time, the court determined to heed the call issued first by Justice Jones in 1980 and then by Linda Webb's 1998 law review article,[6] definitively redefining the distinction between trespass and action on the case as one of culpability, not one of causality. After positively quoting the above-mentioned excerpt from Justice Jones's 1980 dissent, the *McKenzie* court noted:

> We embrace this reasoning today. We overrule *Sasser* and its progeny to the extent that those cases prefer the theory of causality over intent as the mechanism for distinguishing between actions for trespass and for trespass on the case.[7]

For this reason alone, *McKenzie* represented a significant decision–it articulated the most clear and concise distinction between trespass and action on the case for several decades and arguably longer than that. As far as *McKenzie* established intent as the defining difference between trespass and action on the case, it remains intact today as it did in 2004.

The *McKenzie* court went one step further, however, concluding that "wanton conduct is the equivalent in law to intentional conduct. Such an allegation of intent renders the six-year statutory period of limitations applicable."[8] Depending

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on one's perspective, the *McKenzie* court's conclusion that wantonness was subject to a six-year statute represented either a change in over 100 years of jurisprudence or simply a clarification of existing law and principles. Needless to say, this conclusion created much fodder for debate.

Is Wantonness an Intentional Tort, or is it Something Different?

In his dissent in *Strozier*, Justice Jones followed his above-quoted clarification of the distinction between causality and culpability by appearing to conflate the concepts of "wantonness" and "intent" for statute of limitations purposes:

> Wanton conduct, as that term is traditionally used and understood in the jurisprudence of our state, signifies the intentional doing of, or failing to do, an act, or discharge a duty, with the likelihood of injury to the person or property of another as a reasonably foreseeable consequence. Such conduct, resulting in injury, is actionable in trespass and governed by the six-year statute of limitations, in my opinion.[9]

Thus, in Justice Jones' opinion, the *intent to do an act* that might cause injury and the *intent to actually cause an injury* were equivalent in their culpability and, thus, both governed by a six-year statute. The majority in *McKenzie* embraced the reasoning of Justice Jones when it concluded that "wanton conduct is the equivalent in law to intentional conduct."[10]

Five years later, the Alabama Supreme Court followed *McKenzie* in *Carr v. International Refining and Manufacturing Co*.[11] The plaintiffs in *Carr* alleged claims of wantonness against their former employer arising out of the employees' exposure to toxic chemicals. Following a discussion about the effect of the decision in *McKenzie*, the court held:

> The former employees in this case have alleged that the new defendants engaged in wanton conduct that resulted in injury to them. Accordingly, under the analysis announced in *McKenzie*, [], the six-year limitations period of § 6-2-34(1) applies.[112]

In a lengthy dissent, Justice Murdock argued that the court should recognize the distinction between intent to do an *act* and intent to *cause an injury*. Nevertheless, a result of *McKenzie* and *Carr* was that claims for any tortious injury, including wantonness, that could be shown to result from intentional *conduct* would be subject to a six-year statute of limitations under § 6-2-34(1), regardless of whether the *injuries* themselves were intentional.

Ex parte Capstone

The facts leading to the court's decision in *Ex parte Capstone* were straightforward. William Walker alleged to have suffered an injury when he stepped onto an allegedly defective manhole cover at a jobsite where Capstone was the general contractor. Walker asserted claims of negligence and wantonness, contending that Capstone knew that the manhole cover was defective because of a previous accident and that it intentionally refused to fix the problem. Finding that Walker's injury occurred more than two years before suit was filed, the trial court dismissed both claims, ruling that Walker's wantonness claim also was subject to the two-year catch-all statute of limitations.[13]

…claims for any tortious injury, including wantonness, that could be shown to result from intentional conduct would be subject to a six-year statute of limitations under § 6-2-34(1), regardless of whether the injuries themselves were intentional.

Although it expressed concerns about its conclusion, the Alabama Court of Civil Appeals reversed the trial court as to the dismissal of the wantonness claim, holding that it was bound by the supreme court's unambiguous statement in *McKenzie* that allegations of intentional conduct, as in claims of wantonness, render the six-year statute of limitations applicable. The supreme court granted Capstone's petition for certiorari review.

Writing for the majority of the court, Justice Murdock–the vigorous dissenter in *Carr*–explained that wantonness had historically been defined as "the conscious doing of some act or the omission of some duty, while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result."[14] Moreover, wantonness does not require proof that the defendant entertained a specific intent to *cause the injury*.

With that framework in mind, the court determined that claims of wantonness are distinctively different than claims alleging intentional torts, such as false imprisonment or assault and battery referenced in *Ala. Code* § 6-2-34(1). Accordingly, the supreme court in *Capstone* held that the statute of limitations for wantonness claims must fall within the catch-all provision of the two-year statute of limitations, *Ala. Code* § 6-2-38(l).

Prospective Application of the Two-Year Statute of Limitations

Although decisions of the court are usually applied retroactively, the court elected to apply the rule announced–or clarified, depending on your perspective–in *Ex parte Capstone prospectively*:

> [L]itigants whose causes of action have accrued on or before the date of this decision shall have two years from today's date to bring their action unless and to the extent that the time for filing their action under the six-year limitations period announced in *McKenzie* would expire sooner.[15]

In other words, if a wantonness claim accrued within the four years preceding the issuance of the *Capstone* decision, the claimant has only two years from the issuance of *Capstone* to file the claim. Claims that accrued more than four years prior to the issuance of *Capstone* must be filed within the six-year statute of limitations.

Conclusion

In the past, resourceful practitioners with claims that were clearly time-barred by the two-year statute of limitations for negligence nevertheless would file suits alleging claims of wantonness. Such claims often faced an uphill battle at summary judgment because of difficulties in proving intent to do the act *or* cause injury, but the claims usually would be permitted to proceed through costly discovery and sometimes survived summary judgment. Following the *Capstone* decision, alleging wantonness as an effort to get around the two-year time bar is no longer an option. ▲▼▲

Note: *As of the date of publication, Capstone's application for rehearing on the issue of the prospective application of the court's decision is pending.*

Endnotes

1. No. 1090966, 2011 LEXIS 85 (Ala. June 3, 2011).
2. *Strozier v. Marchich*, 380 So. 2d 804, 805 (Ala. 1980) (Jones, J., dissenting) (quoting *Rhodes v. Roberts*, 1 Stew. 145, 146 (1827) (emphasis added)).
3. For a history of this rule's application, see Linda Suzanne Webb, *Limitation of Tort Actions under Alabama Law: Distinguishing Between the Two-Year and the Six-Year Statutes of Limitation*, 49 Ala. L. Rev. 1049 (Spring 1998) or Justice Jones' dissent in *Strozier*, 380 So. 2d 804.
4. 380 So. 2d at 809.
5. 887 So. 2d 861 (Ala. 2004).
6. Webb, *supra* note 3.
7. *McKenzie*, 887 So. 2d at 870 (citing *Sasser v. Dixon*, 273 So. 2d 182 (1973)).
8. *Id.*
9. *Strozier*, 380 So. 2d at 809.
10. *McKenzie*, 887 So. 2d at 870.
11. 13 So. 3d 947 (Ala. 2009) (plurality opinion).
12. *Id.* at 955.
13. *Ex parte Capstone*, 2011 LEXIS 85 at *2-3.
14. *Id.* at *15 (quoting *Carr*, 13 So. 3d at 962-63 (Murdock, J., dissenting)) (quoting, in turn, *Bozeman v. Central Bank of the South*, 646 So. 2d 601, 603 (Ala. 1994) (quotation omitted)).
15. *Id.* at *41.

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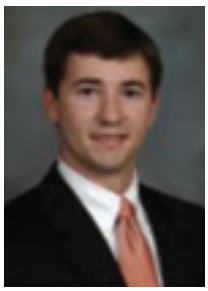

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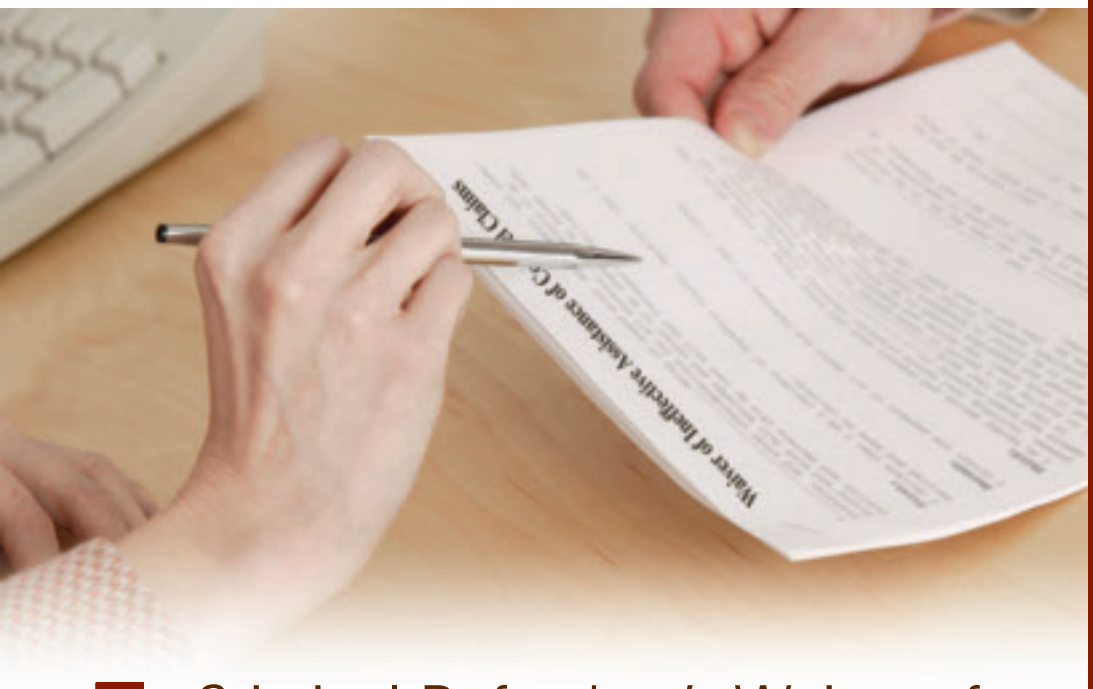


J. ANTHONY MCLAIN

Criminal Defendant's Waiver of Ineffective Assistance of Counsel Claims

QUESTION:

May a criminal defendant's lawyer advise a client to enter into a plea agreement that includes a provision requiring the client to waive all ineffective assistance of counsel claims against that lawyer? May a prosecutor include in a plea agreement a provision that would require the defendant to waive all ineffective assistance of counsel claim against the defendant's lawyer?

ANSWER:

Advising a criminal defendant to enter into an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of rules 1.7(b) and 1.8(h), *Ala. R. Prof. C.* Likewise, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea agreement because such would violate Rule 8.4(a), *Ala. R. Prof. C.*, which prohibits an attorney from "induc(ing) another" to violate the *Rules of Professional Conduct*.

DISCUSSION:

The Disciplinary Commission has been asked to issue an opinion regarding the ethical propriety of a criminal defense lawyer advising a client on whether to enter into a plea agreement that contains a provision requiring the client to waive the right to later bring an ineffective assistance of counsel claim against that attorney. The flipside to any such

 Continued from page 485

question is whether a prosecutor may require the defendant, as a condition of the plea agreement, to waive such rights. As an initial matter, the Disciplinary Commission stresses that this opinion does not address the legality or constitutionality of such waivers. Rather, this opinion deals solely with whether a criminal defense attorney or prosecutor may, under the *Alabama Rules of Professional Conduct*, participate in obtaining such a waiver.

A number of state bars and state supreme courts have addressed this identical issue and determined that a lawyer may not advise a criminal client as to whether to enter into a plea agreement that includes a provision requiring the defendant to waive a post-conviction right to bring an ineffective assistance of counsel claim against that same lawyer.[1] In doing so, those bars and courts have noted that a lawyer may not seek an agreement with a client prospectively limiting his liability for malpractice unless the client is independently represented in making the agreement. This rule is expressed in Rule 1.8(h), *Alabama Rules of Professional Conduct*, as follows:

Rule 1.8 Conflict of Interest: Prohibited Transactions

* * *

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The Disciplinary Commission is aware that both the Arizona and Texas bars find no such violation of Rule 1.8(h) and, therefore, allow defense lawyers to advise their clients on such waivers.[2] In Formal Opinion 95-08, the Arizona State Bar concluded that there was no violation of Rule 1.8(h) because the defense lawyer is not actually a party to the agreement between the client and the government. Additionally, the opinion concluded that the rule simply refers to "malpractice" claims and nothing more. In Opinion 571, the Texas State Bar concluded that a violation of Rule 1.8(h) does not exist because a "plea agreement waiving a post-conviction appeals based on ineffective assistance of counsel does not expressly limit the defense counsel's liability to the defendant for malpractice." However, the Disciplinary Commission finds

that Rule 1.8(h), *Ala. R. Prof. C.*, does prohibit defense counsel from advising a client on whether to enter into a plea agreement that requires a waiver of any right to bring an ineffective assistance of counsel claim.

In Opinion 2001-06, the Ohio Board of Bar Commissioners on Grievances and Discipline noted as follows:

> While a waiver of claims of ineffective assistance of counsel does not eliminate the opportunity for a criminal defendant to bring a legal malpractice action against a criminal defense attorney, it significantly limits and may even destroy the defendant's ability to establish proximate cause, a necessary element of a legal malpractice claim. Given this relationship, it is the Board's view that a plea agreement provision that waives appellate or post-conviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice.

A civil claim of malpractice and a claim of ineffective assistance of counsel are legally distinct from one another; however, both involve claims by the client that the lawyer's representation was unreasonable or lacking and that the client was harmed as a result. Further, it is often the case that the underlying facts necessary to establish such claims are virtually identical. As the dissent argued in Arizona State Bar Opinion 95-08, "[c]riminal defendants should not be singled out for disparate treatment simply because they usually seek habeas corpus relief rather than malpractice damage awards."

The Disciplinary Commission also finds that, pursuant to Rule 1.7(b), a conflict of interest exists where a lawyer must counsel his client on whether to waive any right to pursue an ineffective assistance of counsel claim against himself. Rule 1.7(b), *Ala. R. Prof. C.*, provides as follows:

RULE 1.7 Conflict of Interest: General Rule

* * *

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

 Continued from page 487

(1) the lawyer reasonably believes the representation will not be adversely affected; and

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

Under Rule 1.7(b), a conflict of interest exists where a client's interests conflict with the interests of his lawyer. The Disciplinary Commission finds it hard to conceive of a situation where it would be in the interests of a lawyer for his client to file an ineffective assistance of counsel claim. Such claims against a lawyer can harm that lawyer's reputation and subject that lawyer to discipline by the bar or the courts.

However, there are times when it may be in the client's best interest to file an ineffective assistance of counsel claim against his lawyer. It would be inappropriate under any scenario for the lawyer against whom the claim may be brought to counsel the client as to whether to bring that claim or to waive the right to bring such a claim. This is especially so in the context of a criminal case where the client's freedom and liberty may be at stake. As such, the lawyer may not counsel the client as to whether to waive his right to bring an ineffective assistance of counsel claim.

Because a criminal defense lawyer may not advise a client whether to enter into a plea agreement waiving the right to bring an ineffective assistance of counsel claim, a prosecutor may not seek such a waiver from a criminal defendant represented by counsel. Rule 8.4(a), *Ala. R. Prof. C.,* provides, in part, as follows:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the *Rules of Professional Conduct*, knowingly assist or induce another to do so, or do so through the acts of another…

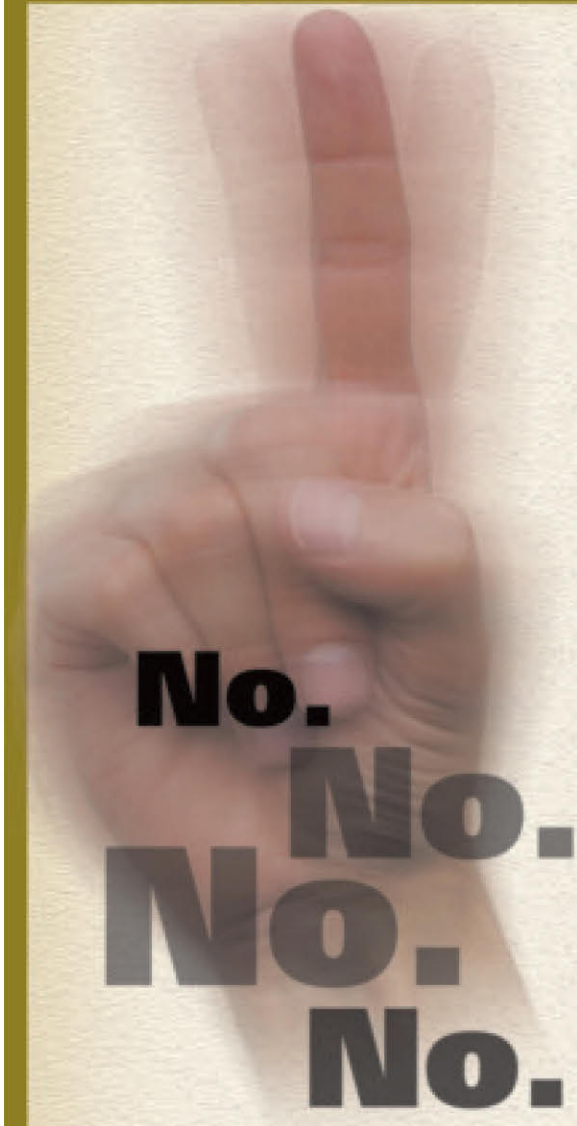
As discussed, a criminal defense lawyer may not counsel a client to waive his right to bring an ineffective assistance of counsel claim without violating rules 1.7(b) and 1.8(h), *Ala. R. Prof. C.* Rule 8.4(a) provides that it is an ethical violation for any lawyer to "induce another" to "violate the *Rules of Professional Conduct*." If a prosecutor were to require a waiver of the right to bring an ineffective assistance of counsel claim in a plea agreement, the defense lawyer would be placed in the intolerable situation of either being forced to withdraw from representation or violate rules 1.7(b) and 1.8(h).

Moreover, a lawyer's withdrawal would not cure the conflict. Rather, the lawyer's withdrawal would only pass on the conflict to the defendant's next lawyer. As a result, the defendant would either be forced to accept counsel that has a conflict of interest or be forced to proceed pro se in executing the plea agreement in violation of his Sixth Amendment right to counsel.

Additionally, the lawyer cannot simply refuse to explain such a provision to the client as he has a duty under rules 1.1 [Competence], 1.2 [Scope of Representation] and 1.4 [Communication] to thoroughly explain each and every provision of the agreement to the client. A lawyer must do so to ensure that the client is knowingly and voluntarily entering into the agreement. As such, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea deal since, in doing so, he would be "inducing" the defendant's lawyer into violating rules 1.7(b) and 1.8(h), *Ala. R. Prof. C.*, or would place the defendant into the untenable situation of either accepting counsel that has an inherent conflict of interest or proceeding without the benefit of counsel. [RO-2011-02]

Endnotes

1. See Advisory Committee of the Supreme Court of Missouri Formal Opinion 126; North Carolina State Bar Opinion RPC 129; Ohio Board of Commissioners on Grievances and Discipline Opinion 2001-06; Tennessee Board of Professional Responsibility Advisory Opinion 94-A-549; and Vermont Bar Association Advisory Ethics Opinion 95-04.
2. Arizona State Bar Committee on the Rules of Professional Conduct Opinion 95-08 and Texas Bar Opinion 571.



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Payments may be mailed to the Alabama State Bar
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For more than 35 years, the Alabama Law Institute has had law revisions become law and revisions completed and ready for introduction in the next legislative session.

Effective January 1, 2011

1. Alabama Uniform Power of Attorney Act SB 53 (Act 2011-683)

The drafting committee was chaired by Richard Cater with Tom Jones and Othni Lathram as reporter. The bill was sponsored by senators Arthur Orr and Tami Irons and Representative Bill Poole.

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 granting the authorization is the "principal" and the person authorized to act is the "agent."

A durable power of attorney is an authorization that continues or becomes effective after the principal becomes incapacitated. Alabama passed our current Durable Power of Attorney statute in 1981 (*See Ala. Code § 26-1-2*) to allow one to designate another to make financial decisions for them without requiring a court-appointed conservator.

Under current law a power of attorney is ineffective unless designated as "durable" when the principal subsequently becomes incompetent. This act reverses the default to make all powers of attorney "durable" unless they specifically provide otherwise.

This act will be prospective only in application. Current § 26-1-2 will continue to govern all powers executed prior to the effective date of the new act, and all healthcare powers will be governed by a new § 26-1A-404 which will carry forward existing law as it relates to healthcare powers without change.

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The act offers clear guidelines for the agent. It provides:

1. 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.

2. Methods for the agent to give notice of his or her resignation if the principal becomes incapacitated

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

1. Providing protections for persons accepting a power of attorney without actual knowledge that it is invalid or has been terminated

2. Offering a 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"

3. Providing an optional statutory form durable power of attorney

2. Alabama Unsworn Foreign Declarations Act HB 29 (Act 2011-533)

The drafting committee was chaired by Harlan Prater, IV with Othni Lathram serving as reporter. Bill sponsors were Senator Cam Ward and Representative Marcel Black.

This act affirms the validity of a document signed in a foreign country which states it is signed under penalty of perjury.

Prior to this, Alabama law required that all affidavits offered in a court or administrative proceeding be notarized. This means persons who sign documents in foreign countries with information relevant to Alabama cases or transactions must go to the U.S. consular office or find other means to obtain appropriate foreign notarization.

In recent years, access to U.S. embassies and consulates has become more difficult because of closings and added security.

This act requires:

- The declarant must be physically located outside U.S. boundaries;
- The declaration must be signed;
- The declaration set forth the location of the declarant; and
- The declaration set forth that it is signed under penalty of perjury.

Under the act, unsworn declarations cannot be used for:

- Depositions;
- Oaths of office;

- Oaths related to self-proved wills;
- Declarations recorded under Title 35 (Property);
- Powers of attorney; or
- Oaths required to be given before specified officials other than a notary.

Use of an unsworn declaration, like a sworn declaration, would be subject to perjury laws, and the act provides a form that must be substantially followed. The *Criminal Code*, §13A-10-100(b)(3)(a), defines statements subject to perjury broadly enough to include declarations executed pursuant to this act.

Federal courts have used unsworn declarations for more than 30 years. Federal law allows an unsworn declaration to be recognized and valid as the equivalent of a sworn affidavit if it contains a statement substantially in the form set forth in the federal act.

3. Alabama Revised Notary Act SB 54 (Act 2011-295)

The drafting committee was chaired by Harlan Prater, IV with Othni Lathram serving as reporter. Sponsors were Senator Tammy Irons, Representative Paul DeMarco and Representative Arthur Orr.

Alabama's notary laws were last amended in 1987. Since then, a number of provisions have become outdated. Examples of outdated provisions are the requirement that a notary seal must leave an impression by embossing, limiting notaries to one county and low bond limits.

The Alabama Revised Notary Act changes the law in four ways:

1. The act allows for use of a stamped seal. This allows documents which are filed or stored electronically to show up better after scanning.

2. All new notaries and renewals will be for a statewide commission instead of a notary being either for one county or statewide. Currently, there are more than 74,000 active notaries and only 17 are limited to one county.

3. This act removes the statutory requirement for notaries to keep a journal of their notarial acts and file them in probate court.

4. This act will also increase the bond a notary must hold from $10,000 to $25,000 dollars.

Existing notaries are valid and unchanged until renewed. This revision makes no changes for Alabama international notaries or civil law notaries.

4. Alabama Uniform Rule against Perpetuities Act HB 28 (Act 2011-532)

The drafting committee was chaired by Bill Hairston, III with Reese Murray, III serving as reporter. Sponsors were Senator Ben Brooks, Representative Demetrius Newton and Representative Bill Poole.

Alabama is the last of the 50 states to have the original common law rule against perpetuities in full force and effect. This distinctiveness is heightened because, by statute, Alabama imposes the rule upon personal property and land. See *Alabama Code of 1975* §35-4-4.

Simply stated, the common law rule provides that no future interest is good unless it must vest, if at all, not later than 21 years after a life in being at the creation of the interest.

Under the common law rule, any violation of the rule results in the transfer being void. The rule can cause harsh results for two reasons. First, even a hypothetical violation of the rule, no matter how improbable, voids the transfer. Second, if the transfer is to a class of persons and even one has the potential of vesting outside the permissible time period, the transfer to all members of the class is void.

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Every other state in the country has modified the common law rule in some manner. Twenty-seven states and the District of Columbia, including Florida, Georgia and Tennessee, have adopted the Uniform Statutory Rule against Perpetuities.

The Uniform Statutory Rule adopts a "wait-and-see" approach. This means that rather than a transfer becoming void because of a possible violation of the rule, the Uniform Statutory Rule provides a period of time within which an interest can vest. If vesting occurs, the transfer is saved; if not, then it is invalid. This period of time in this act for vesting is 100 years, except for trusts which have 360 years. In order for a trust to have the benefit of the 360-year period, it must be governed by Alabama law and the trustee must have the power to sell, lease or mortgage all of the property which is held in trust. This 360-year period would put Alabama trusts on equal footing with those in other southeastern states.

Second, the Uniform Statutory Rule allows for a court to reform a transfer which violates the rule. This means that if the transfer does not vest within the time period allowed, a person can petition a circuit court to reform the transfer in a manner that would allow it to occur.

There are a number of exceptions to the rule. These include transfers which are business transactions and those related to charities.

Expected Introductions 2012 Legislature

1. Foreign Money Judgments Recognition Act

The chair of the committee is Dean John Carroll.

In international law, the principle of reciprocity generally governs the recognition and enforcement in one country of judgments entered in another. If the country which originates a judgment recognizes and enforces the original judgments of the country that is being asked to recognize and enforce it, then that country is likely to comply with the petition to recognize and enforce the judgment. In the United States, however, the common law rules are not certain enough for reciprocity to be a sure thing when judgments of state courts are brought for enforcement outside the boundaries of the U.S. Some foreign courts have refused to enforce judgments entered by courts in the U.S. The remedy is to make it absolutely certain that judgments from the courts of other countries are recognized and enforced in U.S. courts.

Under the UFM-JRA, foreign judgments are money judgments entered in a "foreign state," which is "any governmental unit other than the United States" or any part of the United States (including territories). Excluded are tax and family law-related judgments. A foreign judgment, under UFM-JRA, is conclusive between the parties and is enforceable in the same manner as a judgment of a state of the U.S. entitled to full faith and credit under the U.S. Constitution.

2. UCC Article 9 amendments

The chair of the committee is Larry Vinson.

Amendments provide greater guidance as to the name of a debtor to be provided on a financing statement. For business entities and other registered organizations, the amendments clarify that the proper name for perfection purposes is the name filed with the state and provided on

the organization's charter or other constitutive documents, to the extent there is a conflict with the name on an entity database. More importantly, the amendments provide significantly greater clarity as to the name of an individual debtor to be provided on a financing statement.

Alternative A, known as the "only-if" rule, requires a filer to provide on the financing statement the name on the debtor's driver's license, if the license has not on its face expired. If the debtor does not have a driver's license, the filer must use either the individual name of the debtor (i.e., whatever the debtor's name is under current law) or the debtor's surname and first personal name.

Alternative B, known as the "safe harbor" rule, leaves intact the requirement that the financing statement use the debtor's "individual name," but provides that the name on the driver's license will also be sufficient as well as the debtor's surname and first personal name.

The amendments also deal with perfection issues arising on after-acquired property when a debtor (individual or organization) moves to a new jurisdiction.

A number of additional technical amendments are also included in this package.

3. Principal and Income amendments (2008)

The chair of the committee is Leonard Wertheimer.

In 2008, the Uniform Law Commission finalized amendments to two sections of the Uniform Principal and Income Act (UPAIA). The amendments were drafted to clarify two discrete portions of the UPAIA, sections 409 and 505, and to provide a new transitional section 606 to facilitate the technical implementation of the amendments. The section 409 amendments should serve to resolve issues brought about by IRS Revenue Ruling 2006-26 and assist separate funds within a trust in qualifying for the IRS estate tax marital deduction safe harbors. The section 505 amendments should allow mandatory income trusts that own an entity to retain the proper amount of funds from distributions to meet their existing tax obligations. The amendments to

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the UPAIA have been adopted in 16 states to date, during the 2009 legislative sessions.

UPAIA Section 409: As an estate planning matter, sometimes a person designates a trust for the benefit of his or her spouse as beneficiary of his or her IRA or similar retirement plan ("a plan") rather than designating the spouse as beneficiary. This is most common when that person has children by a prior marriage or has a spouse who is incapacitated or for whom creditor protection or asset management is desired. Qualifying this trust for the federal estate tax marital deduction prevents estate tax from being incurred until the surviving spouse dies.

As a practical example of how the revised section works for income tax purposes, if a distribution is made from a plan to a trust, the trustee is required to appropriately allocate that distribution between trust principal and trust income. The distribution is allocated to trust income to the extent that it represents the internal income of the plan itself, and the rest is allocated to principal within the trust. The portion allocated to trust income is paid and taxed to the surviving spouse. The trust is subject to income tax on amounts retained as principal, but is not taxed on amounts paid to the spouse.

UPAIA Section 505: It is not uncommon for trusts that are required to pay income to a beneficiary to own an interest in an LLC or other "pass-through" entity (an "entity"). The trust must report its share of the entity's income, whether or not the trust actually receives its entire share of entity income. Many such entities distribute to their owners only enough income to enable the owners to pay their tax obligations. They commonly reinvest the rest of the income in business operations. This strategy works well when the owners are individuals, but it can cause problems when the owners are mandatory income trusts.

As a practical example, suppose a trust has a 40 percent combined federal and state income tax rate and it is to be taxed on $100x of the entity's income. The entity distributes $40x to the trust to fund the tax obligation. If the trust is required to distribute the full $40x that it receives from the entity to the beneficiary, the trust will still be taxed on $60x of income ($100x minus the $40x that was distributable to the beneficiary), but will have no money from the distribution remaining to cover its share of the taxes. The beneficiary, as opposed to the trust, would still be liable for the taxes on the $40x distribution as normal.

The amendments to UPAIA section 505 provide a formula for calculating how much the trust needs to distribute and how much it can use to pay its resulting tax obligation. The proposed change clarifies that the trust will keep the money it needs to pay its taxes and distribute the balance of the income to the mandatory income beneficiary.

4. Interstate Depositions and Discovery Act

The chair of the committee is Dean John Carroll.

The act sets forth an efficient and inexpensive procedure for litigants to depose out-of-state individuals and for the production of discoverable materials that may be located out of state. Uniform procedures have become necessary as the amount of litigation involving individuals and documents located outside of the trial state has increased.

Under the act, litigants can present a clerk of the court located in the state where discoverable materials are sought with a subpoena issued by a court in the trial

state. Once the clerk receives the foreign subpoena, a subpoena will be issued for service upon the person or entity on which the original subpoena is directed. The terms of the issued subpoena must incorporate the same terms as the original subpoena and contain the contact information for all counsel of record and any party not represented by counsel.

The act requires minimal judicial oversight and eliminates the need for obtaining a commission or local counsel in the discovery state, letters rogatory or the filing of a miscellaneous action during the discovery phase of litigation. Discovery authorized by the subpoena is to comply with the rules of state in which it occurs. Furthermore, motions to quash, enforce or modify a subpoena issued pursuant to the act shall be brought in and governed by the rules the discovery state.

5. Amendments Condominium Act

The chair of the committee is John Plunk and Carol Stewart serves as reporter.

Alabama's Condominium Act was passed in 1990. During the past 21 years issues have been raised needing clarification. The committee reviewed the Uniform Common Interest Ownership Act to provide provisions to clarify the Condominium Act. These amendments are not a complete revision of the current law but only a clarification of it.

Projects under Review

1. Collaborative Law Act

The chair of the committee is Senator Cam Ward and Penny Davis serves as reporter.

In recent years, as the use of collaborative law has grown, it has come to be governed by a variety of statutes, court rules and formal and informal standards. A comprehensive statutory framework is necessary to guarantee the benefits of the collaborative process and further enhance its use. The rules/act encourages the

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development and growth of collaborative law as an option for parties who wish to use it as a form of alternative dispute resolution.

Collaborative law is a *voluntary* process in which the lawyers and clients agree that the lawyers will represent the clients solely for purposes of settlement, and the clients will hire new counsel if the case does not settle. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. No one is required to participate, and parties are free to terminate the process at any time. The act includes explicit informed-consent requirements for parties to enter into collaborative law with an understanding of the costs and benefits of participation. The process is intended to promote full and open disclosure; information disclosed in a collaborative process, which is not otherwise discoverable, is privileged against use in any subsequent litigation.

The collaborative law process provides lawyers and clients with an important, useful and cost-effective option for amicable, non-adversarial dispute resolution. Like mediation, it promotes problem-solving and permits solutions not possible in litigation or arbitration.

2. Limited Liability Company Act (LLC)

The chair of the committee is Kent Henslee with Professor Jim Bryce serving as reporter.

The committee has reviewed the Revised LLC Act and compared it with the current Alabama law. The committee is incorporating parts of the revised act into the current law as well as ensuring any changes to the LLC Act is compatible with the new Business and Nonprofit Entities Code.

3. Nonprofit Corporation Act

The chair of the committee is L.B. Feld with Professor Jim Bryce serving as reporter.

Alabama's Model Nonprofit Act was adopted in 1984 and followed the 1964 Model Nonprofit Act drafted by the American Bar Association. Since that time, the Nonprofit Act has been revised twice by the ABA with the third edition adopted in August 2008.

Subsequent to the passage of the Alabama Business and Nonprofit Entities Code in 2009, the committee has reviewed the Nonprofit Act in light of the need to make changes to incorporate the new Nonprofit Corporation Law into the Alabama Business and Nonprofit Entities Code. The committee is working to ensure that the changes in the model act recommended by the ABA are compatible with Alabama's new Business and Nonprofit Entities Code, effective 2011. All revised entities will become a part of the Entities Code.

4. Uniform Interstate Family Support Act

The chair of the committee is Julia Roth with Penny Davis serving as reporter.

The 2008 Uniform Interstate Family Support Act (UIFSA) amendments modify the current version of the UIFSA's international provisions to comport with the obligations of the United States under the 2000 Hague Convention on Maintenance.

The UIFSA provides universal and uniform rules for the enforcement of family support orders by setting basic jurisdictional standards for state courts and by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding. It establishes rules for determining which state issues the controlling order in the event of proceedings initiated in multiple jurisdictions. It further provides rules for modifying or refusing to modify another state's child support order.

In order for the U.S. to fully accede to the Hague Convention, it is necessary to modify the UIFSA by incorporating provisions of the Convention that affect existing state law. Section 7 of the UIFSA provides for the guidelines and procedures for the registration recognition enforcement and modification of foreign support orders from countries that are parties to the Convention. Enactment of the amendment to the UIFSA will improve the enforcement of American child support orders abroad and assist many children residing in the U.S. in their efforts to receive the financial support due from parents, wherever the parents reside.

Legislation before Congress to ratify the Convention provides that the new amendments of the UIFSA must be enacted in every jurisdiction within two years after the enactment of federal implementing legislation as a condition for continued receipt of federal funds for state child support programs. If that legislation is enacted as presented, the failure to enact this amendment by that date will result in the loss of significant federal funding. The committee is watching Congress closely for any action to ratify the Convention.

5. Uniform Certificate of Title Act for Vessels

The committee is chaired by E. B. Peebles.

The major objectives of the Uniform Certificate of Title Act for Vessels are to: (1) qualify as a state titling law that the Coast Guard will approve; (2) facilitate transfers of ownership of a vessel; (3) deter and impede the theft of vessels by making information about the ownership of vessels available to both government officials and those interested in acquiring an interest in a vessel; (4) accommodate existing financing arrangements for vessels; and (5) provide certain consumer protections when purchasing a vessel through the act's branding initiative.

6. Partition of Heirs Property Act

In 2010, the Uniform Law Commission promulgated the Uniform Partition of Heirs Property Act (UPHPA) to help address family tenancy in common issues. The act does not limit or prohibit the filing of a partition action and does not replace in any comprehensive way existing partition laws, but provides narrowly focused statutory procedures and a hierarchy of remedies for use in partition actions involving only heirs' property. Key highlights of the UPHPA include:

"Heirs property" is defined as real property that is held under a tenancy in common in which there is no binding agreement among the cotenants governing partition of the property. Additionally, one or more of the cotenants must have acquired title from a relative, and

 Continued from page 499

either 20 percent or more of the interests are held by cotenants who are relatives, 20 percent or more of the interests are held by an individual who acquired title from a relative or 20 percent or more of the cotenants themselves are relatives. When an action for partition of real property is filed, the court must determine whether the property is heirs' property. The UPHPA provisions will govern if the property is heirs' property unless all of the cotenants have agreed otherwise.

After the court determines the value of the property, UPHPA provides all of the cotenants who did not request partition by sale with a right to buy out all of the interests of those who have done so, at a price equal to the court-determined value of the property multiplied by the fractional interest of the cotenant that is bought. If more than one cotenant elects to purchase the interests of those proposing sale, the interests for sale are apportioned among the electing cotenants based upon their relative interests in the property. Upon motion of a cotenant entitled to buy out another cotenant that petitioned for sale, the court also has discretion to conduct a second buyout of the interests of cotenants named as defendants who were served with the complaint but who did not appear in the action, provided that the first buyout has been completed and the purchase price for interests of non-appearing cotenants is based upon the court-determined value of the property. In many circumstances, this second buyout process can help to make partition in kind of the property more feasible and consolidate ownership of the property to facilitate its long-term management.

If all of the interests of those seeking partition by sale are not purchased by other cotenants, or if there is a cotenant remaining who seeks partition in kind after the court has concluded the operation of the act's buyout provisions, then the court shall proceed with a partition in kind unless great or manifest prejudice to the cotenants as a group would result. The UPHPA provides a list of economic and non-economic factors which a court shall consider in determining whether great or manifest prejudice would occur if partition in kind were ordered.

If the court does not order partition in kind, it shall order partition by sale unless none of the cotenants have requested partition by sale, in which case the court shall dismiss the action.

7. *Alabama Criminal Code* Review

The chair of the committee is Howard Hawk with the Hon. Bill Bowen serving as reporter.

The *Alabama Criminal Code* became effective in 1980. Since that time there have been numerous amendments, additions and changes. A new *Criminal Code* committee was formed in 2009.

The 1980 *Criminal Code* is being compared with the current law showing line-through and underlined changes during the past 30 years. The committee is undertaking a systematic review of the entire criminal code, classification system and sentencing structure.

This review will be conducted with the goal of ensuring the criminal code is as effective and efficient as possible. The committee is reviewing the chapters one at a time. It is anticipated that this review will take several years to complete.

8. *Rules of Criminal Procedure*

The chair of the committee is the Hon. Bill Bowen with Bob McCurley serving as reporter.

Since the adoption of the *Alabama Rules of Criminal Procedure* in 1981, the institute and the court have maintained a committee to answer questions that are posed for interpretations of the rules and to modify the rules when necessary due to recently enacted legislation or court interpretations of the rules.

The committee meets one or two times a year to review these issues and readily submits revisions both to the rules and to the comments which are routinely adopted by the supreme court.

Notices

- Notice is hereby given to **Eleanor Robertson Harden**, whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 25, 2011, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2010. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 11-722]

- Notice is hereby given to **Carey Wayne Spencer, Jr.**, who practiced in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 25, 2011, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2010. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 11-730]

- **Jerome Tucker**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2011, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 10-355 before the Disciplinary Board of the Alabama State Bar. [ASB No. 10-355]

- Notice is hereby given to **Jimmy Donald Wells**, who practiced in Jasper, and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 25, 2011, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2010. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 11-733]

DISCIPLINARY NOTICES Continued from page 501

Reinstatements

- Former Dothan attorney **Cada Mills Carter** was reinstated to the practice of law in Alabama, with numerous conditions, effective July 7, 2011, by order of the Supreme Court of Alabama. The supreme court's order was based on the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Carter on August 30, 2010. Carter was previously disbarred from the practice of law in Alabama, effective April 19, 1993. [Rule 28, Pet. No. 10-1370]

- Birmingham attorney **Dagney Johnson** was reinstated to the practice of law in Alabama, effective June 14, 2011, by order of the Supreme Court of Alabama. The supreme court's order was based on the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Johnson on March 14, 2011. Johnson had been previously suspended from the practice of law in Alabama for 91 days, effective December 1, 2010, by order of the Disciplinary Board of the Alabama State Bar. [Rule 28, Pet. No. 11-581]

- Pelham attorney **Kevin M. McCain** was reinstated to the practice of law in Alabama, effective June 14, 2011, by order of the Supreme Court of Alabama. The supreme court's order was based on the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by McCain on April 7, 2011. McCain had been previously transferred to disability inactive status, effective September 1, 2010, by order of the Disciplinary Board of the Alabama State Bar. [Rule 28, Pet. No. 11-675]

- Montgomery attorney **Johnnie Lynn Branham Smith** was summarily suspended from the practice of law in Alabama pursuant to rules 8(e) and 20(a), *Ala. R. Disc. P.,* by order of the Disciplinary

Commission of the Alabama State Bar, effective July 1, 2011. Smith was suspended for failing to respond to a bar complaint. On July 12, 2011, after Smith filed a response, the Disciplinary Commission granted Smith's request that the summary suspension be dissolved and entered an order to that effect. [Rule 20(a), Pet. No. 2011-1128]

Surrender of License

- Bay Minette attorney **Russell Jackson Watson** surrendered his license to practice law in Alabama. The voluntary surrender of license was accepted by the Alabama Supreme Court and made effective August 23, 2011. [Rule 23(a), Pet. No. 11-1256; ASB No. 10-1616]

Suspensions

- Tuscaloosa attorney **John Edwin Bockman** was suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar for one year. The Disciplinary Commission ordered that the suspension be held in abeyance and Bockman be placed on probation for two years, pursuant to Rule 8(h), *Ala. R. Disc. P.* The Disciplinary Commission accepted Bockman's conditional guilty plea in which he pled guilty to having violated rules 8.4(c), (d) and (g), *Ala. R. Prof. C.* Bockman intentionally provided false information on a petition for bankruptcy to avoid venue in the jurisdiction in which Bockman normally practices. [ASB No. 11-135]

- Rainsville attorney **Christopher Kyle Croft** was suspended from the practice of law in Alabama for five years, with said suspension deferred pending successful completion of a two-year period of probation. Croft entered a conditional guilty plea, admitting that between October 2002 and June 2005, he solicited and accepted investment funds in a pooled investment fund maintained by a corporation; that he commingled investor funds with personal funds; that he, on behalf of the corporation, issued statements which indicated that funds were on deposit with the corporation and that those funds were increasing in value; that he transferred those funds to online securities trading accounts and conducted trades in those accounts on behalf of the investment pool; that by August 5, 2005, all of the investors' funds had been lost; and that Croft did not register the corporation as a broker dealer or himself as a broker dealer agent or advisor with the Alabama Securities Commission, violations of rules 8.4(a), 8.4(b), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* [Rule 22(a), Pet. No. 08-33; ASB No. 05-241(A)]

- On July 7, 2011, the Supreme Court of Alabama issued an order suspending former Birmingham attorney **Angela Turner Drees** for one year, effective July 7, 2011. This order was based on the order entered December 16, 2010, of Panel I of the Disciplinary Board of the Alabama State Bar. Drees had appealed the Disciplinary Board's decision. However, on June 17, 2011, the Supreme Court of Alabama entered an order dismissing the appeal for lack of prosecution. Drees was found guilty of having violated rules 3.1(a), 3.3(a), 3.5(c), 4.4, 8.4(a), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* Drees made false statements of material fact to the Alabama Court of Civil Appeals and the Supreme Court of Alabama during the appeal of a domestic matter. [ASB No. 08-176(A)]

- Bessemer attorney **Joel Robert Good** was interimly suspended from the practice of law in Alabama, effective July 13, 2011, by order of the Supreme Court of Alabama. The supreme court entered its order based on the July 13, 2011 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Good's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2011-1129]

PRO BONO CELEBRATION WEEK

Alabama's 2011 Celebration A Big Success

Nothing epitomizes the Alabama State Bar's motto better than the efforts of Alabama lawyers during Pro Bono Celebration Week and throughout the year. In 2009, the American Bar Association approved the first National Pro Bono Celebration. This year, the state bar held its third Pro Bono Celebration, in October. The celebration was an opportunity to recognize the impact that lawyers have in their communities, to recruit and train more pro bono volunteers and to acknowledge the partnerships that form the basis for so many of the private bar's successful pro bono efforts.

*Members of the **Pro Bono Week Celebration Committee** present when Governor Robert Bentley signed a proclamation recognizing October 23-29 as "Pro Bono Week in Alabama" included (first row, left to right): Jeanne Rasco, vice chair, Pro Bono Week Celebration Committee; Emily Marks, chair, ASB Pro Bono and Public Service Committee; Linda Lund, director, ASB VLP; Phillip McCallum, ASB president-elect; Kelli Mauro, director, Birmingham Bar Association Volunteer Lawyers Program; and Royal Dumas, committee member. In the second row, left to right, are: Ted Hosp, chair, Chief Justice Malone's Access to Justice Committee; Jim Pratt, ASB president; Cooper Shattuck, legal advisor to Gov. Bentley; Jimbo Terrell, chair, ASB Pro Bono Week Celebration Committee; Alex Smith, committee member; and Angela Rawls, director, Madison County Volunteer Lawyers Program.*

Widespread poverty and legal issues

Over 940,000 Alabamians live in poverty, including more than 300,000 Alabama children. Twenty-five percent of these Alabamians face legal issues requiring representation. The majority of these are civil problems, consumer issues (creditor harassment, utility non-payment, bankruptcy), health issues (Medicaid, government insurance, nursing home), family law issues (divorce, child support/custody, abuse), employment issues (unemployment benefits, pension, lost employment), and housing issues (unsatisfactory repairs, foreclosure, eviction, poor living conditions). And many of these are critical to the safety and independence of these citizens.

Model program

Through the efforts of **Tom Methvin** and **Alyce Spruell**, both state bar past presidents, and with the support of Alabama State Bar President **Jim Pratt**, Alabama's Pro Bono Celebration Week has become a model program consistently recognized by the American Bar Association as one of the best in the country. In fact, the ABA's Standing Committee on Pro Bono and Public Service held one of its semi-annual meetings in Birmingham this year, because it recognized that there is "a burgeoning pro bono commitment" throughout Alabama.

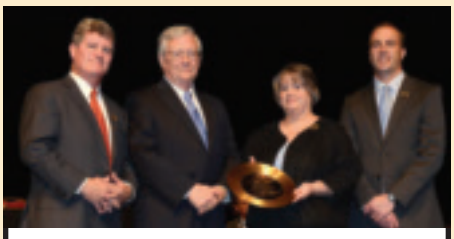
This year, the Pro Bono Celebration Task Force obtained proclamations by Alabama Governor Robert Bentley, each of the three Alabama judges associations, the Board of Bar Commissioners and cities and counties throughout Alabama, recognizing Pro Bono Week and encouraging participation.

Statistics from Pro Bono Celebration Week demonstrate the tremendous commitment of Alabama lawyers. Through the various volunteer lawyers programs and Legal Services Alabama, lawyers donated hundreds of hours of service assisting clients with legal matters, and numerous matters were resolved informally without placing additional demands upon our court system.

Committed year-round

Despite the fact that Pro Bono Celebration Week only occurs once a year, many Alabama lawyers are committed to pro bono service year-round. The state bar's VLP refers cases to volunteer private attorneys who agree to provide free civil legal assistance to low-income clients in two cases or for up to 20 hours per year. Currently, approximately 3,000 attorneys statewide participate in the program. In 2009, these attorneys provided over 23,000 hours of pro bono service to the poor. Additionally, volunteer lawyers provided free wills to over 1,000 police officers, firefighters and other first responders through the "Wills for Heroes" clinics.

Contact Linda Lund, director of the Alabama State Bar Volunteer Lawyers Program, at (888) 857-6154 to learn more about the program.



ASB President-elect Phillip McCallum, VLP Director Linda Lund and Pro Bono Week Celebration Committee Chair Jimbo Terrell present Judge Harold Albritton with the first "Judge W. Harold Albritton Pro Bono Award" at the fall admission ceremony.

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marcia.daniel@alabar.org

About Members

Marcus A. Jaskolka announces the opening of **Jaskolka Law Firm LLC** at 512 Montgomery Hwy., Ste. 200, Birmingham 35216. Phone (205) 822-6782.

Tina E. Roberts announces the opening of **The Roberts Law Firm** at 1419 Leighton Ave., Ste. E, Anniston 36207. Phone (256) 770-4048.

Among Firms

Baker, Donelson, Bearman, Caldwell & Berkowitz PC announces that **L. Griffin Tyndall** has joined as a shareholder.

Battle & Winn LLP announces that **Adam P. Plant** has joined as an associate.

William K. Bradford and **Amber L. Ladner** announce the opening of **Bradford Ladner LLP** at 3928 Montclair Rd., Ste. 208, Birmingham 35213. Phone (205) 802-8823.

ABOUT MEMBERS AMONG FIRMS

Continued from page 505

John C. Callahan announces the opening of **Callahan PC** at 301 Washington St., Ste. 301, Huntsville 35801, and that **Lisa M. McCormack** has joined *of counsel*.

Children's of Alabama announces that **Robert Royston** has joined as counsel/risk manager.

Fees & Burgess PC announces that **Stacy L. Moon** has become a shareholder.

Hale, Sides & Akins LLC announces that **Mallory M. Combest** has joined as an associate.

Johnston Barton Proctor & Rose LLP announces that **Dara D. Fernandez** has joined as an associate.

David P. Martin, Jason E. Burgett and **Ariel S. Blocker** announce the formation of **The Martin Law Group LLC** with offices at 2117 Jack Warner Parkway, Ste. 1B, Tuscaloosa 35401. Phone (205) 343-1771.

Maynard, Cooper & Gale PC announces that **Henry Sprott Long, III** and **J. Benjamin Mitchell** have joined as associates.

Peragine & Lorio LLC announces that **Christa H. Forrester** has joined *of counsel*.

Presley Burton & Collier LLC announces that **Thomas Longino** has joined the firm.

Starnes Davis Florie announces that **Rick Harris** has joined *of counsel*.

Stephens, Millirons, Harrison & Gammons PC announces that **Circuit Judge (ret.) Bruce E. Williams** has joined *of counsel*.

The **Subcontractors Association of Alabama** and **WorkersFirst CompFund** announce that **David Campbell** has been named COO and general counsel of SAA.

Frank M. Wilson PC announces that **Melissa L. Isaak** joined the firm.

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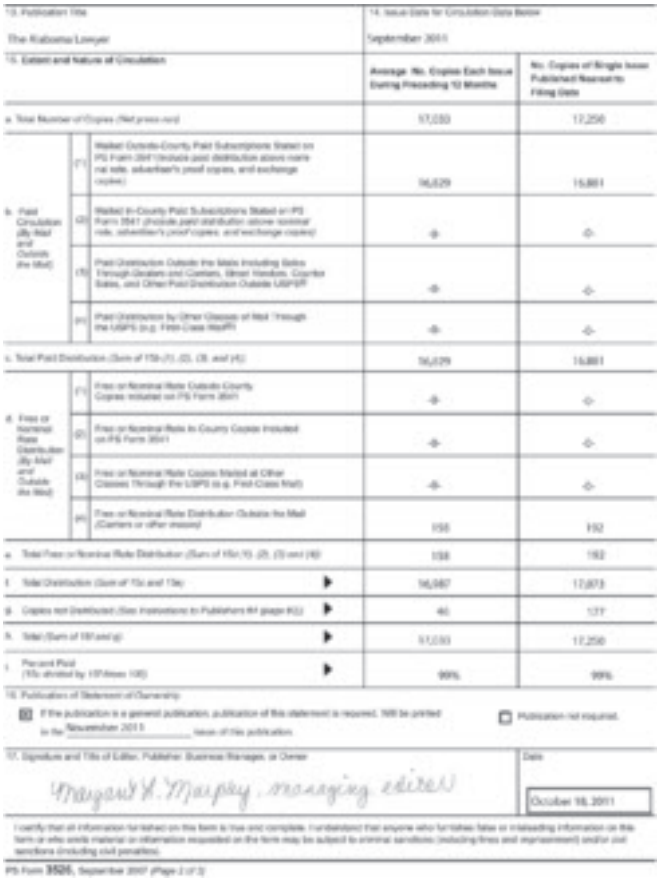

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